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EU JUDICIAL COOPERATION IN CRIMINAL LAW

JURISPRUDENCE

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JUDGMENT OF THE COURT (Third Chamber)

12 August 2008 (*)

(Police and judicial cooperation in criminal matters – Framework Decision 2002/584/JHA – Articles 31 and 32 – European arrest warrant and the surrender procedures between Member States – Possibility for the State executing an extradition request to apply a convention adopted before 1 January 2004 but applicable in that State from a later date)

In Case C‑296/08 PPU,

REFERENCE for a preliminary ruling under Article 234 EC from the Chambre de l'instruction of the Cour d'appel de Montpellier (France), made by decision of 3 July 2008, received at the Court on the same day, in the extradition proceedings against

Ignacio Pedro Santesteban Goicoechea,

THE COURT (Third Chamber),

composed of A. Rosas (Rapporteur), President of the Chamber, U. Lõhmus, J.N. Cunha Rodrigues, A. Ó Caoimh and A. Arabadjiev, Judges,

Advocate General: J. Kokott,

Registrar: M.‑A. Gaudissart, head of unit,

having regard to the request of the referring court of 3 July 2008, received at the Court on the same day, that the reference for a preliminary ruling be dealt with under an urgent procedure pursuant to Article 104b of the Rules of Procedure,

having regard to the decision of the Third Chamber of 7 July 2008 granting that request,

having regard to the written procedure and further to the hearing on 6 August 2008,

after considering the observations submitted on behalf of:

– Mr Santesteban Goicoechea, by Y. Molina Ugarte, avocat,

– the French Government, by E. Belliard, G. de Bergues and A.‑L. During, acting as Agents,

– the Spanish Government, by the Abogacía del Estado,

– the Commission of the European Communities, by S. Grünheid and R. Troosters, acting as Agents,

after hearing the Advocate General,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 31 and 32 of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the

surrender procedures between Member States (OJ 2002 L 190, p. 1, 'the Framework Decision').

2 The reference was made in the course of proceedings brought before the Chambre de l'instruction (Indictment Division) of the Cour d'appel de Montpellier (Court of Appeal, Montpellier) following an extradition request made on 2 June 2008 by the Spanish authorities.

Legal context

International law

3 The European Convention on Extradition was signed at Paris on 13 December 1957. Article 10 of the convention, 'Lapse of time', provides:

'Extradition shall not be granted when the person claimed has, according to the law of either the requesting or the requested Party, become immune by reason of lapse of time from prosecution or punishment.'

4 The European Convention on the Suppression of Terrorism was signed at Strasbourg on 27 January 1977.

European Union law

5 The Convention on simplified extradition procedure between the Member States of the European Union was drawn up on the basis of Article K.3 of the Treaty on European Union by Council Act of 10 March 1995 and signed on that date by all the Member States (OJ 1995 C 78, p. 1, 'the 1995 Convention').

6 According to Article 1(1) of the 1995 Convention:

'The aim of this Convention is to facilitate the application, between the Member States of the European Union, of the European Convention on Extradition [of 13 December 1957], by supplementing its provisions.'

7 The Convention relating to extradition between the Member States of the European Union, known as the Dublin Convention, was drawn up on the basis of Article K.3 of the Treaty on European Union by Council Act of 27 September 1996 and signed on that date by all the Member States (OJ 1996 C 313, p. 11, 'the 1996 Convention').

8 Article 1 of the 1996 Convention provides in particular:

'1. The purpose of this Convention is to supplement the provisions and facilitate the application between the Member States of the European Union:

– of the European Convention on Extradition of 13 December 1957 ...

– the European Convention on the Suppression of Terrorism of 27 January 1977 ...

– the Convention of 19 June 1990 applying the Schengen Agreement of 14 June 1985 [between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic] on the gradual abolition of checks at their common borders [OJ 2000 L 239, p. 19] in relations between the Member States which are party to that Convention ...'

9 Article 8(1) of the 1996 Convention reads as follows:

'Extradition may not be refused on the ground that the prosecution or punishment of the person would be statute-barred according to the law of the requested Member State.'

10 It follows from Article 18(2) and (3) of the 1996 Convention that it is to enter into force 90 days after notification, by the last Member State to adopt it, that its constitutional procedures for adoption have been completed. As not all the Member States have adopted the Convention, it has

not therefore entered into force in accordance with that provision.

11 Article 18(4) of the 1996 Convention states:

'Until this Convention enters into force, any Member State may, when giving the notification referred to in paragraph 2, or at any other time, declare that as far as it is concerned this Convention shall apply to its relations with Member States that have made the same declaration. Such declarations shall take effect 90 days after the date of deposit thereof.'

12 Article 18(5) of the 1996 Convention states that it is to apply only to requests submitted after the date on which it enters into force or is applied as between the requested Member State and the requesting Member State.

13 Recitals 3 to 5 in the preamble to the Framework Decision read as follows:

'(3) All or some Member States are parties to a number of conventions in the field of extradition, including the European Convention on extradition of 13 December 1957 and the European Convention on the suppression of terrorism of 27 January 1977. The Nordic States have extradition laws with identical wording.

(4) In addition, the following three Conventions dealing in whole or in part with extradition have been agreed upon among Member States and form part of the Union *acquis*: the Convention of 19 June 1990 implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at their common borders ... (regarding relations between the Member States which are parties to that Convention), the [1995] Convention ... and the [1996] Convention ...

(5) The objective set for the Union to become an area of freedom, security and justice leads to abolishing extradition between Member States and replacing it by a system of surrender between judicial authorities. Further, the introduction of a new simplified system of surrender of sentenced or suspected persons for the purposes of execution or prosecution of criminal sentences makes it possible to remove the complexity and potential for delay inherent in the present extradition procedures. Traditional cooperation relations which have prevailed up till now between Member States should be replaced by a system of free movement of judicial decisions in criminal matters, covering both pre-sentence and final decisions, within an area of freedom, security and justice.'

14 Recital 11 in the preamble to the Framework Decision reads as follows:

'In relations between Member States, the European arrest warrant should replace all the previous instruments concerning extradition, including the provisions of Title III of the Convention implementing the Schengen Agreement which concern extradition.'

15 Article 31 of the Framework Decision, 'Relation to other legal instruments', is worded as follows:

'1. Without prejudice to their application in relations between Member States and third States, this Framework Decision shall, from 1 January 2004, replace the corresponding provisions of the following conventions applicable in the field of extradition in relations between the Member States:

(a) the European Convention on Extradition of 13 December 1957, its additional protocol of 15 October 1975, its second additional protocol of 17 March 1978, and the European Convention on the suppression of terrorism of 27 January 1977 as far as extradition is concerned;

(b) the Agreement between the 12 Member States of the European Communities on the simplification and modernisation of methods of transmitting extradition requests of 26 May 1989;

(c) the [1995] Convention ...;

(d) the [1996] Convention ...;

(e) Title III, Chapter 4 of the Convention of 19 June 1990 implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at common borders.

2. Member States may continue to apply bilateral or multilateral agreements or arrangements in force when this Framework Decision is adopted in so far as such agreements or arrangements allow the objectives of this Framework Decision to be extended or enlarged and help to simplify or facilitate further the procedures for surrender of persons who are the subject of European arrest warrants.

Member States may conclude bilateral or multilateral agreements or arrangements after this Framework Decision has come into force in so far as such agreements or arrangements allow the prescriptions of this Framework Decision to be extended or enlarged and help to simplify or facilitate further the procedures for surrender of persons who are the subject of European arrest warrants, in particular by fixing time-limits shorter than those fixed in Article 17, by extending the list of offences laid down in Article 2(2), by further limiting the grounds for refusal set out in Articles 3 and 4, or by lowering the threshold provided for in Article 2(1) or (2).

The agreements and arrangements referred to in the second subparagraph may in no case affect relations with Member States which are not parties to them.

Member States shall, within three months from the entry into force of this Framework Decision, notify the Council and the Commission of the existing agreements and arrangements referred to in the first subparagraph which they wish to continue applying.

Member States shall also notify the Council and the Commission of any new agreement or arrangement as referred to in the second subparagraph, within three months of signing it.

3. Where the conventions or agreements referred to in paragraph 1 apply to the territories of Member States or to territories for whose external relations a Member State is responsible to which this Framework Decision does not apply, these instruments shall continue to govern the relations existing between those territories and the other Member States.'

16 Article 32 of the Framework Decision, 'Transitional provision', provides:

'Extradition requests received before 1 January 2004 will continue to be governed by existing instruments relating to extradition. Requests received after that date will be governed by the rules adopted by Member States pursuant to this Framework Decision. However, any Member State may, at the time of the adoption of this Framework Decision by the Council, make a statement indicating that as executing Member State it will continue to deal with requests relating to acts committed before a date which it specifies in accordance with the extradition system applicable before 1 January 2004. The date in question may not be later than 7 August 2002. The said statement will be published in the *Official Journal of the European Communities*. It may be withdrawn at any time.'

17 Pursuant to Article 32 of the Framework Decision, the French Republic made the following statement (OJ 2002 L 190, p. 19):

'Pursuant to Article 32 of the framework decision ... France states that as executing Member State it will continue to deal with requests relating to acts committed before 1 November 1993, the date of entry into force of the Treaty on European Union signed in Maastricht on 7 February 1992, in accordance with the extradition system applicable before 1 January 2004.'

National legislation

18 Loi n° 2004-204 portant adaptation de la justice aux évolutions de la criminalité (Law No 2004-204 adapting the legal system to developments in criminality) of 9 March 2004 (JORF, 10 March 2004, p. 4567) implemented the Framework Decision by inserting into the Code de procedure pénale (Code of Criminal Procedure) Articles 695-11 to 695-51.

19 That law also included provisions implementing the 1995 and 1996 Conventions.

20 Law No 2004-1345 of 9 December 2004 authorised ratification of the 1996 Convention (JORF, 10 December 2004, p. 20876).

21 Decree No 2005-770 of 8 July 2005 published the 1996 Convention (JORF, 10 July 2005, p. 11358). It was stated to be applicable from 1 July 2005.

The main proceedings and the reference for a preliminary ruling

22 On 11 October 2000 the Spanish Government, on the basis of the European Convention on Extradition of 13 December 1957, requested the extradition of Mr Santesteba

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JUDGMENT OF THE COURT (Grand Chamber)

17 July 2008 (*)

(Police and judicial cooperation in criminal matters – Framework Decision 2002/584/JHA – European arrest warrant and surrender procedures between Member States – Article 4(6) – Ground for optional non-execution of a European arrest warrant – Interpretation of the terms 'resident' and 'staying' in the executing Member State)

In Case C-66/08,

Reference for a preliminary ruling under Article 35 EU from the Oberlandesgericht Stuttgart (Germany), made by decision of 14 February 2008, received at the Court on 18 February 2008, in the proceedings concerning the execution of a European arrest warrant issued against

Szymon Kozłowski,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas, K. Lenaerts, G. Arestis and L. Bay Larsen (Rapporteur), Presidents of Chambers, J. Makarczyk, P. Kūris, E. Juhász, A. Ó Caoimh, P. Lindh and J.-C. Bonichot, Judges,

Advocate General: Y. Bot,

Registrar: B. Fülöp, Administrator,

having regard to the order of the President of the Court of 22 February 2008 applying an accelerated procedure to the reference for a preliminary ruling under the first paragraph of Article 104a of the Rules of Procedure,

having regard to the written procedure and further to the hearing on 22 April 2008,

after considering the observations submitted on behalf of:

– M. Kozłowski, by M. Stirnweiß, Rechtsanwalt,

– the German Government, by M. Lumma and J. Kemper, acting as Agents,

– the Czech Government, by M. Smolek, acting as Agent,

– the Danish Government, by J. Bering Liisberg, acting as Agent,

– the French Government, by J.-C. Niollet, acting as Agent,

– the Italian Government, by F. Arena, avvocato dello Stato,

– the Netherlands Government, by C. Wissels and M. Noort, acting as Agents,

– the Austrian Government, by C. Pesendorfer and T. Fülöp, acting as Agents,

– the Polish Government, by M. Dowgielewicz and L. Rędziniak, acting as Agents,

– the Slovak Government, by J. Čorba, acting as Agent,

– the Finnish Government, by J. Heliskoski, acting as Agent,

– the Commission of the European Communities, by S. Grünheid and R. Troosters, acting as Agents,

after hearing the Advocate General,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 4(6) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190, p. 1; 'the Framework Decision').

2 The reference was made in proceedings concerning the execution by the Generalstaatsanwaltschaft Stuttgart ('the German executing judicial authority') of a European arrest warrant issued on 18 April 2007 by the Sąd Okręgowy w Bydgoszczy (Regional Court, Bydgoszcz; 'the Polish issuing judicial authority') against Mr Kozłowski, a Polish national.

Legal framework

European Union law

3 Recital 5 in the preamble to the Framework Decision states:

'The objective set for the Union to become an area of freedom, security and justice leads to abolishing extradition between Member States and replacing it by a system of surrender between judicial authorities. Further, the introduction of a new simplified system of surrender of sentenced or suspected persons for the purposes of execution or prosecution of criminal sentences makes it possible to remove the complexity and potential for delay inherent in the present extradition procedures. Traditional cooperation relations which have prevailed up till now between Member States should be replaced by a system of free movement of judicial decisions in criminal matters, covering both pre-sentence and final decisions, within an area of freedom, security and justice.'

4 Recital 7 of the Framework Decision provides:

'Since the aim of replacing the system of multilateral extradition built upon the European Convention on Extradition of 13 December 1957 cannot be sufficiently achieved by the Member States acting unilaterally and can therefore, by reason of its scale and effects, be better achieved at Union level, the Council may adopt measures in accordance with the principle of subsidiarity as referred to in Article 2 of the Treaty on European Union and Article 5 of the Treaty establishing the European Community ...'

5 Recital 8 to the Framework Decision provides:

'Decisions on the execution of the European arrest warrant must be subject to sufficient controls, which means that a judicial authority of the Member State where the requested person has been arrested will have to take the decision on his or her surrender.'

6 Article 1(1) and (2) of the Framework Decision define the European arrest warrant and refer to the obligation to execute it as follows:

'(1) The European arrest warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.

(2) Member States shall execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of this Framework Decision.'

7 Article 2(1) of the Framework Decision provides:

'A European arrest warrant may be issued for acts … where a sentence has been passed or a detention order has been made, for sentences of at least four months.'

8 Article 3 of the Framework Decision lists three '[g]rounds for mandatory non-execution of the European arrest warrant'.

9 Article 4 of the Framework Decision, entitled 'Grounds for optional non-execution of the European arrest warrant' sets out those grounds in seven numbered paragraphs. Paragraph 6 provides in that regard:

'The executing judicial authority may refuse to execute the European arrest warrant:

…

(6) if the European arrest warrant has been issued for the purposes of execution of a custodial sentence or detention order, where the requested person is staying in, or is a national or a resident of the executing Member State and that State undertakes to execute the sentence or detention order in accordance with its domestic law'.

10 Article 5 of the Framework Decision, entitled 'Guarantees to be given by the issuing Member State in particular cases', is worded as follows:

'The execution of the European arrest warrant by the executing judicial authority may, by the law of the executing Member State, be subject to the following conditions:

…

3) where a person who is the subject of a European arrest warrant for the purposes of prosecution is a national or resident of the executing Member State, surrender may be subject to the condition that the person, after being heard, is returned to the executing Member State in order to serve there the custodial sentence or detention order passed against him in the issuing Member State.'

11 Article 6 of the Framework Decision, entitled 'Determination of the competent judicial authorities', provides:

'(1) The issuing judicial authority shall be the judicial authority of the issuing Member State which is competent to issue a European arrest warrant by virtue of the law of that State.

(2) The executing judicial authority shall be the judicial authority of the executing Member State which is competent to execute the European arrest warrant by virtue of the law of that State.

(3) Each Member State shall inform the General Secretariat of the Council of the competent judicial authority under its law.'

12 It is apparent from the information concerning the date of entry into force of the Treaty of Amsterdam, published in the *Official Journal of the European Communities* of 1 May 1999 (OJ 1999 L 114, p. 56), that the Federal Republic of Germany made a declaration on the basis of Article 35(2) EU by which it accepted the jurisdiction of the Court to give preliminary rulings in accordance with the arrangements laid down in Article 35(3)(b) EU.

National law

13 The Framework Decision was transposed into the German legal system by Paragraphs 78 to 83k of the Law on international mutual legal assistance in criminal matters (Gesetz über die internationale Rechtshilfe in Strafsachen) of 23 December 1982, as amended by the Law on the European arrest warrant (Europäisches Haftbefehlsgesetz) of 20 July 2006 (BGBl. 2006 I, p. 1721; 'the IRG'), while retaining the usual German legal terminology – a 'surrender' within the meaning of the Framework Decision being described as an 'extradition'.

14 The IRG distinguishes between the decision concerning the admissibility of the extradition request and the decision to grant or refuse extradition.

15 According to Articles 29 to 32 of the IRG, it is in any event for the Oberlandesgerichte (Higher Regional Courts) to examine the admissibility of the extradition request, on application by the executing judicial authority.

16 By contrast, the decision to grant or refuse extradition, in the case of extradition requests submitted by an issuing judicial authority of another Member State, is a matter for the executing judicial authority.

17 Article 4(6) of the Framework Decision was transposed, in relation to persons other than German nationals – whether nationals of another Member State or of a third State – by Article 83b(2)(b) of the IRG. According to that provision, entitled 'Grounds for non-execution':

'The extradition of a foreign national whose habitual residence is in Germany may also be refused, if

...

(b) in the case of extradition for the purpose of execution of sentence, he does not consent to such extradition after being informed of his rights (such information being minuted by the judge) and if he has an interest in execution of the sentence in Germany that deserves protection and predominates ...'

18 Paragraph 79(2) of the IRG lays down the procedures for the ruling on the extradition request as follows:

'Before the Oberlandesgericht has ruled on the admissibility of the [extradition] request, the body competent to grant or refuse the request [the 'Generalstaatsanwaltschaften' – General Prosecutor's Offices] shall indicate whether it intends to raise any grounds of non-execution under Paragraph 83b. Reasons shall be given for a decision not to raise any such ground. That decision is subject to review by the Oberlandesgericht ... '

The main proceedings and the questions referred for a preliminary ruling

19 By judgment of 28 May 2002 of the Sąd Rejonowy w Tucholi (Local Court of Tuchola, Poland), Mr Kozłowski was sentenced to five months' imprisonment for destruction of another person's property. The sentence imposed by that judgment has become final, but has not yet been executed.

20 Since 10 May 2006, Mr Kozłowski has been imprisoned in Stuttgart (Germany), where he is serving a custodial sentence of three years and six months, to which he was sentenced by two judgments of the Amtsgericht Stuttgart, dated 27 July 2006 and 25 January 2007, in respect of 61 fraud offences committed in Germany.

21 The Polish issuing judicial authority requested the German executing judicial authority, by a European arrest warrant issued on 18 April 2007, to surrender Mr Kozłowski for the purposes of execution of the sentence of imprisonment of five months imposed on him by the Sąd Rejonowy w Tucholi.

22 On 5 June 2007, Mr Kozłowski was heard on the matter by the Amtsgericht Stuttgart. He stated to the latter, in the course of that hearing, that he did not consent to his surrender to the Polish issuing judicial authority.

23 On 18 June 2007, the German executing judicial authority informed Mr Kozłowski that it did not intend to raise any ground for non-execution. According to that authority, there is no ground for non-execution within the meaning of Paragraph 83b of the IRG and, in particular, Mr Kozłowski does not have his habitual residence in Germany. His successive periods of presence on German territory were characterised by the commission of several crimes, without any lawful activity.

24 Consequently, since it considered that it was not necessary to initiate enquiries in order to discover where, with whom and why Mr Kozłowski was staying in Germany, the executing judicial authority requested the Oberlandesgericht Stuttgart to authorise the execution of the European arrest warrant in question.

25 With regard to Mr Kozłowski's personal situation, the order for reference indicates that, according

to the convictions against him in Germany, he is single and childless. He has little or even no command of the German language. He grew up, then worked, in Poland until the end of 2003. Thereafter, for approximately one year, he drew unemployment benefit in that Member State.

26 The national court proceeds on the assumption that from February 2005 until 10 May 2006, the date of his arrest in Germany, Mr Kozłowski lived predominantly in Germany. That stay was interrupted during the 2005 Christmas holidays, and possibly even in the month of June 2005 and the months of February and March 2006. He worked occasionally on building sites but earned his living essentially by committing crimes.

27 Finally, the national court explains that, in the course of the review which it is required to carry out under Paragraph 79(2) of the IRG, it is called upon to ascertain whether Mr Kozłowski's 'habitual residence' within the meaning of Article 83b(2) of that law was, at the time of the request for surrender, in Germany, and whether it is still there. If that question is answered in the negative, the national court must according to German law authorise the execution of the European arrest warrant, since all the other conditions required under that law are fulfilled.

28 In those circumstances, the Oberlandesgericht Stuttgart decided to stay the proceedings and to refer to the Court of Justice the following questions for a preliminary ruling:

'1) Do the following facts preclude the assumption that a person is a 'resident' of or is 'staying' in a Member State in the sense of Article 4(6) of Council Framework Decision ... :

a) his stay in the Member State [of execution] has not been uninterrupted;

b) his stay there does not comply with the national legislation on residence of foreign nationals;

c) he commits crimes there systematically for financial gain; and/or

d) he is in detention there serving a custodial sentence?

2) Is transposition of Article 4(6) of the Framework Decision ... in such a way that the extradition of a national of the [executing] Member State against his will for the purpose of execution of sentence is always impermissible, whereas extradition of nationals of other Member States against their will can be authorised at the discretion of the authorities, compatible with Union law, in particular with the principle of non-discrimination and with Union citizenship under Article 6(1) EU, read in conjunction with Articles 12 EC and 17 EC et seq., and if so, are those principles at least to be taken into account in the exercise of that discretion?'

Questions referred for a preliminary ruling

29 As a preliminary point, it should be recalled that, as noted in paragraph 12 of this judgment, the Court has jurisdiction, in the present case, to rule on the interpretation of the Framework Decision under Article 35 EU.

First question

30 By its first question, the national court seeks, in essence, to ascertain what is the scope of the terms 'resident' and 'staying' contained in Article 4(6) of the Framework Decision and, in particular, whether in circumstances such as those in the main proceedings, a requested person in proceedings relating to the execution of a European arrest warrant can be considered as covered by that provision.

31 In order to reply to that question, it should be recalled that the objective of the Framework Decision, as made clear in particular by Article 1(1) and (2) and by recitals 5 and 7 in its preamble, is to replace the multilateral system of extradition between Member States by a system of surrender, as between judicial authorities, of convicted persons or suspects for the purpose of enforcing judgments or of criminal proceedings, that system of surrender being based on the principle of mutual recognition (see C-303/05 *Advocaten voor de Wereld* [2007] ECR I-3633, paragraph 28).

32 According to Article 1(2) of the Framework Decision, Member States are to execute any European

arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of that Framework Decision.

33 In that regard, Article 4(6) of the Framework Decision sets out a ground for optional non-execution of the European arrest warrant pursuant to which the executing judicial authority may refuse to execute such a warrant issued for the purposes of execution of a sentence where the requested person 'is staying in, or is a national or a resident of, the executing Member State', and that State undertakes to execute that sentence in accordance with its domestic law.

34 Thus, according to Article 4(6) of the Framework Decision, the scope of that ground for optional non-execution is limited to persons who, if not nationals of the executing Member State, are 'staying' or 'resident' there. However, the meaning and scope of those two terms are not defined in the Framework Decision.

35 The Commission of the European Communities, while conceding that, in some linguistic versions of the Framework Decision, the wording of Article 4(6) could suggest that the term 'staying' is on the same level of importance as the criteria of residence or nationality, contends that, in any case, that provision must be interpreted as meaning that the fact that the requested person is staying in the executing Member State is a necessary but not sufficient condition for invoking the ground for optional non-execution referred to in Article 4(6).

36 In that regard, it is certainly true that the term 'staying' cannot be interpreted in a broad way which would imply that the executing judicial authority could refuse to execute a European arrest warrant merely on the ground that the requested person is temporarily located on the territory of the executing Member State.

37 However, Article 4(6) of the Framework Decision equally cannot be interpreted as meaning that a requested person who, without being a national or resident of the executing Member State, has been staying there for a certain period of time is not in any circumstances capable of having established connections with that State which could enable him to invoke that ground for optional non-execution.

38 It follows that, notwithstanding differences in the various language versions of Article 4(6), the category of requested persons who are 'staying' in the executing Member State within the meaning of that provision is not, as was argued in particular by the Netherlands Government at the hearing of the present case, completely irrelevant for the purposes of ascertaining the scope of that provision.

39 Consequently, it is not sufficient to take into account only the term 'resident' within the meaning of Article 4(6) of the Framework Decision, but it is also necessary to ascertain in what way the term 'staying' may complement the meaning of the first of those two terms.

40 First, that reading of Article 4(6) of the Framework Decision cannot be affected by the fact that, according to the wording of Article 5(3) of the Framework Decision, which concerns a person who is the subject of a European arrest warrant for the purposes of prosecution, surrender may be made subject by the law of the executing Member State to the condition contained in that provision only if the person concerned is a national or resident of that Member State, no reference being made to his 'staying' there.

41 Second, with regard to the interpretation of the terms 'staying' and 'resident', it should be pointed out that, contrary to the argument of the Czech and Netherlands Governments, the definition of those two terms cannot be left to the assessment of each Member State.

42 It follows from the need for uniform application of Community law and from the principle of equality that the terms of a provision of Community law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the Union, having regard to the context of the provision and the objective pursued by the legislation in question (see, by analogy, Case C-195/06 *Österreichischer Rundfunk* [2007] ECR I-8817, paragraph 24 and case-law cited).

43 Since the objective of the Framework Decision, as indicated in paragraph 31 of this judgment, is to put in place a system of surrender, as between judicial authorities, of convicted persons or suspects for the purpose of enforcing judgments or of criminal proceedings, based on the principle of mutual

recognition – a surrender which the executing judicial authority can oppose only on one of the grounds for refusal provided for by the Framework Decision – the terms 'staying' and 'resident', which determine the scope of Article 4(6), must be defined uniformly, since they concern autonomous concepts of Union law. Therefore, in their national law transposing Article 4(6), the Member States are not entitled to give those terms a broader meaning than that which derives from such a uniform interpretation.

44 In order to establish whether, in a specific situation, the executing judicial authority may refuse to execute a European arrest warrant, it must, initially, ascertain only whether the requested person is a national of the executing Member State, a 'resident' of that State or 'staying' there within the meaning of Article 4(6) of the Framework Decision and thus covered by it. Second, and only if the executing judicial authority finds that that person is covered by one of those terms, it must assess whether there is a legitimate interest which would justify the sentence imposed in the issuing Member State being executed on the territory of the executing Member State.

45 In that regard, it must be emphasised, as also pointed out by all the Member States which submitted observations to the Court as well as by the Commission, that the ground for optional non-execution stated in Article 4(6) of the Framework Decision has in particular the objective of enabling the executing judicial authority to give particular weight to the possibility of increasing the requested person's chances of reintegrating into society when the sentence imposed on him expires.

46 Accordingly, the terms 'resident' and 'staying' cover, respectively, the situations in which the person who is the subject of a European arrest warrant has either established his actual place of residence in the executing Member State or has acquired, following a stable period of presence in that State, certain connections with that State which are of a similar degree to those resulting from residence.

47 In the light of the information contained in the order for reference, Mr Kozłowski is not 'resident' in Germany within the meaning of Article 4(6) of the Framework Decision. Consequently, the interpretation which follows concerns only the term 'staying' contained in that provision.

48 In order to determine whether, in a specific situation, there are connections between the requested person and the executing Member State which lead to the conclusion that that person is covered by the term 'staying' within the meaning of Article 4(6) of the Framework Decision, it is necessary to make an overall assessment of various objective factors characterising the situation of that person, which include, in particular, the length, nature and conditions of his presence and the family and economic connections which he has with the executing Member State.

49 Since it is for the executing judicial authority to make an overall assessment in order to determine, initially, whether the person concerned falls within Article 4(6) of the Framework Decision, a single factor characterising the person concerned cannot, in principle, have a conclusive effect of itself.

50 With regard to circumstances such as those related by the national court in its first question, under points (a) to (d), the fact that, as explained under point (a), the requested person's stay in the executing Member State was not uninterrupted and the fact that, as described under point (b), his stay in that State does not comply with the national legislation on residence of foreign nationals, while not constituting factors which lead by themselves to the conclusion that he is not 'staying' in that Member State within the meaning of Article 6(4) of the Framework Decision, can however be of relevance to the executing judicial authority when it is called upon to assess whether the person concerned is covered by that provision.

51 With regard to the fact that, as explained in point (c) of the first question, according to which that person systematically commits crimes in the executing Member State and the fact that, as described in point (d) of that question, he is in detention there serving a custodial sentence, it must be held that they are not relevant factors for the executing judicial authority when it initially has to ascertain whether the person concerned is 'staying' within the meaning of Article 4(6) of the Framework Decision. By contrast, such factors may, supposing that the person concerned is 'staying' in the executing Member State, be of some relevance for the assessment which the executing judicial authority is then called upon to carry out in order to decide whether there are grounds for not implementing a European arrest warrant.

52 It follows that, without being conclusive, two of the four circumstances related by the national courts in its first question, under points (a) and (b), can be of relevance for the executing judicial authority when it has to ascertain whether the situation of the person concerned falls within Article 4

(6) of the Framework Decision.

53 In that regard, it must be held that, in the light of various factors referred to by the national court as characterising the situation of a person such as Mr Kozłowski, in particular the length, nature and conditions of his stay, the absence of family ties and his very weak economic connections with the executing Member State, such a person cannot be regarded as covered by the term 'staying' within the meaning of Article 4(6) of the Framework Decision.

54 Having regard to all of the foregoing considerations, the answer to the first question must be that Article 4(6) of the Framework Decision is to be interpreted as meaning that:

– a requested person is 'resident' in the executing Member State when he has established his actual place of residence there and he is 'staying' there when, following a stable period of presence in that State, he has acquired connections with that State which are of a similar degree to those resulting from residence;

– in order to ascertain whether there are connections between the requested person and the executing Member State which lead to the conclusion that that person is covered by the term 'staying' within the meaning of Article 4(6), it is for the executing judicial authority to make an overall assessment of various objective factors characterising the situation of that person, including, in particular, the length, nature and conditions of his presence and the family and economic connections which that person has with the executing Member State.

Second question

55 According to the national court, it must authorise the execution of the Euorpean arrest warrant issued against Mr Kozłowski if it finds that he does not have his 'habitual residence', within the meaning of Article 83b(2)(b) of the IRG, in Germany.

56 Having regard to paragraphs 47 and 53 of this judgment and to the reply given by the Court to the first question, it is no longer necessary in the present case to reply to the second question referred, since the requested person in the main proceedings is not covered by Article 4(6) of the Framework Decision.

Costs

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

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

Article 4(6) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, is to be interpreted to the effect that:

– a requested person is 'resident' in the executing Member State when he has established his actual place of residence there and he is 'staying' there when, following a stable period of presence in that State, he has acquired connections with that State which are of a similar degree to those resulting from residence;

– in order to ascertain whether there are connections between the requested person and the executing Member State which lead to the conclusion that that person is covered by the term 'staying' within the meaning of Article 4(6), it is for the executing judicial authority to make an overall assessment of various objective factors characterising the situation of that person, including, in particular, the length, nature and conditions of his presence and the family and economic connections which that person has with the executing Member State.

[Signatures]

* Language of the case: German.

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ORDONNANCE DU PRÉSIDENT DE LA COUR

22 février 2008 (*)

«Procédure accélérée»

Dans l'affaire C-66/08,

ayant pour objet une demande de décision préjudicielle au titre de l'article 35 UE, introduite par l'Oberlandesgericht Stuttgart (Allemagne), par décision du 14 février 2008, parvenue à la Cour le 18 février 2008, dans la procédure relative à l'exécution d'un mandat d'arrêt européen émis à l'encontre de

Szymon Kozlowski,

LE PRÉSIDENT DE LA COUR,

sur proposition de M. L. Bay Larsen, juge rapporteur,

le premier avocat général, M. M. Poiares Maduro, entendu,

rend la présente

Ordonnance

1 La demande de décision préjudicielle porte sur l'interprétation de l'article 4, point 6, de la décision-cadre 2002/584/JAI du Conseil, du 13 juin 2002, relative au mandat d'arrêt européen et aux procédures de remise entre États membres (JO L 190, p. 1, ci-après la «décision-cadre»).

2 Cette demande a été présentée dans le cadre d'une procédure relative à l'exécution, par les autorités allemandes, du mandat d'arrêt européen émis le 18 avril 2007 par le Sąd Okręgowy w Bydgoszczy (III Wydział Karny) (tribunal de Bydgoszcz) à l'encontre de M. Kozlowski, ressortissant polonais, recherché en raison de sa condamnation, le 28 mai 2002, à une peine d'emprisonnement d'une durée de cinq mois, par le Sąd Rejonowy w Tucholi (II Wydział Karny) (tribunal de Tuchola). M. Kozlowski, actuellement détenu en Allemagne pour faits d'escroquerie commis dans cet État membre, ne consent pas à sa remise à l'autorité judiciaire d'émission.

3 La juridiction de renvoi cherche en particulier à savoir si M. Kozlowski remplit la condition de résidence ou de domicile figurant à l'article 4, point 6, de la décision-cadre. En effet, ce dernier séjournerait, bien que de manière non continue, en Allemagne depuis le mois de février de l'année 2005, probablement de manière illégale et sans intention manifeste de retourner en Pologne. En cas de réponse affirmative, l'autorité judiciaire d'exécution pourrait user de la faculté qui lui est reconnue de refuser l'exécution du mandat d'arrêt européen, tout en exécutant la peine polonaise à l'issue de la peine allemande.

4 La juridiction de renvoi cherche également à savoir si l'article 4, point 6, de la décision-cadre est à interpréter, à la lumière du principe de non-discrimination et du fait de l'établissement de la citoyenneté européenne, en ce sens qu'il permettrait un traitement différent, par l'autorité judiciaire d'exécution, de la personne recherchée lorsque celle-ci refuse sa remise, selon qu'elle est ressortissante de l'État membre d'exécution ou d'un autre État membre.

5 Dans sa décision de renvoi, l'Oberlandesgericht Stuttgart demande à la Cour de soumettre le renvoi préjudiciel à la procédure d'urgence, en application des articles 104 ter, premier alinéa, du règlement de procédure et 23 bis du statut de la Cour de justice.

6 Or, comme la juridiction de renvoi le précise dans sa décision, lesdits articles, publiés au *Journal officiel de l'Union européenne* du 29 janvier 2008 (JO L 24, p. 39), dont elle demande l'application par anticipation, n'entreront en vigueur que le premier jour du deuxième mois suivant celui de leur publication, à savoir le 1er mars 2008.

7 Introduite avant le 1er mars 2008, la présente affaire ne peut ainsi faire l'objet d'une procédure d'urgence en application de l'article 104 ter, premier alinéa, du règlement de procédure de la Cour.

8 Eu égard à l'esprit de coopération caractérisant les relations entre les juridictions nationales et la Cour, cette dernière interprète toutefois la demande de la juridiction de renvoi comme visant à une réduction substantielle de la durée du traitement de la présente affaire et la considère comme une demande de procédure accélérée, en application de l'article 104 bis, premier alinéa, de son règlement de procédure.

9 Il résulte de cette disposition que, à la demande de la juridiction nationale, le président de la Cour peut, exceptionnellement, sur proposition du juge rapporteur, l'avocat général entendu, décider de soumettre un renvoi préjudiciel à une procédure accélérée dérogeant aux dispositions du règlement de procédure, lorsque les circonstances invoquées établissent l'urgence extraordinaire de statuer sur la question posée à titre préjudiciel.

10 À cet égard, la juridiction de renvoi fait ainsi valoir à l'appui de sa demande que l'exécution du mandat d'arrêt européen délivré à l'encontre de M. Kozlowski risque d'être compromise dans la mesure où la détention sur le territoire allemand de ce dernier doit s'achever le 10 novembre 2009. De plus, M. Kozlowski pourrait obtenir, en application des dispositions pénales allemandes sur le sursis d'exécution des peines, sa libération anticipée aux deux tiers de la durée de détention, à savoir dès le 10 septembre 2008. Il serait certes juridiquement possible que la juridiction de renvoi, avant cette date et en considération de la demande de remise, ordonne l'arrestation de M. Kozlowski aux fins de l'exécution de cette dernière, mais, en tout état de cause, la durée de sa détention serait brève, celle-ci devant être proportionnelle à la peine de cinq mois à laquelle il a été condamné pour les délits commis en Pologne.

11 La présente affaire soulève des problèmes d'interprétation portant sur un domaine sensible de l'activité du législateur européen et touchant à des aspects centraux du fonctionnement du mandat d'arrêt européen, sur lesquels la Cour est appelée à se prononcer pour la première fois. L'interprétation de la disposition concernée de la décision-cadre, demandée par la juridiction de renvoi, est susceptible d'avoir des conséquences générales tant pour les autorités appelées à coopérer dans le cadre du mandat d'arrêt européen que sur les droits des personnes recherchées, lesquelles se trouvent dans une situation d'incertitude.

12 En l'occurrence, une réponse rapide de la Cour aux questions posées permettrait à l'autorité judiciaire d'exécution de se prononcer dans les meilleures conditions possibles sur la demande de remise qui lui a été adressée par l'État membre d'émission, lui donnant ainsi la possibilité de se conformer, dans les plus brefs délais, aux obligations qui lui incombent en vertu de la décision-cadre.

13 Dans ces conditions, il convient de soumettre la présente affaire à la procédure accélérée.

Par ces motifs, le président de la Cour ordonne:

L'affaire C-66/08 est soumise à la procédure accélérée prévue à l'article 104 bis, premier alinéa, du règlement de procédure.

Signatures

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* Langue de procédure: l'allemand.

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JUDGMENT OF THE COURT (Third Chamber)

9 October 2008 (*)

(Police and judicial cooperation in criminal matters – Framework Decision 2001/220/JHA – Standing of victims in criminal proceedings – Private prosecutor in substitution for the public prosecutor – Testimony of the victim as a witness)

In Case C-404/07,

REFERENCE for a preliminary ruling under Article 35 EU from the Fővárosi Bíróság (Hungary), made by decision of 6 July 2007, received at the Court on 27 August 2007, in the criminal proceedings

György Katz

v

István Roland Sós,

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, J.N. Cunha Rodrigues (Rapporteur), J. Klučka, P. Lindh and A. Arabadjiev, Judges,

Advocate General: J. Kokott,

Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 19 June 2008,

after considering the observations submitted on behalf of:

– Mr Katz, by L. Kiss, ügyvéd,

– Mr Sós, by L. Helmeczy, ügyvéd,

– the Hungarian Government, by J. Fazekas, R. Somssich and K. Szíjjártó, acting as Agents,

– the Austrian Government, by E. Riedl, acting as Agent,

– the Commission of the European Communities, by R. Troosters and B. Simon, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 10 July 2008,

gives the following

Judgment

1 The reference for a preliminary ruling concerns the interpretation of Articles 2 and 3 of Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings (OJ 2001 L 82, p. 1; 'the Framework Decision').

2 The reference was made in criminal proceedings brought against Mr Sós, who is being prosecuted for fraud by Mr Katz, acting as substitute private prosecutor.

Legal framework

European Union law

3 According to recital 4 in the preamble to the Framework Decision:

'Member States should approximate their laws and regulations to the extent necessary to attain the objective of affording victims of crime a high level of protection, irrespective of the Member State in which they are present.'

4 Under Article 1 of the Framework Decision, for the purposes of the Framework Decision:

'(a) "victim" shall mean a natural person who has suffered harm, including physical or mental injury, emotional suffering or economic loss, directly caused by acts or omissions that are in violation of the criminal law of a Member State;

...'

5 Article 2 of the Framework Decision states:

'1. Each Member State shall ensure that victims have a real and appropriate role in its criminal legal system. It shall continue to make every effort to ensure that victims are treated with due respect for the dignity of the individual during proceedings and shall recognise the rights and legitimate interests of victims with particular reference to criminal proceedings.

2. Each Member State shall ensure that victims who are particularly vulnerable can benefit from specific treatment best suited to their circumstances.'

6 Article 3 of the Framework Decision provides:

'Each Member State shall safeguard the possibility for victims to be heard during proceedings and to supply evidence.

Each Member State shall take appropriate measures to ensure that its authorities question victims only in so far as necessary for the purpose of criminal proceedings.'

7 Under Article 5 of the Framework Decision:

'Each Member State shall, in respect of victims having the status of witnesses or parties to the proceedings, take the necessary measures to minimise as far as possible communication difficulties as regards their understanding of, or involvement in, the relevant steps of the criminal proceedings in question, to an extent comparable with the measures of this type which it takes in respect of defendants.'

8 Article 7 of the Framework Decision provides:

'Each Member State shall, according to the applicable national provisions, afford victims who have the status of parties or witnesses the possibility of reimbursement of expenses incurred as a result of their legitimate participation in criminal proceedings.'

9 According to the Information concerning the declarations by the French Republic and the Republic of Hungary on their acceptance of the jurisdiction of the Court of Justice to give preliminary rulings on the acts referred to in Article 35 of the Treaty on European Union, published in the *Official Journal of the European Union* on 14 December 2005 (OJ 2005 L 327, p. 19), the Republic of Hungary made a declaration under Article 35(2) EU accepting the jurisdiction of the Court of Justice of the European Communities to give rulings in accordance with the arrangements laid down in Article 35(3)(a) EU.

10 Nevertheless, according to the decision of the Hungarian Government (kormányhatározat) No

2088/2003 (V. 15.) of 15 May 2003, containing a declaration relating to references to the Court of Justice for a preliminary ruling, 'the Republic of Hungary [declared], under Article 35(2) EU, that it accepts the jurisdiction of the Court of Justice of the European Communities in accordance with the provisions of Article 35(3)(b) EU'.

11 The Information concerning the declarations by the Republic of Hungary, the Republic of Latvia, the Republic of Lithuania and the Republic of Slovenia on their acceptance of the jurisdiction of the Court of Justice to give preliminary rulings on the acts referred to in Article 35 of the Treaty on European Union, published in the *Official Journal of the European Union* on 14 March 2008 (OJ 2008 L 70, p. 23), states that the Republic of Hungary withdrew the declaration it made earlier and 'has declared that it accepts the jurisdiction of the Court of Justice of the European Communities in accordance with the arrangements laid down in Article 35(2) and (3)(b) of the Treaty on European Union'.

National legislation

12 Paragraph 28(7) of Law No XIX of 1998 on criminal procedure (Büntetőeljárásról szóló 1998 évi XIX. törvény) provides:

'Subject to the provisions of this Law, the public prosecutor shall institute criminal proceedings and, except in the case of private prosecution or substitute private prosecution, shall conduct those proceedings in court, or refer the case for mediation, stay the proceedings or partially discontinue them. The public prosecutor may decide to terminate the proceedings or to change the charges. He may examine the case file during the trial stage. He may make applications concerning all matters raised in the proceedings in respect of which the court must rule.'

13 Paragraph 31(1) of that Law provides:

'The following may not act in the capacity of public prosecutor in criminal proceedings:

...

(b) anyone taking part or having taken part in the proceedings as ... victim, private prosecutor, substitute private prosecutor, party bringing a civil claim or complainant, the representative of any of those persons or any person closely related to the foregoing;

(c) anyone taking part or having taken part in the proceedings as a witness or as an expert or specialist;

...'

14 Paragraph 51(1) of the Law defines the victim as the holder of rights or legitimate interests harmed or jeopardised by the offence. Under Paragraph 51(2), the victim is entitled:

'(a) save where otherwise provided in this Law, to attend the proceedings and to examine the procedural documents concerning him;

(b) to make applications and submit observations at any stage in the proceedings;

(c) to obtain information from the court, the public prosecutor and the investigating authority on his rights and obligations in the criminal proceedings;

(d) to exercise all rights of appeal in the cases provided for in this Law.'

15 Under Paragraph 53(1) of Law No XIX of 1998:

'The victim may act as substitute private prosecutor in the cases provided for in this Law where:

(a) the public prosecutor or investigating authority decides not to act on a complaint or not to proceed with a prosecution or investigation;

(b) the public prosecutor partially discontinues criminal proceedings;

(c) the public prosecutor terminates the proceedings;

(d) the public prosecutor finds, following the investigation, that there has not been an offence which warrants prosecution and for that reason has not instituted proceedings, or, following the investigation carried out in proceedings instituted by a private prosecution, has decided not to take over the proceedings himself;

(e) the public prosecutor has terminated the proceedings at trial stage on the ground that he considers that the offence does not warrant prosecution.'

16 Paragraph 236 of that Law states:

'Save where otherwise provided in this Law, the substitute private prosecutor shall exercise, in the judicial proceedings, the rights of the public prosecutor, including the right to apply for the imposition of coercive measures entailing the removal or restriction of liberty of the accused. The substitute private prosecutor may not apply for the accused to be deprived of parental authority.'

17 Paragraph 343(5) of the Law provides:

'The substitute private prosecutor may not extend the scope of the prosecution.'

Facts and question referred for a preliminary ruling

18 In the criminal proceedings instituted before the Fővárosi Bíróság (Budapest Metropolitan Court) by Mr Katz as substitute private prosecutor against Mr Sós, the latter is accused of having committed acts of fraud referred to in paragraph 318(1) of the Hungarian Criminal Code (Büntető törvénykönyv) and having caused Mr Katz serious harm within the meaning of Paragraph 318(6)(a). Those proceedings were instituted following a decision by the public prosecutor in the same case not to proceed with prosecution.

19 The Fővárosi Bíróság explains that criminal proceedings instituted by a substitute private prosecutor are a special means by which criminal proceedings can be instituted under Hungarian rules of criminal procedure. In addition to criminal proceedings instituted on the application of the public prosecutor, Hungarian law permits victims of certain minor offences to institute and conduct a prosecution; this is known as 'private prosecution' ('magánvád'). The 'substitute private prosecution' ('pótmagánvád'), which is at issue in the main proceedings, is a third means of instituting criminal proceedings, which permits victims of a crime to take action, inter alia where the public prosecutor terminates proceedings which he has instituted. Private prosecution and substitute private prosecution should not be confused with the bringing of civil claims for damages in criminal proceedings.

20 Mr Katz's application requesting that he, as a victim, be summoned and heard as a witness in the substitute criminal proceedings at issue was dismissed by the Fővárosi Bíróság, which ruled on that offer to supply evidence and terminated legal debate on that point.

21 In his oral submissions to the referring court, Mr Katz claimed that, by refusing to hear the victim, who is also prosecutor, as a witness, the referring court infringed the principles concerning the right to a fair trial and equality of arms enshrined in the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950 ('the ECHR'). He also maintained that he had already suffered harm during the investigation by reason of the fact that the investigating authority did not comply with its obligation to establish the facts, whereas the legal mechanism of the substitute private prosecution precisely enables that situation to be remedied so that, thanks to the testimony of the victim appearing in person, the truth can be ascertained and the latter can obtain reparation for the harm suffered. According to Mr Katz, the victim would otherwise be placed at a disadvantage compared to the person being prosecuted.

22 At a subsequent hearing before that court, held on 6 July 2007, the court reopened the criminal investigation. It pointed out that, while Paragraph 236 of Law No XIX of 1998 derogates from the prohibition on a substitute private prosecutor acting in the capacity of the public prosecutor, there is no provision in that Law derogating from the prohibition contained in Paragraph 31(1), under which a witness may not act in the capacity of public prosecutor. The Fővárosi Bíróság inferred from this that a substitute private prosecutor may not be heard as a witness in such criminal proceedings. With regard to a private prosecution, the Law in question contains an express provision under which the private prosecutor may be heard as a witness. Even though private prosecutions and substitute private prosecutions are undoubtedly similar, the same rules cannot, in the absence of any cross-

reference between them, be applied to those two distinct types of proceedings.

23 The Fővárosi Bíróság then states that the Hungarian legislature itself has recognised that the substitute private prosecution mechanism is an important instrument which can compensate for inaction of the legal authorities. There is also no doubt that that legal mechanism involves the victim being given the genuine possibility of obtaining a judicial decision in proceedings of a legally binding nature. It could be difficult or even impossible to achieve that result if the victim acting as substitute private prosecutor had no possibility of being heard as a witness and if that victim could not, thanks to his own testimony, supply evidence, when, more often than not, it is the victim who would know the facts which require to be established.

24 However, the Fővárosi Bíróság states, it should also be acknowledged that, by having at his disposal the powers granted to the public prosecutor, the substitute private prosecutor's rights are rather considerable. Given his power to make applications, he has the possibility of supplying evidence. He also has the right to submit observations.

25 The Fővárosi Bíróság is unsure as to what is meant by the concepts of a 'real and appropriate' role for victims and the 'possibility' they have 'to be heard during proceedings and to supply evidence', provided for in Articles 2 and 3 of the Framework Decision respectively, and wonders whether they should include the possibility for a national court to hear the victim of a crime as a witness in the course of a substitute private prosecution.

26 It is in those circumstances that the Fővárosi Bíróság, acting as a court of first instance, decided to stay proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Must Articles 2 and 3 of … Framework Decision 2001/220 … be interpreted as meaning that the national court must be guaranteed the possibility of hearing the victim as a witness also in criminal proceedings which have been instituted by him as a substitute private prosecution?'

Admissibility

27 As is clear from paragraph 10 of the present judgment, by decision of the Hungarian Government No 2088/2003 of 15 May 2003 the Republic of Hungary declared that it accepts the jurisdiction of the Court to rule on the validity and interpretation of the acts referred to in Article 35 EU in accordance with the arrangements laid down in Article 35(3)(b) EU. It is not disputed that the present order for reference was submitted in accordance with that declaration, and therefore the Fővárosi Bíróság falls within the courts which are entitled to refer questions to the Court under Article 35 EU.

28 The Hungarian Government considers that the reference for a preliminary ruling is nevertheless inadmissible, as it is hypothetical. In its view, the Fővárosi Bíróság wrongly asserts that Hungarian law does not permit a substitute private prosecutor to be heard as a witness in criminal proceedings. In support of its argument, the Hungarian Government relies in particular on Opinion No 4/2007 of the criminal division of the Legfelsőbb Bíróság (Hungarian Supreme Court) of 14 May 2007, which states that 'there is no legal obstacle precluding, in criminal proceedings, the questioning as a witness of the victim acting as substitute private prosecutor.' Mr Katz also takes the view that there is no doubt at all that Hungarian law authorises a substitute private prosecutor to be heard as a witness in criminal proceedings.

29 It should be noted, that, in accordance with Article 46(b) EU, the provisions of the EC Treaty concerning the powers of the Court of Justice and the exercise of those powers, including the provisions of Article 234 EC, apply to the provisions of Title VI of the EU Treaty under the conditions laid down by Article 35 EU. It follows that the system under Article 234 EC applies to the Court's jurisdiction to give preliminary rulings under Article 35 EU, subject to the conditions laid down by the latter article (see, inter alia, Case C-296/08 PPU *Santesteban Goicoechea*, [2008] ECR I-0000, paragraph 36, and the case-law cited).

30 Like Article 234 EC, Article 35 EU makes reference to the Court of Justice for a preliminary ruling subject to the condition that the national court 'considers that a decision on the question is necessary to enable it to give judgment', meaning that the case-law of the Court of Justice on the admissibility of references under Article 234 EC is, in principle, transposable to references for a preliminary ruling submitted to the Court of Justice under Article 35 EU (see, inter alia, Case C-467/05 *Dell'Orto* [2007] ECR I-5557, paragraph 39, and the case-law cited).

31 It follows that the presumption that questions referred by national courts for a preliminary ruling are relevant may be rebutted only in exceptional cases, where it is quite obvious that the interpretation which is sought of the provisions of European Union law referred to in the questions bears no relation to the actual facts of the main action or to its purpose or where the problem is hypothetical or the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it. Save for such cases, the Court is, in principle, bound to give a preliminary ruling on questions concerning the interpretation of the acts referred to in Article 35(1) EU (*Dell'Orto*, paragraph 40, and the case-law cited).

32 As is evident from paragraphs 18 to 25 of this judgment, the order for reference sets out the principal facts of the main action and the provisions of applicable national law which are directly relevant, and it explains the reasons why the court making the reference is seeking an interpretation of the Framework Decision, and also the link between the latter and the national legislation applicable in the matter.

33 Contrary to what is argued by the Hungarian Government, it is not obvious that, in the main proceedings, the problem raised is of a hypothetical nature, if only because it is not in dispute that the referring court dismissed Mr Katz's application to be heard as a witness in the substitute private prosecution in those proceedings on the ground that Hungarian law does not expressly confer that right in such a situation.

34 Moreover, it is not for the Court, in the context of a reference for a preliminary ruling, to give a ruling on the interpretation of provisions of national law or to decide whether the interpretation given by the national court of those provisions is correct (see, inter alia, with regard to Article 234 EC, Case C-244/06 *Dynamic Medien*[2008] ECR I-0000, paragraph 19).

35 Therefore, it is necessary to reply to the reference for a preliminary ruling.

36 On the other hand, it is not appropriate to accede to Mr Katz's request that the Court extend the question referred to include examination of the question whether the Framework Decision means that certain powers of investigation granted by Hungarian law to the public prosecutor are also to be available to a substitute private prosecutor.

37 Under Article 35 EU, it is for the national court, not the parties to the main proceedings, to bring a matter before the Court of Justice. The right to determine the questions to be put to the Court thus devolves on the national court alone and the parties may not change their tenor (see *Santesteban Goicoechea*, paragraph 46).

38 Furthermore, to answer the questions formulated by Mr Katz would be incompatible with the function given to the Court by Article 35 EU and with its duty to ensure that the governments of the Member States and the parties concerned are given the opportunity to submit observations in accordance with Article 23 of the Statute of the Court of Justice, bearing in mind that under the latter provision only the order of the national court is notified to the interested parties (see *Santesteban Goicoechea*, paragraph 47).

The question referred for a preliminary ruling

39 It is common ground that a person in the position of Mr Katz is a victim within the meaning of Article 1(a) of the Framework Decision, a provision according to which a victim is a natural person who has suffered harm directly caused by acts or omissions which infringe the criminal law of a Member State.

40 Articles 5 and 7 of the Framework Decision make clear that the latter covers the situation of the victim, whether acting as a witness or as a party to the proceedings.

41 There is no provision in the Framework Decision which aims to exclude from its scope the situation where, in criminal proceedings, the victim assumes, as in the present instance, the role of the prosecutor in place of the public authorities.

42 According to recital 4 in the preamble to the Framework Decision the victims of crime should be afforded a high level of protection.

43 Under Article 2(1) of the Framework Decision, Member States are to ensure that victims have a real and appropriate role in their criminal legal system, and are to recognise victims' rights and legitimate interests with particular reference to criminal proceedings.

44 The first paragraph of Article 3 of the Framework Decision provides, in general terms, that the Member States are to safeguard the possibility for victims to be heard during proceedings and to supply evidence.

45 Accordingly, while a victim who acts in the capacity of substitute private prosecutor may claim the rights attaching to the status of victim provided for under the Framework Decision, the fact remains that neither the first paragraph of Article 3 nor any other provision of the Framework Decision supplies further details concerning the rules of evidence applicable to victims in criminal proceedings.

46 It must therefore be concluded that the Framework Decision, while requiring Member States, first, to ensure that victims enjoy a high level of protection and have a real and appropriate role in their criminal legal system and, second, to recognise victims' rights and legitimate interests and ensure that they can be heard and supply evidence, leaves to the national authorities a large measure of discretion with regard to the specific means by which they implement those objectives.

47 However, in order not to deprive the first paragraph of Article 3 of the Framework Decision of much of its practical effect or to infringe the obligations stated in Article 2(1) of the Framework Decision, those provisions imply, in any event, that the victim is to be able to give testimony in the course of the criminal proceedings which can be taken into account as evidence.

48 It should be added that the Framework Decision must be interpreted in such a way that fundamental rights, including in particular the right to a fair trial as set out in Article 6 of the ECHR, are respected (see, in particular, Case C-105/03 *Pupino* [2005] ECR I–5285, paragraph 59).

49 It is therefore for the referring court to ensure in particular that the way in which the evidence is taken in the criminal proceedings, viewed as whole, does not prejudice the fairness of the proceedings for the purposes of Article 6 of the ECHR, as interpreted by the European Court of Human Rights (see, inter alia, Case C-276/01 *Steffensen* [2003] ECR I-3735, paragraph 76, and *Pupino*, paragraph 60).

50 In those circumstances, the answer to the question referred must be that Articles 2 and 3 of the Framework Decision are to be interpreted as not obliging a national court to permit the victim to be heard as a witness in criminal proceedings instituted by a substitute private prosecution such as that in issue in the main proceedings. However, in the absence of such a possibility, it must be possible for the victim to be permitted to give testimony which can be taken into account as evidence.

Costs

51 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 (Third Chamber) hereby rules:

Articles 2 and 3 of Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings are to be interpreted as not obliging a national court to permit the victim to be heard as a witness in criminal proceedings instituted by a substitute private prosecution such as that in issue in the main proceedings. However, in the absence of such a possibility, it must be possible for the victim to be permitted to give testimony which can be taken into account as evidence.

[Signatures]

* Language of the case: Hungarian.

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OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 10 July 2008 [1](1)

Case C-404/07

György Katz
v
István Roland Sós

(Reference for a preliminary ruling from the Fővárosi Bíróság, Hungary)

(Police and judicial cooperation in criminal matters – Framework Decision 2001/220 – Protection of victims – Substitute private prosecution – Testimony as a witness)

I – Introduction

1. The present proceedings once again (2) concern the interpretation of Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings. (3) Clarification is required as to whether the Framework Decision requires that victims of crime must be able to be heard as witnesses in criminal proceedings in which they fulfil the role of prosecutor.

II – Legal framework

A – *European Union law*

2. The rules concerning the jurisdiction of the Court to give preliminary rulings with respect to framework decisions are laid down in Article 35(2) and (3) EU:

'2. By a declaration made at the time of signature of the Treaty of Amsterdam or at any time thereafter, any Member State shall be able to accept the jurisdiction of the Court of Justice to give preliminary rulings as specified in paragraph 1.

3. A Member State making a declaration pursuant to paragraph 2 shall specify that either:

(a) any court or tribunal of that State against whose decisions there is no judicial remedy under national law may request the Court of Justice to give a preliminary ruling on a question raised in a case pending before it and concerning the validity or interpretation of an act referred to in paragraph 1 if that court or tribunal considers that a decision on the question is necessary to enable it to give judgment; or

(b) any court or tribunal of that State may request the Court of Justice to give a preliminary ruling on a question raised in a case pending before it and concerning the validity or interpretation of an act referred to in paragraph 1 if that court or tribunal considers that a decision on the question is necessary to enable it to give judgment.'

3. The aims of Framework Decision 2001/220 are set out above all in recital 8 of its preamble:

'The rules and practices as regards the standing and main rights of victims need to be approximated, with particular regard to the right to be treated with respect for their dignity, the right to provide and receive information, the right to understand and be understood, the right to be protected at the various stages of procedure and the right to have allowance made for the disadvantage of living in a different Member State from the one in which the crime was committed.'

4. Article 2(1) describes in general terms how the interests of victims are to be taken into consideration in criminal proceedings:

'Each Member State shall ensure that victims have a real and appropriate role in its criminal legal system. It shall continue to make every effort to ensure that victims are treated with due respect for the dignity of the individual during proceedings and shall recognise the rights and legitimate interests of victims with particular reference to criminal proceedings.'

5. The hearing of victims of crime and the provision of evidence by them are covered, in particular, by Article 3:

'Each Member State shall safeguard the possibility for victims to be heard during proceedings and to supply evidence.

Each Member State shall take appropriate measures to ensure that its authorities question victims only in so far as necessary for the purpose of criminal proceedings.'

B – *Hungarian law*

6. Under Hungarian law on criminal procedure, victims of crime may, in certain situations, bring a substitute private prosecution in lieu of the public prosecutor. The party bringing the substitute private prosecution is to exercise in the judicial proceedings the rights of the public prosecutor, save where otherwise provided. In comparison with the powers of the public prosecutor, the powers of the party bringing a substitute private prosecution are limited in so far as he may not propose that the accused be deprived of parental authority, he cannot have access to confidential documents which are separated from the file, and he cannot extend the charge.

7. Further, it is expressly provided that anyone taking part or having taken part in a criminal case as a witness cannot act as public prosecutor.

III – Main proceedings and reference for a preliminary ruling

8. In the main proceedings, György Katz brought a substitute private prosecution against István Roland Sós. Mr Katz accused Mr Sós of defrauding him, thereby causing him particularly serious harm.

9. Mr Katz applied to be heard as a witness. The referring court refused this application. It decided that, as a public prosecutor may not appear as a witness, the same must apply to a party bringing a substitute private prosecution.

10. The referring court doubts, however, whether that is compatible with Framework Decision 2001/220. It has, therefore, by decision of 6 July 2007, referred the following question to the Court for a preliminary ruling:

Must Articles 2 and 3 of Council Framework Decision 2001/220 of 15 March 2001 on the standing of victims in criminal proceedings be interpreted as meaning that the national court must be guaranteed the possibility of hearing the victim as a witness also in criminal proceedings which have been instituted by him as a substitute private prosecution?

11. Written observations were submitted by Mr Katz, the Republic of Austria, the Republic of Hungary and the Commission. The Republic of Hungary and the Commission took part in the hearing of 19 June 2008.

IV – Legal assessment

12. The reference for a preliminary ruling expressly relates exclusively to the question whether a national court must be guaranteed the possibility of hearing the victim as a witness also in criminal proceedings instituted by him as a substitute private prosecution.

13. Framework Decision 2001/220 only deals indirectly with this question, as it concerns the rights of victims of crime, and not the powers of the court. If, however, victims have the right to be heard as witnesses under the Framework Decision, then the national court must logically, in accordance with the question referred, be guaranteed the possibility of hearing the victim as a witness. Taking the Framework Decision into consideration, and in order to provide the national court with an answer, the question referred is therefore to be reformulated as follows:

Must Articles 2 and 3 of Framework Decision 2001/220 on the standing of victims in criminal proceedings be interpreted as meaning that a victim must have the possibility of contributing evidence as a witness in proceedings which have been instituted by him as a substitute private prosecution?

A – *Admissibility of the reference for a preliminary ruling*

14. As the present case concerns the interpretation of a framework decision under Article 34(2)(b) EU, the system under Article 234 EC applies to the jurisdiction of the Court to give preliminary rulings by virtue of Article 35 EU, subject to the conditions laid down by the latter provision. (4)

15. As a consequence, the Court can answer the question only if Hungary has, in accordance with Article 35(2) EU, accepted by way of a declaration its jurisdiction to give preliminary rulings. Such a declaration exists.

16. It is, nevertheless, open to question whether the referring court is entitled to make the reference. Conflicting notices have in fact been published in the *Official Journal of the European Union* concerning the right of national courts to make references: it was at first communicated that Hungary had accepted the jurisdiction of the Court in accordance with Article 35(3)(a) EU. (5) Accordingly, only courts ruling at last instance would have been entitled to make references. After the present reference for a preliminary ruling was lodged with the Court, it was communicated that Hungary had 'withdrawn' this first declaration and instead declared its acceptance of the Court's jurisdiction in accordance with Article 35(3)(b) EU. Accordingly, all national courts may make references for preliminary rulings concerning European Union law. (6)

17. There is no information as to whether the Fővárosi Bíróság is a court of last instance in the present case. It therefore seems possible, according to the communications in the Official Journal, that, at the time of the reference, the court lacked jurisdiction to refer questions concerning European Union law to the Court of Justice.

18. Under Article 35(3) EU, the details provided by the Member States concerning courts entitled to make references do not, however, necessarily confer jurisdiction, but may also be simply declaratory. Contrary to what may be assumed from the wording of the communications in the Official Journal concerning acceptance of jurisdiction, the Member States do not recognise the jurisdiction of the Court of Justice under Article 35(3)(a) or (b) EU, that is to say, with respect to the references of certain courts. On the contrary, the Member States specify (7) which courts may make references. The 'specification' need not be connected with the declaration accepting the jurisdiction of the Court of Justice. The actual regulation of entitlement to make references may instead be by way of a separate internal legislative act.

19. At least in the present case, the entitlement to make references was specified correctly only by the Hungarian Decision (Kormányhatározat) 2088/2003. This expressly accepts the jurisdiction of the Court under Article 35(3)(b) EU. This Hungarian decision already existed at the time of the reference for a preliminary ruling, and the referring court and the Hungarian Government correctly found the jurisdiction of the Court upon it.

20. The original communication in the Official Journal was, consequently, incorrect, and was corrected by the later communication concerning Hungarian acceptance of the Court's jurisdiction. It should, moreover, be noted that, at the time of the Court's judgment at any rate, its jurisdiction will not be in doubt.

21. The Court, therefore, has jurisdiction to answer the question referred for a preliminary ruling.

22. Hungary is, nevertheless, of the opinion that the reference for a preliminary ruling is inadmissible, due to its hypothetical nature. It states that the referring court's doubts concerning the possibility for the party bringing a substitute private prosecution to be heard as a witness in criminal proceedings are based on an incorrect interpretation of Hungarian law and that, according to a commentary on criminal procedural law and an opinion of the Supreme Court, (8) a party bringing a substitute private prosecution may, under Hungarian criminal procedural law, appear as a witness.

23. It is, however, in principle to be presumed that questions referred by national courts for a preliminary ruling are relevant to the decision. (9) It is only in exceptional circumstances that the Court examines the conditions in which a case was referred to it by a national court, in order to assess whether it has jurisdiction. (10) According to established case-law, the Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it. (11) Save for such cases, the Court is in principle bound to give a preliminary ruling on questions concerning the interpretation of Community law. (12)

24. The Hungarian Government presents strong circumstantial evidence to the effect that the question referred for a preliminary ruling requires no further clarification under Hungarian law. However, the reference for a preliminary ruling and the refusal to date to hear Mr Katz as a witness demonstrate that at least the referring court interprets Hungarian law differently, presumably even despite being aware of the opinion of the Supreme Court.

25. It is not the Court's role, when assessing the admissibility of a reference for a preliminary ruling, to correct a national court's interpretation of national law. (13) The Court should rather assist the referring court to overcome doubts concerning the interpretation of Community and Union law.

26. Consequently, the question referred for a preliminary ruling is not clearly hypothetical.

27. Finally, Mr Katz suggests that the reference for a preliminary ruling should be widely construed and it should be examined whether Framework Decision 2001/220 requires certain investigative powers of the prosecuting authority to be vested in the party bringing a substitute private prosecution.

28. However, Article 234 EC establishes direct cooperation between the Court of Justice and the national courts by way of a non-contentious procedure excluding any initiative of the parties, who are merely invited to be heard in the course of that procedure. (14) Under Article 234 EC it is for the national court, and not the parties to the main action, to bring a matter before the Court of Justice. Since the right to determine the questions to be brought before the Court devolves upon the national court alone, the parties may not change the tenor of the questions. (15)

29. Consequently, the referring court's question is to be answered.

B – *Question referred*

30. The reference for a preliminary ruling concerns Hungarian procedures with respect to substitute private prosecutions, that is to say, the status of victims of a crime where they themselves, in the course of criminal proceedings relating to the crime, exercise the function of prosecutor in lieu of a public prosecutor.

31. Criminal proceedings in the Member States are, in general, brought by public prosecutors. In exceptional cases, however, private parties, generally the victims of crimes, may bring a criminal prosecution before a court in lieu of the public prosecutor and exercise the function of the public prosecutor during the criminal proceedings. This procedure raises the question to what extent rules governing public prosecutors are also applicable to parties bringing a private prosecution. This relates both to the powers of the prosecutor and to any limitations on them.

32. The present case concerns the possibility of being heard as a witness. In principle, the hearing of a person as a witness in his own case is problematic due to potential conflicts of interest. On the other hand, the victim's evidence can significantly contribute to proving the guilt of the perpetrator, and thus to reaching a fair and correct judgment.

33. Framework Decision 2001/220 does not contain any special rules concerning the rights of victims where they bring a prosecution themselves. Nevertheless, the general rules on the rights of victims show that victims must always have the opportunity to provide evidence by means of testimony in criminal proceedings.

34. This follows, in particular, from the first paragraph of Article 3 of Framework Decision 2001/220, under which the Member States are to safeguard the possibility for victims to be heard during proceedings and to supply evidence.

35. The Austrian Government admittedly emphasises that testimony of the victim is not expressly mentioned. However, the element of testimony is implicitly contained in the formulation 'to be heard'. Furthermore, victims' testimony is in many cases the most important evidence they can supply. As the Commission emphasises, to exclude the victim's testimony as evidence would render the right to be safeguarded under the first paragraph of Article 3 of Framework Decision 2001/220 largely meaningless.

36. To undermine the rights of victims in such a way would be incompatible with the aims of Framework Decision 2001/220. According to recital 8, victims should, inter alia, obtain the right to provide information. In general, under Article 2(1), the Member States are to ensure that victims have a real and appropriate role in their criminal legal systems. They are to recognise, under the same provision, the rights and legitimate interests of victims with particular reference to criminal proceedings.

37. At least where victims wish to give testimony, it is fundamentally consistent with their legitimate interests to allow them to do so. With respect to the Austrian Government's reference to the fact that testimony could also represent a burden for the victim, this is not relevant to the present case. As indeed the Commission also makes clear, the issue to be decided here is not whether victims can be forced to give testimony against their will.

38. There also seems to be nothing to indicate that the rights of victims should not be applicable to criminal proceedings in which they bring the prosecution. Framework Decision 2001/220 does not contain any limitations in this respect.

39. On the contrary, it is specifically victims bringing prosecutions who deserve special protection. They generally exercise this function precisely because the public prosecutors refuse to bring a prosecution. In such a situation, a prohibition of testimony would amount to an additional disadvantage: victims would have to conduct the proceedings alone, without the support of a public prosecutor, and would, at the same time, be deprived of important evidence. The referring court and the Commission are, therefore, justified in their concerns that it would be difficult, if not impossible, to succeed with a private prosecution if the prosecuting victim were not able to give testimony.

40. The Commission is, therefore, of the opinion that the victim must be able to give testimony as a witness also when bringing the prosecution. This cannot, however, be inferred from Framework Decision 2001/220. The term 'witness' is not used in paragraph 1 of Article 3. Rather, the victim has the right to be heard and to supply evidence.

41. Framework Decision 2001/220 shows that the legislator was aware of the distinction between the role of the victim as witness and as a party. It is expressly stated in Articles 5 and 7 that victims can participate in criminal proceedings as witnesses or as parties.

42. Consequently, it is not necessary that victims bringing a prosecution receive the status of witnesses if the applicable national law governing criminal procedure nevertheless grants them the possibility of being heard before the court, and this testimony constitutes admissible evidence. This seems, according to a study carried out by the Court's research department, to correspond with the procedures in many Member States regarding this situation: victims who bring prosecutions may contribute evidence by way of testimony without being entirely equated with witnesses. In particular, testimony under oath is often precluded.

43. Such individualised consideration of the testimony of victims bringing prosecutions takes the difficulty of their role into account. Even irrespective of the role as prosecutor, the victim's interest in the outcome of the proceedings is clear. Where the victim also assumes the role of prosecutor, it becomes all the more difficult to ensure the objectivity which is essential for a good witness. Therefore, the value of a victim's testimony cannot be regarded as solid and irrefutable. On the

contrary, courts must assess the testimony of victims particularly carefully in every case, thereby taking the individual situation of the victim fully into consideration.

44. It should, in addition, be emphasised that giving effect to the position of victims bringing prosecutions should not entail any kind of diminution of the rights of the defence. These rights derive from the right to a fair trial, which is enshrined in Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 ('the ECHR') and recognised by Articles 47 and 48 of the Charter of Fundamental Rights of the European Union, (16) proclaimed in Nice on 7 December 2000. The rights of the defence, therefore, constitute a fundamental right forming part of the general principles of law whose observance the Court ensures. (17) The Framework Decision is, consequently, to be interpreted in such a way as to respect Article 6 of the ECHR, as interpreted by the European Court of Human Rights. (18)

45. Under Article 6(3)(d) of the ECHR, the defendant has, in particular, the right to examine or have examined witnesses against him. This applies also to the testimony of the victim of the crime, even where the victim brings the prosecution. The principle of equality of arms between the prosecution and the defendant may not be prejudiced.

46. The Member States have the obligation to give effect to these requirements in their law governing criminal procedure. Inasmuch as this has not been carried out with the necessary clarity, the national courts are obliged to strive to interpret the procedural law in conformity with the Framework Decision. (19)

V – Conclusion

47. I therefore propose that the reply to the question referred for a preliminary ruling should be as follows:

Under the first paragraph of Article 3 of Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings, victims of crimes who act as prosecutor in lieu of a public prosecutor in the resulting criminal proceedings must have the possibility of contributing evidence in the proceedings by giving testimony. Such victims need not, however, be afforded the status of witnesses if the applicable national law governing criminal procedure nevertheless grants them the possibility of being heard before the court and that testimony constitutes admissible evidence.

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1 – Original language: German.

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2 – See Case C-105/03 *Pupino* [2005] ECR I-5285 and Case C-467/05 *Dell'Orto* [2007] ECR I-5557.

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3 – OJ 2001 L 82, p. 1.

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4 – See *Pupino* (cited in footnote 2), paragraph 19, and *Dell'Orto* (cited in footnote 2), paragraph 33. See also Case C-354/04 P *Gestoras Pro Amnistía and Others* v *Council* [2007] ECR I-1579, paragraph 54, and Case C-355/04 P *Segi and Others* v *Council* [2007] ECR I-1657, paragraph 54.

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5 – OJ 2005 L 327, p. 19.

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6 – OJ 2008 L 70, p. 23.

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7 – French: 'indiquer'; German: 'bestimmen'.

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8 – Opinion 4/2007 of 4 May 2007.

9 – Case C-355/97 *Beck and Bergdorf* [1999] ECR 4977, paragraph 22; *Pupin* (cited in footnote 2), paragraph 30; Joined Cases C-202/04 and C-94/04 *Cipolla and Others* [2006] ECR I-11421, paragraph 25; Case C–212/06 *Gouvernement de la Communauté française andGouvernement wallon* [2008] ECR I-0000, paragraph 29; and Case C-188/07 *Commune deMesquer* [2008] ECR I-0000, paragraph 30.

10 – Joined Cases C-295/04 to C-298/04 *Manfredi and Others* [2006] ECR I-6619, paragraph 27.

11 – See, inter alia, Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 61; Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, paragraph 24; and *Commune de Mesquer* (cited in footnote 9), paragraph 30.

12 – See *Bosman* (cited in footnote 11), paragraph 59, and *IATA and ELFAA* (cited in footnote 11), paragraph 24.

13 – See Case 16/83 *Prantl* [1984] ECR 1299, paragraph 10; Joined Cases 91/83 and 127/83 *Heineken Brouwerijen* [1984] ECR 3435, paragraph 10; Case C-347/89 *Eurim-Pharm* [1991] ECR I-1747, paragraph 16; Case C-246/04 *Turn- und Sportunion Waldburg* [2006] ECR I-589, paragraph 20; and Case C-244/06 *Dynamic Medien* [2008] ECR I-0000, paragraph 19.

14 – This is illustrated by Case C–2/06 *Kempter* [2008] ECR I–0000, paragraphs 41 and 42.

15 – Case 44/65 *Singer* [1965] ECR 965, 970; Case C-381/89 *Sindesmos Melon tis EleftherasEvangelikis Ekklisias and Others* [1992] ECR I-2111, paragraph 19; Case C-412/96 *Kainuun Liikenne and Pohjolan Liikenne* [1998] ECR I-5141, paragraph 23; Case C-402/98 *ATB and Others* [2000] ECR I-5501, paragraph 29; and Joined Cases C-376/05 and C-377/05 *Brünsteiner und Autohaus Hilgert* [2006] ECR I-11383, paragraph 28.

16 – OJ 2000 C 364, p. 1, as amended by the proclamation of 12 December 2007, OJ 2007 C 303, p. 1.

17 – Case C-283/05 *ASML* [2006] ECR I-12041, paragraph 27, and Case C-14/07 *Weiss undPartner* [2008] ECR I-0000, paragraph 47.

18 – *Pupino* (cited in footnote 2), paragraph 59.

19 – *Pupino* (cited in footnote 2), paragraph 34.

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Reference for a preliminary ruling from the Landgericht Regensburg (Germany) lodged on 21 June 2007 - Staatsanwaltschaft Regensburg v Klaus Bourquain

(Case C-297/07)

Language of the case: German

Referring court

Landgericht Regensburg

Parties to the main proceedings

Applicant: Staatsanwaltschaft Regensburg

Defendant: Klaus Bourquain

Question referred

With regard to the interpretation of Article 54 of the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, [1] does the rule prohibiting a person whose trial has been finally disposed of in one contracting party from being prosecuted in another contracting party for the same act apply, where the penalty imposed on him could never be enforced under the laws of the sentencing contracting party?

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[1] - OJ 2000 L 239, p. 19.

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CONCLUSIONS DE L'AVOCAT GÉNÉRAL
M. Dámaso Ruiz-Jarabo Colomer
présentées le 8 avril 2008 (1)

Affaire C‑297/07

Staatsanwaltschaft Regensburg
contre
Klaus Bourquain

[demande de décision préjudicielle formée par le Landgericht Regensburg (Allemagne)]

«Demande préjudicielle au titre de l'article 35 UE – Acquis de Schengen – Convention d'application de l'accord de Schengen – Interprétation de l'article 54 – Principe ne bis in idem – Condamnation par contumace – Force de chose jugée – Condition de non-exécution de la peine»

I – Introduction

1. Au cours des cinq dernières années, la Cour a précisé les contours un peu flous du principe ne bis in idem dans une jurisprudence (2) à laquelle j'ai eu l'honneur de contribuer (3) et dont la vocation à avoir une portée générale n'est en rien obscurcie par les spécificités de chaque cas d'espèce.

2. Tout comme pour la contemplation d'un tableau, une appréciation d'ensemble exige de prendre ses distances par rapport à l'objet pour ne pas courir le risque que la rétine ne capte que les traits, la texture et la masse de couleurs, sans réussir à appréhender la signification globale de l'œuvre.

3. Cela peut quelquefois être particulièrement difficile, comme dans la présente affaire, qui a été ouverte en partie à la suite du comportement paradoxal d'une personne qui prétend assurer son bien-être personnel en invoquant sa propre condamnation à mort, (4) prononcée 47 ans auparavant, pour faire jouer le principe ne bis in idem. C'est là la grandeur et la servitude du droit.

II – Cadre juridique

A – *L'acquis de Schengen*

4. Ce corpus juridique comprend:

a) l'accord signé le 14 juin 1985 dans la localité luxembourgeoise qui lui donne son nom, par les États formant l'Union économique Benelux, la République fédérale d'Allemagne et la République française, relatif à la suppression graduelle des contrôles aux frontières communes (5);

b) la convention d'application de cet accord, conclue le 19 juin 1990 (6), (ci-après la Convention)

qui établit des mesures de coopération pour compenser la disparition de ces contrôles;

c) les protocoles et les instruments d'adhésion d'autres États membres, les déclarations et les actes adoptés par le comité exécutif institué par la Convention, ainsi que ceux pris par les instances auxquelles ce comité exécutif attribue des pouvoirs de décision (7).

5. Le protocole (n° 2) annexé au traité sur l'Union européenne et au traité instituant la Communauté européenne (ci-après, le «protocole») intègre ce corpus de normes dans le cadre de l'Union; en vertu de son article 2, paragraphe 1, premier alinéa, il s'applique aux treize États énumérés à l'article 1er (8) depuis l'entrée en vigueur du traité d'Amsterdam (le 1er mai 1999).

6. La décision 2007/801/CE du Conseil, du 6 décembre 2007 (9), a notablement élargi le champ d'application territoriale de l'acquis de Schengen, en déclarant que les dispositions de ce dernier s'appliquent désormais pleinement à la République tchèque, à la République d'Estonie, à la République de Lettonie, à la République de Lituanie, à la République de Hongrie, à la République de Malte, à la République de Pologne, à la République de Slovénie et à la République slovaque.

7. Le Royaume-Uni de Grande-Bretagne (10) et d'Irlande du Nord ainsi que l'Irlande (11) ne se sont pas associés pleinement à ce projet commun et ont opté pour une participation ponctuelle.

8. Depuis leur adhésion à l'Union européenne, la République de Chypre, (12)la République de Bulgarie et la Roumanie (13)sont certes liées par le corpus de normes précité, mais il faudra l'intervention du Conseil pour vérifier si les conditions nécessaires à l'application de celles-ci sont remplies.

9. Concernant les pays non membres de l'Union européenne, l'article 6 du protocole impose à la République d'Islande et au Royaume de Norvège de mettre en œuvre et de développer l'acquis de Schengen, qui s'applique dans ces États depuis le 25 mars 2001 (14). En outre, un accord d'association avec la Confédération suisse prévoit la mise en œuvre, l'application et le développement de cet acquis (15) et il est probable que la Principauté de Liechtenstein adhère à cet accord en vertu d'un projet de décision élaboré par le Conseil (16).

10. D'après le préambule du protocole, l'objectif est de renforcer l'intégration européenne pour permettre à l'Union de devenir plus rapidement un espace de liberté, de sécurité et de justice.

11. Se fondant sur l'article 2, paragraphe 1, deuxième alinéa, du protocole, le Conseil a adopté, le 20 mai 1999, les décisions 1999/435/CE et 1999/436/CE, relatives à la définition de l'accord de Schengen en vue de déterminer, conformément aux dispositions pertinentes du traité instituant la Communauté européenne et du traité sur l'Union européenne, la base juridique des normes qui constituent l'acquis (17).

B – *En particulier, le principe ne bis in idem*

12. Le titre III de la convention, intitulé «Police et sécurité», débute par un chapitre consacré à la «coopération policière» (articles 39 à 47), suivi d'un autre qui traite de l'«entraide judiciaire en matière pénale» (articles 48 à 53).

13. Le chapitre 3, intitulé «Application du principe *ne bis in idem*», se compose des articles 54 à 58, qui sont fondés sur les articles 34 UE et 31 UE, selon l'article 2 et l'annexe A de la décision 1999/436.

14. L'article 54 se lit comme suit:

«Une personne qui a été définitivement jugée par une Partie Contractante ne peut, pour les mêmes faits, être poursuivie par une autre Partie Contractante, à condition que, en cas de condamnation, la sanction ait été subie ou soit actuellement en cours d'exécution ou ne puisse plus être exécutée selon les lois de la Partie Contractante de condamnation.»

C – *Le droit français*

15. Je partage les réflexions de certains des intervenants dans le débat préjudiciel (18) sur la paucité des informations contenues dans l'ordonnance de renvoi au sujet de la teneur exacte des dispositions françaises applicables (19).

16. Toutefois, l'article 120 du code français de justice militaire (20) permettait au contumax de faire opposition dans les cinq jours de la notification du jugement et, dans le cas, au demeurant habituel dans les procédures par contumace, où la notification n'était pas certaine, il permettait au condamné de faire opposition tant que l'exécution de la peine n'était pas prescrite.

17. Pour sa part, le code de procédure pénale (21) prévoyait, en ce qui concerne les crimes, un délai de prescription de la peine de vingt ans à compter de son prononcé (22).

18. Il résulte de l'exégèse conjointe de ces normes que le jugement par contumace dont la notification n'est pas établie (23) devient irrévocable (24) vingt ans après son prononcé, sans oublier qu'en l'espèce le délai de prescription coïncide avec celui accordé pour demander la révision (25).

III – Faits, litige au principal et question préjudicielle

19. Le 26 janvier 1961, M. Klaus Bourquain, un ressortissant allemand engagé dans la légion étrangère française (26), a été jugé, déclaré coupable d'homicide et condamné à mort par contumace par le Tribunal permanent des forces armées de la zone est-constantinoise, à Bône (27).

20. Appliquant le code pénal français alors en vigueur, ce tribunal militaire a considéré comme établi que le 4 mai 1960, alors qu'il avait entrepris de déserter à la frontière entre l'Algérie et la Tunisie, dans la province d'El Tarf (28), M. Bourquain avait abattu d'un coup de feu un autre soldat de la légion étrangère, également de nationalité allemande, qui voulait l'empêcher de fuir.

21. S'étant réfugié en République démocratique allemande, le condamné n'a jamais comparu devant le tribunal et la peine n'a pas été exécutée, même si les biens de l'intéressé ont été mis sous séquestre pour garantir le recouvrement des dépens.

22. Il n'y a pas eu d'autre procédure pénale contre M. Bourquain en France et en Algérie; en revanche, les autorités de la République fédérale d'Allemagne ont, en 1962, délivré un mandat d'arrêt à l'adresse de la République démocratique allemande, qui l'a rejeté.

23. En 2002, la Staatsanwaltschaft Regensburg (le parquet de Ratisbonne) a entrepris des démarches en vue de faire juger M. Bourquain en Allemagne, pour les mêmes faits.

24. Mais, à cette date, la peine imposée par le jugement du 26 janvier 1961 ne pouvait être exécutée en France: (1) en effet, ce pays avait, en 1968, amnistié (29) les infractions commises par ses militaires pendant les événements en Algérie; (2) la prescription est intervenue en 1981 et (3) la peine de mort a été abolie (30) la même année.

25. Dans ces circonstances, le Landgericht Regensburg a demandé un avis consultatif au Max-Planck-Institut für ausländisches und internationales Strafrecht (Institut Max-Planck de droit pénal international et étranger, ci-après, l'«institut Max-Planck»), qui a estimé que, même si son exécution immédiate était exclue en raison des particularités du droit français, le jugement par contumace était formellement et matériellement passé en force de chose jugée, ce qui interdisait l'ouverture d'un nouveau procès pénal.

26. En outre, la même juridiction a demandé au ministère de la Justice français de lui dire, au titre de l'article 57 de la convention, si les autorités françaises étaient d'avis que le jugement du 26 janvier 1961 s'opposait à l'ouverture d'un nouveau procès en Allemagne, en raison de l'article 54 de la convention.

27. Tout en estimant que le principe ne bis in idem n'était pas applicable, le procureur du Tribunal aux armées de Paris a confirmé que le jugement était passé en force de chose jugée, qu'il était irrévocable depuis 1981 et qu'il ne pouvait plus être exécuté en France, la peine étant prescrite (31).

28. Ce tissu d'opinions divergentes renforce les doutes conçus par le Landgericht Regensburg, dont l'ordonnance de renvoi vise à déterminer si l'article 54 de la convention exige que la peine ait été exécutable à un moment quelconque. D'après le raisonnement de la juridiction de renvoi, le droit de demander l'ouverture d'un nouveau procès pendant le délai de prescription (32)a pour conséquence que la peine ne peut être mise à exécution qu'après l'expiration de ce délai, qui serait l'instant précis où la prescription de la peine est acquise (33).

29. En conséquence, le Landgericht Regensburg a sursis à statuer et a saisi la Cour de justice de la question préjudicielle suivante:

«Une personne définitivement jugée par une partie contractante peut-elle être poursuivie par une autre partie contractante pour le même fait lorsqu'en vertu du droit de l'État de condamnation, la peine qui a été prononcée à l'encontre de cette personne n'a jamais pu être exécutée?»

IV – Procédure devant la Cour

30. La décision de renvoi a été enregistrée au greffe de la Cour le 21 juin 2007.

31. Des observations écrites ont été présentées dans le délai prévu à l'article 23 du statut CE de la Cour de justice par M. Bourquain, par la Commission des Communautés européennes ainsi que par les gouvernements tchèque, hongrois, néerlandais et portugais.

32. Après que j'eus été informé le 27 février 2008, postérieurement à la réunion générale du 19 février, que le délai pour solliciter la tenue d'une audience avait expiré le 25 sans que nul ne se soit manifesté, la voie était libre pour présenter les conclusions.

V – Analyse de la question préjudicielle

A – *Observations liminaires sur le ne bis in idem dans l'acquis de Schengen*

1. Les deux manifestations du principe

33. La Cour ne reconnaît pas la même portée au principe ne bis in idem selon que celui-ci est appliqué en matière de concurrence (34) ou dans le cadre du «troisième pilier» de l'Union européenne: si elle affirme l'interdiction de la double sanction dans ces deux domaines, ce n'est que dans le second (35) qu'elle étend l'application du principe à la possibilité d'être traduit en justice deux fois pour les mêmes faits (nemo debet bis vexari pro una et eadem causa).

34. La pleine reconnaissance des jugements étrangers en matière pénale constituait un véritable défi pour le droit communautaire et la Cour de justice l'a relevé sans éluder sa responsabilité en proclamant, pour la libre circulation des personnes, que l'article 54 de la Convention garantit l'exercice de cette liberté fondamentale à toute personne qui a été définitivement jugée, sans qu'elle doive craindre de nouvelles poursuites pénales pour des faits qui ont déjà fait l'objet d'un jugement (36).

2. Ses fondements traditionnels

35. L'article 54 de la convention s'oppose à ce que, en raison d'un même comportement illicite, une personne soit poursuivie pénalement et, éventuellement, condamnée plusieurs fois, dans la mesure où ce cumul de poursuites et de sanctions a pour conséquence inadmissible l'exercice répété du ius puniendi (37).

36. La sécurité juridique garantit à l'accusé dans un procès pénal qu'il ne sera pas traduit en justice une deuxième fois pour le même comportement, s'il est acquitté, et qu'il ne fera pas l'objet d'une nouvelle sanction, s'il est condamné.

37. On ne saurait au demeurant négliger le rôle de soutien de la proportionnalité joué par l'équité, qui interdit le cumul des sanctions (38); en effet, si – en plus de la réinsertion (39) – toute sanction poursuit une double finalité, répressive et dissuasive, en punissant le comportement des uns et en décourageant les autres de l'imiter, elle doit aussi assurer la pondération de ces finalités, en maintenant un juste équilibre afin de sanctionner le comportement en cause, tout en étant exemplaire.

38. Enfin, en tant qu'exigence structurelle du système juridique, la légitimité du ne bis in idem repose également sur le respect de la chose jugée.

3. Les derniers développements

a) De la confiance entre États…

39. Cette notion, assez jeune dans la construction d'une justice pénale européenne, est sous-jacente au principe de reconnaissance mutuelle (40) introduit au point 33 des conclusions du Conseil européen de Tampere du 16 octobre 1999 (41).

40. Le point 10 des motifs de la décision-cadre 2002/584/JAI du Conseil, du 13 juin 2002, relative au mandat d'arrêt européen et aux procédures de remise entre États membres (42), postule directement un degré de confiance élevé entre les États membres.

41. Tout cela laissait présager que la Cour ne tarderait pas à se prononcer, ce qu'elle a fait à la première occasion (43) en soulignant l'importance de la confiance mutuelle, condition essentielle de l'application de l'article 54 de la convention en vertu de laquelle chaque État membre doit accepter la façon dont le droit pénal est appliqué dans les autres, même quand le sien conduit à une solution différente; en d'autres termes, du point de vue des effets, la ratio de la confiance mutuelle se teinte d'utilitarisme en appuyant le principe de reconnaissance mutuelle.

42. Cependant, si cette clarification par la Cour facilite la résolution de certaines affaires, elle est insuffisante dans d'autres cas, surtout parce que ce système de coopération renforcée donne aux différents juges nationaux un rôle de premier plan, qui exige des dons très marqués en matière d'interprétation (44).

43. Un moyen adéquat de surmonter les situations de confusion pourrait être l'harmonisation (45) du droit pénal et de la procédure pénale des États membres, tant il est vrai que les réticences pour adopter des décisions dans ce domaine de l'ordre juridique se dissipent normalement dès la constatation que les décisions pénales prononcées dans un autre État présentent des garanties identiques.

44. Pour l'heure, le ne bis in idem continue d'arborer la bannière de la confiance partagée puisque, indépendamment du point de savoir si la convergence sera un jour réalité, l'article 54 de la convention n'est pas tributaire d'un rapprochement des législations pénales entre les États (46); au contraire, l'absence de rapprochement renforce encore sa portée.

45. Si chaque État doit présumer que certaines conditions, en particulier en matière de droits fondamentaux, sont respectées par tous les autres, l'expérience indique que la confiance mutuelle est un principe normatif, qui concentre les normes d'interprétation des obligations relatives au «troisième pilier» en jouant un rôle équivalent à celui du principe de la coopération loyale (47).

46. Bien qu'elle ait sa source dans le champ abstrait de la coopération entre États, la reconnaissance mutuelle se matérialise dans ce que les garanties individuelles ont de plus tangible (48) et conduit à la vérification de standards usuels dans le domaine des droits subjectifs, où son invocation habituelle par les opérateurs juridiques accroît la probabilité d'arriver à une compréhension commune.

b) ... à la reconnaissance d'un droit pour l'individu

47. Malgré les progrès, détacher les libertés majeures (comme celle de circulation) de l'interdiction de traduire en justice ou de sanctionner «deux fois pour les mêmes faits» exige encore des efforts considérables, dont la justification se ressent du niveau d'intégration atteint dans une Union européenne qui conçoit le citoyen comme titulaire de droits et bénéficiaire ultime des normes (49).

48. Mais je ne vois aucun inconvénient à compléter les normes (sans les remplacer) d'une coopération entre États fondée sur la confiance mutuelle par une vision tendant à appliquer les droits fondamentaux comme point de référence (50),car le *ne bis in idem* s'analyse, face au *ius puniendi*, comme une émanation de la protection juridictionnelle qui découle du droit à un procès équitable (51) et il a d'ailleurs rang constitutionnel dans certains des États parties au système de Schengen (52).

49. Dans la mesure où elle acquiert sa véritable densité normative avec l'élaboration d'un droit subjectif au traitement unitaire de l'action répressive (53), la règle du *ne bis in idem* est ancrée dans un substrat solide qui contribue à couvrir les vulnérabilités (54) de certaines institutions, comme la prescription, la chose jugée ou les multiples théories de la proportionnalité que le seul recours à la confiance mutuelle entre États (55) ne permet pas de résoudre de manière satisfaisante.

50. Cet horizon s'est éclairci avec la proclamation autonome du ne bis in idem dans la charte des droits fondamentaux de l'Union européenne (56), dont l'article 50 dispose que «nul ne peut être poursuivi ou puni pénalement en raison d'une infraction pour laquelle il a déjà été acquitté ou condamné dans l'Union par un jugement pénal définitif conformément à la loi».

51. Parmi les multiples facettes des droits fondamentaux, une importance spéciale doit être reconnue aux limites et aux exceptions qu'ils donnent à la reconnaissance mutuelle (57), à condition de correspondre à des principes communs à tous les États membres (58).

B – *La notion de «jugement définitif»*

52. Les termes dans lesquels le Landgericht Regensburg a formulé la question montrent que son problème est simplement celui de la portée de l'article 54 de la convention qui interdit de poursuivre une nouvelle fois les mêmes faits lorsque, en cas de condamnation, la sanction «ne [peut] plus être exécutée».

53. Toutefois, il faut examiner d'abord si la condamnation par contumace constitue un «jugement définitif», au sens de la disposition précitée, compte tenu de l'impossibilité d'exécution immédiate de la sanction due à l'obligation de tenir un nouveau procès dans les cas où le contumax a été repris.

1. Son interprétation

54. L'arrêt Kretzinger, précité, a éludé ce débat (59) en estimant au point 67 qu'il n'était pas «nécessaire d'examiner la question de savoir si un jugement rendu par défaut, dont la force exécutoire peut être subordonnée à des conditions en vertu de l'article 5, point 1, de la décision-cadre, doit être considéré comme une décision par laquelle une personne 'a été définitivement jugée' au sens de l'article 54 de CAAS».

55. Toutefois, la Cour a retenu un critère extensif, qui réaffirme la nécessité de respecter, au sein de l'Union européenne, les décisions mettant fin à la situation procédurale de la personne poursuivie selon la législation de l'État dans lequel les démarches correspondantes ont été entamées.

56. Elle a ainsi inclus dans la notion de jugement définitif l'extinction de l'action publique lorsque le Parquet ordonne le classement sans l'intervention d'un organe juridictionnel (affaire Gözütok et Brügge) ainsi que les décisions qui acquittent le prévenu définitivement pour insuffisance de preuves (affaire Van Straaten) ou en raison de la prescription du délit (affaire Gasparini e.a.).

57. En outre, même si les différentes versions linguistiques de l'article 54 de la Convention présentent des divergences (60), la raison téléologique pour laquelle il faut soutenir la circulation des personnes s'inscrit de façon univoque dans l'espace de liberté, de sécurité et de justice, dont la réalisation serait compromise si les particularités des procédures nationales ne permettaient pas de retenir une conception généreuse de la notion de jugement définitif.

58. Dans l'idéal, la res judicata (61) confère au jugement un état juridique non modifiable par quelque moyen que ce soit, faute de voie de recours ou parce que le recours n'a pas été introduit dans le délai légal (62).

2. Le jugement prononcé par contumace

59. Les différences de conception entre États sur la notion de décision judiciaire prise in absentia font obstacle à une coopération sans heurts en matière pénale; cela a d'ailleurs été relevé dans des initiatives récentes (63) qui s'efforcent d'introduire un embryon d'unité en organisant les critères autour de règles communes destinées à réduire ces différences.

60. En l'espèce, un éventuel jugement ultérieur compromettrait apparemment, au regard de l'article 54 de la convention, le caractère «définitif» du jugement du tribunal de Bône.

61. Mais le doute était temporaire, puisque, comme l'affirme le procureur du Tribunal aux armées de Paris, le jugement avait acquis force de chose jugée en 1981, c'est-à-dire avant le début du procès en Allemagne; or cette déclaration (64) ne peut être contestée à l'échelon du droit communautaire.

62. La Cour doit cependant réaliser que l'article 54 de la convention n'exige pas que le jugement devienne définitif au moment de son prononcé, puisqu'il suffit que cette condition soit remplie au moment où commence le deuxième procès (65); or, pour M. Bourquain, le deuxième procès a commencé en 2002, alors que la décision du tribunal militaire avait déjà acquis force de chose jugée, au sens de la réglementation française.

63. Au demeurant, d'après divers instruments juridiques (66), la présence du prévenu permet de mettre en œuvre sa défense et son droit à un procès équitable (67); d'ailleurs, la décision-cadre 2002/584 (68) permet d'exiger de l'État qui prétend exécuter une sanction prononcée par défaut des assurances suffisantes que le condamné peut demander un nouveau procès dans lequel ses droits fondamentaux seront garantis.

64. Transformer cette garantie pour l'accusé en une condition annulant l'application d'autres droits conduirait à une situation absurde, qui se réaliserait si l'application du principe ne bis in idem était limitée aux décisions qui excluent toute révision à son avantage.

65. Pour les raisons exposées ci-dessus, la condamnation prononcée en l'absence de l'intéressé doit être considérée comme «définitive» aux fins de l'application de l'article 54 de la convention.

C – *La condition relative à la «non-exécution de la sanction»*

66. Dans la présente affaire, tous s'accordent à dire que, quand le procès a été entamé en Allemagne, la sanction n'était pas exécutable en France parce que, d'une part, elle était prescrite et que, d'autre part, ce pays avait aboli la peine capitale et avait promulgué une loi d'amnistie pour les événements en Algérie.

67. Mais la question du Landgericht Regensburg vise à déterminer si l'entrave à l'exécution de la sanction doit être postérieure à son imposition, ce qui est la thèse du gouvernement hongrois lorsqu'il soutient que l'article 54 de la convention admet que les obstacles se présentent a posteriori, mais n'envisage pas l'hypothèse d'une sanction qui serait d'emblée impossible à mettre en œuvre, comme en l'espèce, où la non comparution de M. Bourquain rendait irréalisable l'organisation d'un nouveau procès pour matérialiser la sanction.

68. Le même gouvernement s'appuie sur les termes «ne puisse plus être exécutée» figurant à l'article 54 pour en déduire a contrario que la sanction devait avoir été exécutable à un moment antérieur.

69. Cet argument n'est pas convaincant, car le sens des mots n'est pas toujours une référence adéquate, comme la Cour l'a souligné quelques fois (69); en outre, à mon avis, la brièveté de l'expression indique uniquement que la sanction devient exécutoire lorsqu'on veut ouvrir le nouveau procès et non avant, ce qui préserve l'effet utile de la norme.

70. Cependant, l'article 54 concerne des normes pénales nationales qui, en raison de leur nature de ultima ratio, excluent toute interprétation extensive (70) contraire au principe de légalité (71) en vigueur dans les traditions communes aux États et explicitement (72) intégré dans le droit communautaire (73)

71. Sans préjudice de ces observations, la réflexion du gouvernement néerlandais sur la difficulté d'imaginer qu'un jugement définitif inflige des sanctions non exécutables (74) n'est pas dénuée d'intérêt.

72. L'appréciation de la portée de la norme qui affirme le caractère exécutoire de la sanction et non du jugement, requiert une attention particulière.

73. Sous cette réserve, il faut distinguer entre jugement exécutable et jugement exécutoire (75); en effet, si la réglementation française ne permet pas d'exécuter la sanction sans un nouveau procès, elle n'affecte en rien la valeur du jugement pris en tant que titre juridique se projetant ipso jure sur la personne et le patrimoine du prévenu, comme le montrent la vérification de la responsabilité de M. Bourquain dans un nouveau procès s'il avait été retrouvé ainsi que la mise sous séquestre de ses biens.

74. En parallèle, la sanction deviendrait exécutoire une fois surmonté l'obstacle procédural qui lui enlevait toute portée pratique, sans d'ailleurs porter atteinte à sa validité intrinsèque (76), qu'il faut

distinguer de son efficacité.

75. Pour toutes les raisons développées ci-dessus, je propose que la Cour interprète l'article 54 de la convention en ce sens qu'il s'applique également à la sanction prononcée dans un jugement définitif qui, en raison des particularités procédurales du droit national, n'aurait jamais pu être exécuté.

D – *De l'amnistie, du ne bis in idem et de leurs natures divergentes*

76. Si je n'examine pas la façon dont l'abolition de la peine de mort et la prescription de la sanction font obstacle à l'exécution du jugement du tribunal de Bône, ce n'est pas pour éluder le problème, mais parce que l'évidence de la réponse, d'une part, et le respect de la compétence exclusive du juge national, d'autre part, rendent superflu et inapproprié de développer ce sujet.

77. Néanmoins, la prudence impose de réfléchir, fût-ce brièvement, sur les implications de l'amnistie, étant donné la variété des formes prises par ce mécanisme exceptionnel de clémence dans les divers systèmes juridiques.

78. Le protocole additionnel II à la convention de Genève (77) rattache l'amnistie à la notion de pacification et de réconciliation après des périodes de convulsions ayant entraîné des affrontements violents au sein d'une communauté.

79. Il s'agit d'apaiser des sentiments à l'étiologie très précise, générés par des événements collectifs qui ont ouvert une fracture politique et sociale au sein d'une population donnée.

80. Cette terminologie vise, si elle est prise dans un sens large (78), toutes les mesures de pardon ou de remise de peine, y compris la grâce (79); dans d'autres conceptions, elle vise uniquement des décisions prises par le parlement suivant la procédure prévue pour l'adoption des lois.

81. Malgré l'existence en Europe, en ce qui concerne ces mesures de clémence, de différences perceptibles au regard de critères aussi différents que la typologie, la finalité, voire la nature des délits susceptibles d'en faire l'objet (80), ces mesures gardent toutes pour effet de pouvoir éteindre le ius puniendi dans tous les États et d'aboutir à ce que des autorités non judiciaires abrogent les effets d'un jugement pénal (81).

82. Cet ensemble de mesures de clémence, diverses par les idées qui les sous-tendent, mais uniformes par les objectifs qu'elles poursuivent, correspond en bloc à de véritables gestes de volonté politique, fondés sur des principes d'opportunité qui plongent leurs racines dans la souveraineté des États dans la gestion de leurs conflits intérieurs.

83. En matière de ne bis in idem communautaire, la confiance mutuelle ne devrait pas englober les cas de non-exécution d'une sanction dus à la mise en œuvre de ces facultés exorbitantes par les pouvoirs nationaux, car, dans ces hypothèses, la logique de la reconnaissance mutuelle cesse d'opérer dans la sphère de l'application judiciaire de la loi, dont elle est alors détournée par des facteurs à forte composante sociologique et politique.

84. Ce n'est pas par hasard que la décision-cadre relative au mandat d'arrêt européen fait de l'amnistie l'un des motifs obligatoires de non-exécution, lorsque l'État requis est compétent pour poursuivre l'infraction selon sa propre loi pénale (article 3, paragraphe 1).

85. Du point de vue des droits fondamentaux, l'amnistie ne permet pas non plus de justifier la non-exécution de la peine par application du principe *ne bis in idem*; en effet, indépendamment du fait qu'elle peut devenir un instrument dangereux pour la mise en œuvre de ces droits (82), force est de constater encore une fois l'intervention de deux dimensions différentes, tant il est vrai que l'amnistie se fonde sur une base étrangère aux valeurs des droits fondamentaux et s'applique dans le cadre de paramètres si vagues et si aléatoires qu'ils échappent à tout critère de rationalité juridique et excluent toute possibilité de contrôle juridictionnel (83).

VI – Conclusion

86. Par ces motifs, je propose à la Cour de justice de répondre à la question préjudicielle dans le sens suivant:

«L'article 54 de la convention d'application de l'accord de Schengen, signée le 19 juin 1990, doit être interprété en ce sens qu'une personne définitivement jugée dans un État ne peut être poursuivie dans un autre État pour les mêmes faits lorsque, en vertu du droit de l'État de condamnation, la peine qui a été prononcée à l'encontre de cette personne n'a jamais pu être exécutée».

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1 – Langue originale: l'espagnol.

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2 – La Cour a eu affaire à ce principe à sept reprises: arrêts du 11 février 2003, Gözütok et Brügge (C-187/01 et C-385/01, Rec. p. I-1345); du 10 mars 2005, Miraglia (C-469/03, Rec. p. I-2009); du 9 mars 2006, Van Esbroeck (C-436/04, Rec. p. I-2333); du 28 septembre 2006, Van Straaten (C-150/05, Rec. p. I-9327); du 28 septembre 2006, Gasparini e.a. (C-467/04, Rec. p. I-9199); du 18 juillet 2007, Kretzinger (C-288/05, Rec. p. I-6441), et du 18 juillet 2007, Kraaijenbrink (C–367/05, Rec. p. I-6619).

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3 – Dans les affaires Gözütok et Brügge, Van Esbroeck et Van Straaten, j'ai présenté des conclusions respectivement le 19 septembre 2002, le 20 octobre 2005 et le 8 juin 2006. À l'exception de l'affaire Miraglia, dans laquelle il n'y a pas eu de conclusions, c'est l'avocat général Sharpston qui a présenté des conclusions le 15 juin 2006 dans l'affaire Gasparini e.a. et le 5 décembre 2006 dans les affaires Kretzinger et Kraaijenbrink.

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4 – *Nietzsche F.,El crepúsculo de los ídolos*, Alianza Editorial, Madrid, 2006, p. 34. Dans l'aphorisme 8 des Maximes et pointes, où il parle de l'École de guerre de la vie, F. Nietzsche montre – sur la toile de fond constituée par la volonté de survivre – la capacité du genre humain à exploiter l'adversité: «Ce qui ne me fait pas mourir me rend plus fort». En Espagne, on dirait «lo que no mata engorda».

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5 – JO 2000, L 239, p. 13.

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6 – JO 2000, L 239, p. 19.

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7 – JO 2000, L 239, p. 63 et suiv.

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8 – Le Royaume de Belgique, la République fédérale d'Allemagne, la République hellénique, le Royaume d'Espagne, la République française, le Grand-Duché de Luxembourg, la République d'Autriche, la République portugaise, la République italienne, la République de Finlande, le Royaume des Pays-Bas, le Royaume de Suède et le Royaume de Danemark, ce dernier jouissant toutefois d'un statut particulier, qui lui permet de se soustraire aux décisions adoptées dans ce domaine.

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9 – JO L 323, p. 34.

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10 – Décisions du Conseil 2000/365/CE, du 29 mai 2000 (JO L 131, p. 43), et 2004/926/CE, du 22 décembre 2004, (JO L 395, p. 70) relatives à la mise en œuvre de certaines parties de l'acquis de Schengen par le Royaume-Uni de Grande-Bretagne et d'Irlande du Nord.

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11 – Il a été répondu à la demande présentée par ce pays par la décision 2002/192/CE du Conseil, du 28 février 2002 (JO L 64, p. 20).

12 – Article 3, paragraphe 2, de l'acte relatif aux conditions d'adhésion (JO 2003, L 236, p. 50).

13 – Article 4, paragraphe 2, de l'acte relatif aux conditions d'adhésion (JO 2005, L 157, p. 203).

14 – Le 19 décembre 1996, les treize États membres de l'Union alors signataires des accords de Schengen et les États nordiques susmentionnés ont signé, à Luxembourg, un accord ad hoc, auquel a fait suite l'accord conclu le 18 mai 1999 par le Conseil de l'Union européenne, la République d'Islande et le Royaume de Norvège sur l'association de ces deux États à la mise en œuvre, à l'application et au développement de l'acquis de Schengen (JO L 176, p. 36). En vertu de l'article 15, paragraphe 4, de ce dernier accord, le Conseil était chargé de fixer une date d'entrée en vigueur dudit accord pour les nouvelles parties contractantes, tâche qu'il a accomplie par sa décision 2000/777/CE, du 1er décembre 2000 (JO L 309, p. 24), en indiquant, de façon générale, le 25 mars 2001 (article 1er).

15 – Approuvé par décision 2004/860/CE du Conseil, du 25 octobre 2004 (JO L 370, p. 78).

16 – Proposition de décision du Conseil du 1er décembre 2006, [COM (2006), 752 final].

17 – JO L 176, p. 1 et 17, respectivement.

18 – Spécifiquement celles du gouvernement hongrois, au point 8 de ses observations.

19 – Il est regrettable que la République française ou la République fédérale d'Allemagne ne soient pas intervenues, car cela aurait permis de combler certaines lacunes.

20 – Bien que ce code soit aujourd'hui abrogé, la version qui était en vigueur en 1958, qui remontait elle-même à une loi du 9 mars 1928, est applicable ratione temporis à la situation dans le litige au principal.

21 – Article 133.2 du code actuellement en vigueur et articles 639, 640 et 763 du texte qui était applicable à la date de l'homicide.

22 – Au point 27 de ses observations, la République portugaise invoque l'article 639 du code français de procédure pénale, dont il découle que la prescription de la peine commence à courir avant l'arrestation du condamné par contumace: «si le contumax se constitue prisonnier ou s'il est arrêté avant que la peine soit éteinte par prescription [...]».

23 – Rien n'indique en l'espèce que le jugement ait été notifié au condamné.

24 – Le terme français qui caractérise cet état est celui d'«irrévocabilité», qui se réfère à un jugement formellement définitif.

25 – Cela résulte du rapport établi par le procureur du Tribunal aux armées de Paris,

auquel je me référerai de façon plus détaillée dans la suite de mon analyse.

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26 – Indépendamment de son intervention dans la guerre d'Algérie, ce corps d'élite des troupes françaises, créé en 1831 par le roi Louis-Philippe I, a écrit au Mexique le 30 avril 1863 une des pages les plus célèbres de son histoire, avec la bataille de Camarón, où quelque 65 soldats commandés par Jean Danjou ont résisté pendant dix longues heures à l'assaut de milliers de soldats de l'armée régulière mexicaine. Cet épisode a été transformé en roman, avec une grande rigueur, par J. Mañes, dans *El mito de Camerone*, 2° éd., Hergué Editorial, Huelva, 2005.

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27 – Il s'agit de l'actuelle Annaba, une ville d'Algérie connue dans l'Antiquité sous le nom d'Hipona, dont Saint-Augustin a été l'évêque de 396 à 430.

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28 – Nonobstant la barrière infranchissable entre la réalité et la fiction, les circonstances de ce triste événement ne peuvent manquer de faire penser à *L'Étrange*r (Camus, A., *El Extranjero*, Alianza Editorial, Madrid, 2003) où, avec un existentialisme sans fard, le prix Nobel de littérature, né en Algérie, relate les tribulations de Meursault, un personnage totalement indifférent à la mort de sa mère ou à l'occasion de mariage qui s'offre à lui et qui pousse l'apathie jusqu'à tirer au revolver sur «l'Arabe», au seul motif qu'il a été ébloui par le reflet du soleil sur le couteau de ce dernier; son apathie se prolonge même pendant le procès à l'issue duquel il sera condamné à mort, puisqu'il provoque l'hilarité de l'assistance en déclarant que son action n'a pas eu d'autre mobile que l'astre du jour.

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29 – Loi du 31 juillet 1968.

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30 – Loi n° 81-908, du 9 octobre (Journal officiel du 10 octobre 1981, p. 2759). Récemment, à la suite de la réforme apportée par la loi constitutionnelle n° 2007-239, du 23 février 2007 (Journal officiel du 24 février 2007, p. 3355), la République française a intégré cette abolition dans le texte de l'article 66 de sa Constitution.

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31 – Il y a là une contradiction patente puisque, indépendamment du point de savoir si la sanction n'a pas été subie ou si elle n'est pas actuellement en cours d'exécution, l'autre condition d'application du principe est qu'elle «ne puisse plus être exécutée» selon les lois de l'État de condamnation.

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32 – J'insiste sur le fait qu'il s'agit de délais qui courent en parallèle.

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33 – C'est de propos délibéré que j'évite toute considération sur la non-exécution de la sanction en raison de l'amnistie, car cet aspect ressortit à la compétence exclusive du juge national, sans préjudice de la compétence de la Cour pour analyser son impact éventuel dans le cadre de l'article 54 de la convention.

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34 – L'arrêt du 14 décembre 1972, Boehringer Mannheim/Commission (7/72, Rec. p. 1281), en a fait un principe général du droit communautaire.

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35 – Vervaele, J., «El principio non bis in idem en Europa», dans *La orden de detención et entrega europea*, Arroyo, L., et Nieto, A., éd. de la Universidad de Castilla-La Mancha, Cuenca, 2006, p. 229, souligne la portée limitée du principe en droit de la concurrence.

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36 – Points 38, 32, 57 et 27, respectivement, des arrêts prononcés dans les affaires Gözütok et Brügge, Miraglia, Van Straaten et Gasparini e. a.

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37 – Conclusions dans les affaires Gözütok et Brügge (points 48 et suiv.) et Van Esbroeck (points 18 et suiv.).

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38 – Même si le prosaïsme du sujet n'incite guère à lui prodiguer un traitement littéraire, on ne peut manquer de songer à la façon dont Alexandre Dumas (*Impressions de voyage*, Michel Lévy Frères, Libraires-Éditeurs, Paris, 1855, p. 57) aborde le principe précité, qu'il rattache, sur le mode plaisant et sans prétendre à la rigueur juridique, à la difficulté d'appliquer deux fois la même sanction, lorsqu'il décrit la méthode infaillible appliquée par le «cadi» pour simplifier l'action de la justice au Caire; en effet, quand un voleur est pris, on lui coupe une oreille, de sorte qu'en cas de récidive, «il n'y a pas de dénégation possible, à moins que l'oreille n'ait repoussé, ce qui est rare. Alors on coupe l'autre, en vertu de cet axiome de droit, non bis in idem».

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39 – Henzelin, M., «Ne bis in idem, un principe à géométrie variable», *Revue Pénale Suisse*, tome 123, 2005, fasc. 4, Stämpfli éditions SA, p. 347.

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40 – Ce principe devrait être accepté sans réticences puisque, comme le rappelle à juste titre Moreiro González, C. J., dans *Las claúsulas de seguridad nacional*, éd. Iustel, Portal Derecho S. A., Madrid, 2007, p. 132 et 133, le consentement de l'État est le principe créateur des normes internationales et fait surgir la question principale des obligations qui les lient.

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41 – Peu de temps après, la notion de confiance est explicitée dans le programme de mesures destiné à mettre en œuvre le principe de reconnaissance mutuelle des décisions pénales (JO 2001, C 12, p. 10), pour «renforcer la coopération entre États membres, mais aussi la protection des droits des personnes [...] La mise en oeuvre du principe de reconnaissance mutuelle des décisions pénales suppose une confiance mutuelle des États membres dans leurs systèmes de justice pénale respectifs. Cette confiance repose en particulier sur le socle commun que constitue leur attachement aux principes de liberté, de démocratie et de respect des droits de l'homme et des libertés fondamentales ainsi que de l'État de droit».

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42 – JO L 190, p. 1.

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43 – Au point 33 de l'arrêt Gözütok et Brügge, précité, où la Cour se rallie au point 124 de mes conclusions.

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44 – L'expérience privilégiée acquise comme juge national puis comme avocat général à Luxembourg me permet de m'inscrire en contre des réflexions développées par Flore D., «La notion de confiance mutuelle: l'alpha ou l'oméga d'une justice pénale européenne», dans *La confiance mutuelle dans l'espace pénal européen/Mutual Trust in the European Criminal Area*, Éditions de l'Université de Bruxelles, 2005, p. 17: «Si un juge de Bruxelles peut parfois avoir des inquiétudes sur l'attitude de son collègue d'Arlon ou de Bruges, comment n'en aurait-il pas sur les décisions d'un lointain collègue, qu'il n'a jamais vu et ne verra sans doute jamais, qui statue dans un pays qu'il ne connaît pas et où il ne mettra peut-être jamais les pieds, qui n'a peut-être pas le même statut que lui, ni la même indépendance, applique un autre droit et parle une autre langue [...]».

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45 – On peut la concevoir comme un objectif, mais elle n'est en aucune façon la seule condition préalable à l'établissement d'un espace commun de justice, de liberté et de sécurité.

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46 – Point 32 de l'arrêt Gözütok et Brügge, précité.

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47 – De Schutter, O., «La contribution du contrôle juridictionnel à la confiance mutuelle», dans *La confiance mutuelle dans l´espace pénal européen/Mutual Trust in the European Criminal Area*, Éditions de l´Université de Bruxelles, 2005, p. 103.

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48 – Je souligne que le ne bis in idem renferme une de ces garanties individuelles.

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49 – J'ai attiré l'attention sur ce déficit de sensibilité dans mes conclusions dans l'affaire Gözütok et Brügge et j'ai souligné que les articles 54 et suivants de la convention doivent être appréhendés en se plaçant du point de vue du citoyen (points 114 et 115).

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50 Peers, S., *EU Justice and Home Affairs Law*, 2ème éd., Oxford University Press, 2006, p. 460, découvre dans l'Union européenne, en tant que reflet du haut degré d'intégration, certaines mesures de coopération pénale qui, selon lui, contribuent au développement des normes internationales en matière de droits de l'homme.

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51 – Je suggère cette interprétation dans mes conclusions dans l'affaire Gözütok et Brügge.

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52 – Cette règle figure également dans des accords internationaux comme le pacte international relatif aux droits civils et politiques, du 19 décembre 1966 (article 14, paragraphe 7), ou le protocole n° 7 de la convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales (article 4). Mais ces textes s'attachent à la dimension interne du principe et en garantissent l'application sur le territoire ressortissant à la compétence d'un État.

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53 – Selon l'avocat général Sharpston, «l'État ne dispose que d'une seule possibilité d'apprécier le comportement délictueux reproché à un individu et de prononcer un jugement à cet égard» (point 92 de ses conclusions du 15 juin 2006 dans l'affaire Gasparini e.a.).

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54 – Ces vulnérabilités subsisteront tant qu'il n'y aura pas d'harmonisation du droit pénal et de la procédure pénale.

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55 – Un bon exemple à cet égard est constitué par l'affaire Gasparini e.a., précitée, dans laquelle la Cour a adopté une position maximaliste en matière de confiance mutuelle et n'a pas suivi les conclusions de l'avocat général Sharpston, qui a considéré pour sa part que ce concept ne fournit pas de base raisonnable à l'application du principe ne bis in idem aux décisions mettant fin à une procédure en raison de la prescription de l'action pénale (points 108 et suiv.).

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56 – Dans mes conclusions du 12 septembre 2006 dans l'affaire Advocaten voor de Wereld, close par l'arrêt du 3 mai 2007 (C-303/05, Rec. p. I-3633), je soutiens ce qui suit: «Il faut [...] que la charte s'impose comme un outil d'interprétation essentiel dans la défense des garanties citoyennes qui font partie du patrimoine des

États membres. Il faut faire face à ce défi avec prudence, mais avec vigueur, avec la pleine conviction que, si la protection des droits fondamentaux revêt un caractère indispensable dans le pilier communautaire, il n'est pas davantage possible d'y renoncer dans le troisième pilier, car, par la nature même de son contenu, elle est susceptible d'avoir une incidence sur le cœur même de la liberté personnelle, qui présuppose toutes les autres». De même, le traité de Lisbonne, du 13 décembre 2007, modifie l'article 6 UE en lui ajoutant le paragraphe suivant: «L'Union reconnaît les droits, les libertés et les principes énoncés dans la Charte des droits fondamentaux de l'Union européenne du 7 décembre 2000, telle qu'adaptée le 12 décembre 2007 à Strasbourg, laquelle a la même valeur juridique que les traités».

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57 – Cela découle de l'article 6 UE et de l'article 1er, paragraphe 3, de la décision-cadre 2002/584.

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58 – Points 34, 37 et 38 de l'arrêt du 14 octobre 2004, Omega (C- 36/02, Rec. p. I–9609).

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59 – La question a en revanche été abordée par l'avocat général Sharpston dans ses conclusions du 5 décembre 2006, où elle s'appuie sur le principe de confiance mutuelle pour soutenir que le jugement prononcé par défaut dispense la protection prévue par l'article 54 de la convention dès lors qu'il respecte les exigences de l'article 6 de la convention européenne des droits de l'homme (point 101).

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60 – J'ai également fait allusion à ces différences linguistiques dans un autre contexte, dans mes conclusions dans l'affaire Gözütok et Brügge.

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61 – D'après l'article 1er de l'initiative – rejetée – de la République hellénique en vue de l'adoption d'une décision-cadre du Conseil relative à l'application du principe «non bis in idem» (JO 2003, C 100, p. 24 à 27), un jugement est définitif lorsqu'il a autorité de chose jugée, conformément au droit national. Pour une autre perspective, voir Almagro, J. et Tomé, J., *Instituciones de Derecho Procesal. Proceso Penal*, éd. Trivium, Madrid, 1994, p. 347, et Cortés, V., *Derecho Procesal. Parte General. Proceso Civil*, 6ème éd., éd. Tirant lo Blanch, Valencia, 1992, tome I (vol. I), p. 488.

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62 – Cette idée se reflète dans les formulations française «définitivement jugé», anglaise «finally disposed», allemande «rechtskräftig abgeurteilt» ou italienne «giudicata con sentenza definitiva», même si l'ordre juridique espagnol par exemple qualifie ce type de décision de «sentencia firme», notamment dans la version espagnole de l'article 54 de la convention, la «sentencia definitiva» étant uniquement celle qui statue sur le procès en première instance.

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63 – Comme celle des gouvernements slovène, français, tchèque, suédois, slovaque, allemand et du Royaume-Uni, reprise par le Conseil dans un document de travail (5213/08) du 14 janvier 2008, pour faciliter la coopération judiciaire et la reconnaissance mutuelle des jugements rendus par défaut.

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64 – Force est de souligner la concordance avec les informations fournies dans la demande préjudicielle, puisque le prononcé de la décision a déclenché le délai pendant lequel le condamné pouvait l'attaquer ainsi que le délai de prescription de la sanction de sorte que, une fois ces deux délais expirés sans aucune possibilité de révision, la décision est devenue irréversible sur les plans matériel et formel.

65 Des éléments de clarification à cet égard peuvent être trouvés dans mes conclusions dans l'affaire Van Esbroeck, dans laquelle j'analyse l'application dans le temps de l'article 54 de la convention.

66 – Article 6 de la convention européenne pour la sauvegarde des droits de l'homme et des libertés fondamentales et articles 47 et 48 de la charte des droits fondamentaux de l'Union européenne.

67 – Pour connaître les charges, être entendu par un juge impartial, disposer de l'assistance d'un avocat et participer à l'instruction.

68 – Article 5, point 1.

69 – L'arrêt du 13 juillet 1989, Henriksen (173/88, Rec. p. 2763), a rejeté ce mécanisme d'interprétation en observant que l'«on ne saurait apprécier la portée de la notion litigieuse sur la base d'une interprétation exclusivement textuelle» (point 11).

70 – Dans *Lecciones de Derecho penal. Parte general*, éd. Praxis, Barcelona, 1996, p. 37, Berdugo, I., Arroyo, L., García, N., Ferré, J., et Ramón, J., relèvent que le principe de légalité exige de respecter «le domaine réservé de la loi – monopole du Parlement pour définir les comportements délictueux et appliquer les sanctions, à l'exclusion de toute disposition de rang inférieur et de la coutume; la définition précise, spécifique ou restrictive des normes pénales; l'interdiction des interprétations extensives ou par analogie in malam partem; la non-rétroactivité des normes pénales défavorables au prévenu [...]». Dans un sens analogue, Vogel, J., «Principio de legalidad, territorialidad et competencia judicial», dans *Eurodelitos. El derecho penal económico de la Unión Europea*, Tiedemann, K., et Nieto, A., éd. de la Universidad de Castilla-La Mancha, Cuenca, 2004, p. 32, souligne que l'interdiction des interprétations par analogie et l'obligation d'interprétation restrictive sont reconnues dans tous les États membres, sans exception, comme étant le corollaire du principe de légalité.

71 – Le principe de légalité fait partie des principes généraux du droit communautaire, notamment d'après l'arrêt Advocaten voor de Wereld, précité, points 46 et 49.

72 – Point 67 de l'arrêt du 3 mai 2005, Berlusconi e.a. (C-387/02, 391/02 et C-403/02, Rec. p. I-3565), avec renvoi aux arrêts du 12 juin 2003, Schmidberger (C-112/00, Rec. p. I-5659), et du 10 juillet 2003, Booker Aquaculture et Hydro Seafood (C–20/00 et C-64/00, Rec. p. I-7411).

73 – Principe consacré à l'article 49 de la charte des droits fondamentaux de l'Union européenne.

74 – «Le gouvernement néerlandais ne peut par ailleurs pas imaginer une situation dans laquelle une sanction est infligée par un jugement définitif, sanction à propos de laquelle on peut déclarer à un quelconque moment ultérieur qu'elle n'a jamais pu être

Judgment of the Court (Grand Chamber)
of 3 June 2008
The Queen, à la demande de International Association of Independent Tanker Owners (Intertanko) and Others v Secretary of State for Transport. Reference for a preliminary ruling: High Court of Justice (England & Wales), Queen's Bench Division (Administrative Court) - United Kingdom. Maritime transport - Ship-source pollution - Directive 2005/35/EC - Validity - United Nations Convention on the Law of the Sea - Marpol 73/78 Convention - Legal effects of the Conventions - Ability to rely on them - Serious negligence - Principle of legal certainty. Case C-308/06.

In Case C-308/06,

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 4 July 2006, received at the Court on 14 July 2006, in the proceedings

The Queen on the application of:

International Association of Independent Tanker Owners (Intertanko),

International Association of Dry Cargo Shipowners (Intercargo),

Greek Shipping Co-operation Committee,

Lloyd's Register,

International Salvage Union,

v

Secretary of State for Transport,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas, K. Lenaerts, L. Bay Larsen, Presidents of Chambers, K. Schiemann, J. Makarczyk, P. Kris, J. Malenovsku (Rapporteur), A. O Caoimh, P. Lindh and J.-C. Bonichot, Judges,

Advocate General: J. Kokott,

Registrars: L. Hewlett, Principal Administrator, and C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 25 September 2007,

after considering the observations submitted on behalf of:

- the International Association of Independent Tanker Owners (Intertanko), the International Association of Dry Cargo Shipowners (Intercargo), the Greek Shipping Co-operation Committee, Lloyd's Register and the International Salvage Union, by C. Greenwood QC and H. Mercer, barrister,

- the United Kingdom Government, by C. Gibbs, acting as Agent, assisted by C. Lewis and S. Wordsworth, barristers,

- the Danish Government, by J. Bering Liisberg and B. Weis Fogh, acting as Agents,

- the Estonian Government, by L. Uibo, acting as Agent,

- the Greek Government, by A. Samoni-Rantou, S. Khala and G. Karipsiadis, acting as Agents,

- the Spanish Government, by M. Sampol Pucurull, acting as Agent,

- the French Government, by G. de Bergues, L. Butel and C. Jurgensen, acting as Agents,

- the Italian Government, by I.M. Braguglia, acting as Agent, assisted by P. Gentili, avvocato

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dello Stato,

- the Cypriot Government, by D. Lisandrou and N. Kharalampidou, acting as Agents,

- the Maltese Government, by S. Camilleri, acting as Agent,

- the Swedish Government, by K. Wistrand and A. Falk, acting as Agents,

- the European Parliament, by M. Gomez-Leal and J. Rodrigues, acting as Agents,

- the Council of the European Union, by E. Karlsson and E. Chaboureau, acting as Agents,

- the Commission of the European Communities, by K. Simonsson, H. Ringbom and F. Hoffmeister, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 20 November 2007,

gives the following

Judgment

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

1. The validity of Directive 2005/35/EC of the European Parliament and of the Council of 7 September 2005 on ship-source pollution and on the introduction of penalties for infringements cannot be assessed:

- either in the light of the International Convention for the Prevention of Pollution from Ships, signed in London on 2 November 1973, as supplemented by the Protocol of 17 February 1978,

- or in the light of the United Nations Convention on the Law of the Sea, signed in Montego Bay on 10 December 1982.

2. Examination of the fourth question has revealed nothing capable of affecting the validity of Article 4 of Directive 2005/35 in the light of the general principle of legal certainty.

1. This reference for a preliminary ruling concerns the validity of Articles 4 and 5 of Directive 2005/35/EC of the European Parliament and of the Council of 7 September 2005 on ship-source pollution and on the introduction of penalties for infringements (OJ 2005 L 255, p. 11; corrigenda at OJ 2006 L 33, p. 87, and OJ 2006 L 105, p. 65).

2. The reference was made in the course of proceedings brought by the International Association of Independent Tanker Owners (Intertanko), the International Association of Dry Cargo Shipowners (Intercargo), the Greek Shipping Cooperation Committee, Lloyd's Register and the International Salvage Union against the Secretary of State for Transport concerning implementation of Directive 2005/35.

Legal context

International law

3. The United Nations Convention on the Law of the Sea, signed in Montego Bay on 10 December 1982 (UNCLOS'), entered into force on 16 November 1994. It was approved on behalf of the European Community by Council Decision 98/392/EC of 23 March 1998 (OJ 1998 L 179, p. 1).

4. Article 2 of UNCLOS refers to the legal status of the territorial sea in the following terms:

1. The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.

...

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3. The sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law.'

5. Article 17 of UNCLOS provides:

Subject to this Convention, ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea.'

6. Article 34 of UNCLOS specifies as follows the legal status of waters forming straits used for international navigation:

1. The regime of passage through straits used for international navigation established in this Part shall not in other respects affect the legal status of the waters forming such straits or the exercise by the States bordering the straits of their sovereignty or jurisdiction over such waters and their airspace, bed and subsoil.

2. The sovereignty or jurisdiction of the States bordering the straits is exercised subject to this Part and to other rules of international law.'

7. Article 42 of UNCLOS provides:

1. Subject to the provisions of this section, States bordering straits may adopt laws and regulations relating to transit passage through straits, in respect of all or any of the following:

...

(b) the prevention, reduction and control of pollution, by giving effect to applicable international regulations regarding the discharge of oil, oily wastes and other noxious substances in the strait;

...'

8. Part V of UNCLOS lays down a specific legal regime governing the exclusive economic zone.

9. In this Part, Article 56(1) provides:

1. In the exclusive economic zone, the coastal State has:

(a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the sea-bed and of the sea-bed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;

...'

10. Article 58(1) provides:

In the exclusive economic zone, all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in Article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention.'

11. Article 79(1) of UNCLOS states:

All States are entitled to lay submarine cables and pipelines on the continental shelf, in accordance with the provisions of this Article.'

12. Article 89 of UNCLOS provides:

No State may validly purport to subject any part of the high seas to its sovereignty.'

13. Article 90 provides:

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Every State, whether coastal or land-locked, has the right to sail ships flying its flag on the high seas.'

14. Article 116 provides:

All States have the right for their nationals to engage in fishing on the high seas...'

15. Part XII of UNCLOS is devoted to protection and preservation of the marine environment.

16. In Part XII, Article 211 provides:

1. States, acting through the competent international organisation or general diplomatic conference, shall establish international rules and standards to prevent, reduce and control pollution of the marine environment from vessels and promote the adoption, in the same manner, wherever appropriate, of routeing systems designed to minimise the threat of accidents which might cause pollution of the marine environment, including the coastline, and pollution damage to the related interests of coastal States. Such rules and standards shall, in the same manner, be re-examined from time to time as necessary.

2. States shall adopt laws and regulations for the prevention, reduction and control of pollution of the marine environment from vessels flying their flag or of their registry. Such laws and regulations shall at least have the same effect as that of generally accepted international rules and standards established through the competent international organisation or general diplomatic conference.

...

4. Coastal States may, in the exercise of their sovereignty within their territorial sea, adopt laws and regulations for the prevention, reduction and control of marine pollution from foreign vessels, including vessels exercising the right of innocent passage. Such laws and regulations shall, in accordance with Part II, section 3, not hamper innocent passage of foreign vessels.

5. Coastal States, for the purpose of enforcement as provided for in section 6, may in respect of their exclusive economic zones adopt laws and regulations for the prevention, reduction and control of pollution from vessels conforming to and giving effect to generally accepted international rules and standards established through the competent international organisation or general diplomatic conference.

...'

17. The International Convention for the Prevention of Pollution from Ships, signed in London on 2 November 1973, as supplemented by the Protocol of 17 February 1978 (Marpol 73/78'), establishes rules to combat pollution of the marine environment.

18. The regulations for the prevention of pollution by oil are set out in Annex I to Marpol 73/78.

19. Regulation 9 of Annex I states that, subject to the provisions of Regulations 9(2), 10 and 11, any discharge into the sea of oil or oily mixtures from ships to which that annex applies is to be prohibited except when certain exhaustively listed conditions are satisfied.

20. Regulation 10 of Annex I lays down methods for the prevention of oil pollution from ships while operating in special areas.

21. Regulation 11 of that annex, headed Exceptions', states:

Regulations 9 and 10 of this Annex shall not apply to:

(a) the discharge into the sea of oil or oily mixture necessary for the purpose of securing the safety of a ship or saving life at sea; or

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(b) the discharge into the sea of oil or oily mixture resulting from damage to a ship or its equipment:

(i) provided that all reasonable precautions have been taken after the occurrence of the damage or discovery of the discharge for the purpose of preventing or minimising the discharge; and

(ii) except if the owner or the master acted either with intent to cause damage, or recklessly and with knowledge that damage would probably result; or

(c) the discharge into the sea of substances containing oil, approved by the Administration [of the flag State], when being used for the purpose of combating specific pollution incidents in order to minimise the damage from pollution. Any such discharge shall be subject to the approval of any Government in whose jurisdiction it is contemplated the discharge will occur.'

22. The regulations for the control of pollution by noxious liquid substances are set out in Annex II to Marpol 73/78.

23. Regulation 5 of Annex II prohibits discharge into the sea of the substances covered by that annex, except when certain exhaustively listed conditions are satisfied. Regulation 6(a) to (c) of that annex sets out, in analogous terms, the exceptions provided for in Regulation 11(a) to (c) of Annex I.

Community law

24. Article 3(1) of Directive 2005/35 provides:

This Directive shall apply, in accordance with international law, to discharges of polluting substances in:

(a) the internal waters, including ports, of a Member State, in so far as the Marpol regime is applicable;

(b) the territorial sea of a Member State;

(c) straits used for international navigation subject to the regime of transit passage, as laid down in Part III, section 2, of [UNCLOS], to the extent that a Member State exercises jurisdiction over such straits;

(d) the exclusive economic zone or equivalent zone of a Member State, established in accordance with international law; and

(e) the high seas.'

25. Article 4 of Directive 2005/35 provides:

Member States shall ensure that ship-source discharges of polluting substances into any of the areas referred to in Article 3(1) are regarded as infringements if committed with intent, recklessly or by serious negligence. These infringements are regarded as criminal offences by, and in the circumstances provided for in, Framework Decision 2005/667/JHA supplementing this Directive.'

26. Article 5 of Directive 2005/35 states:

1. A discharge of polluting substances into any of the areas referred to in Article 3(1) shall not be regarded as an infringement if it satisfies the conditions set out in Annex I, Regulations 9, 10, 11(a) or 11(c) or in Annex II, Regulations 5, 6(a) or 6(c) of Marpol 73/78.

2. A discharge of polluting substances into the areas referred to in Article 3(1)(c), (d) and (e) shall not be regarded as an infringement for the owner, the master or the crew when acting under the master's responsibility if it satisfies the conditions set out in Annex I, Regulation 11(b) or in Annex II, Regulation 6(b) of Marpol 73/78.'

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27. Article 8 of Directive 2005/35 provides:

1. Member States shall take the necessary measures to ensure that infringements within the meaning of Article 4 are subject to effective, proportionate and dissuasive penalties, which may include criminal or administrative penalties.

2. Each Member State shall take the measures necessary to ensure that the penalties referred to in paragraph 1 apply to any person who is found responsible for an infringement within the meaning of Article 4.'

The main proceedings and the questions referred for a preliminary ruling

28. The claimants in the main proceedings comprise a group of organisations within the maritime shipping industry representing substantial proportions of that industry. They applied to the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court), for judicial review in relation to the implementation of Directive 2005/35.

29. By decision of 4 July 2006, that court decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

(1) In relation to straits used for international navigation, the exclusive economic zone or equivalent zone of a Member State and the high seas, is Article 5(2) of Directive 2005/35/EC invalid in so far as it limits the exceptions in Annex I Regulation 11(b) of [Marpol] 73/78 and in Annex II Regulation (6)(b) of [Marpol] 73/78 to the owners, masters and crew?

(2) In relation to the territorial sea of a Member State:

(a) Is Article 4 of the Directive invalid in so far as it requires Member States to treat serious negligence as a test of liability for discharge of polluting substances; and/or

(b) Is Article 5(1) of the Directive invalid in so far as it excludes the application of the exceptions in Annex I Regulation 11(b) of [Marpol] 73/78 and in Annex II Regulation (6)(b) of [Marpol] 73/78?

(3) Does Article 4 of the Directive, requiring Member States to adopt national legislation which includes serious negligence as a standard of liability and which penalises discharges in territorial sea, breach the right of innocent passage recognised in [UNCLOS], and if so, is Article 4 invalid to that extent?

(4) Does the use of the phrase serious negligence in Article 4 of the Directive infringe the principle of legal certainty, and if so, is Article 4 invalid to that extent?'

Admissibility

30. The French Government questions whether the reference for a preliminary ruling is admissible, the national court having, in its view, failed to set out the circumstances in which the case has been brought before it. The French Government submits that, in contrast to cases such as that giving rise to the judgment in Case C-491/01 British American Tobacco (Investments) and Imperial Tobacco [2002] ECR I-11453, the order for reference does not state that the claimants in the main proceedings have sought to bring an action contesting the transposition of Directive 2005/35 by the United Kingdom of Great Britain and Northern Ireland.

31. In that regard, it is to be remembered that, when a question on the validity of a measure adopted by the institutions of the European Community is raised before a national court, it is for that court to decide whether a decision on the matter is necessary to enable it to give judgment and, consequently, whether it should request the Court to rule on that question. Accordingly, where the national court's questions relate to the validity of a provision of Community law, the Court

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is obliged in principle to give a ruling (British American Tobacco (Investments) and Imperial Tobacco , paragraph 34 and the case-law cited).

32. It is possible for the Court to refuse to give a preliminary ruling on a question submitted by a national court only where, inter alia, it is quite obvious that the ruling sought by that court on the interpretation or validity of Community law bears no relation to the actual facts of the main action or its purpose or where the problem is hypothetical (British American Tobacco (Investments) and Imperial Tobacco , paragraph 35 and the case-law cited).

33. In the present case, it is clear from the order for reference that the claimants in the main proceedings have made an application to the High Court for judicial review of implementation of Directive 2005/35 in the United Kingdom and that they may make such an application even though, when the application was made, the period prescribed for implementation of the directive had not yet expired and no national implementing measures had been adopted.

34. Nor is it disputed before the Court of Justice that the questions submitted are relevant to the outcome of the main proceedings, as the adoption of national measures designed to transpose a directive into domestic law in the United Kingdom may be subject to the condition that the directive be valid (see British American Tobacco (Investments) and Imperial Tobacco , paragraph 37).

35. It is therefore not obvious that the ruling sought by the national court on the validity of Directive 2005/35 bears no relation to the actual facts of the main action or its purpose or concerns a hypothetical problem.

Consideration of the questions referred for a preliminary ruling

Questions 1 to 3

36. By its first three questions, the national court essentially requests the Court of Justice to assess the validity of Articles 4 and 5 of Directive 2005/35 in the light of Regulations 9 and 11(b) of Annex I, and Regulations 5 and 6(b) of Annex II, to Marpol 73/78 and in the light of the provisions of UNCLOS which define the conditions under which coastal States may exercise certain of their rights in the various marine zones.

37. The claimants in the main proceedings and the Greek, Cypriot and Maltese Governments submit that Articles 4 and 5 of Directive 2005/35 do not comply with Marpol 73/78 or UNCLOS in several respects. In particular, by laying down that liability is to be incurred for serious negligence, those articles establish a stricter liability regime for accidental discharges than that laid down in Article 4 of Marpol 73/78, read in conjunction with Regulations 9 and 11(b) of Annex I, and Regulations 5 and 6(b) of Annex II, to that Convention.

38. The claimants in the main proceedings and the abovementioned governments proceed on the basis that the legality of Directive 2005/35 may be assessed in the light of UNCLOS, since the Community is a party thereto and it thus forms an integral part of the Community legal order.

39. In their submission, the directive's legality may also be assessed in the light of Marpol 73/78. They state that UNCLOS defines and governs the extent of the jurisdiction of the Contracting Parties in their actions on the high seas, in their exclusive economic zones and in international straits. Thus, the Community lacks the power to adopt legislation applying to discharges from ships not flying the flag of one of the Member States, save to the extent that UNCLOS accords the Community the right to adopt such legislation. Under UNCLOS, the Contracting Parties have the power only to adopt legislation implementing the international rules and standards in such marine areas, that is to say, in the present case, the provisions of Marpol 73/78. This power is specified with regard to the high seas in Article 211(1) and (2) of UNCLOS, with regard to international straits in Articles 42(1)(b) and 45 of that Convention and with regard to the exclusive economic

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zone in Article 211(5). The same holds for territorial waters, by virtue of Article 2(3) of UNCLOS.

40. The claimants in the main proceedings add that the legality of Directive 2005/35 must be assessed in the light of Marpol 73/78 for the further reason that the Community legislature seeks to implement the latter in Community law by means of that directive.

41. Furthermore, the field of maritime transport is a field where the Community has assumed the function of regulating the implementation of the international obligations of the Member States. The position is analogous to that under the General Agreement on Tariffs and Trade of 30 October 1947 (GATT 1947') before the advent of the Agreement establishing the World Trade Organisation, where the Community, without becoming a party to GATT 1947, succeeded to the obligations of Member States through its actions under the common commercial policy. The field covered by GATT 1947 was thereby brought within the jurisdiction of the Community, its provisions having the effect of binding the Community.

Findings of the Court

42. It is clear from Article 300(7) EC that the Community institutions are bound by agreements concluded by the Community and, consequently, that those agreements have primacy over secondary Community legislation (see, to this effect, Case C-61/94 Commission v Germany [1996] ECR I-3989, paragraph 52, and Case C-311/04 Algemene Scheeps Agentuur Dordrecht [2006] ECR I-609, paragraph 25).

43. It follows that the validity of a measure of secondary Community legislation may be affected by the fact that it is incompatible with such rules of international law. Where that invalidity is pleaded before a national court, the Court of Justice thus reviews, pursuant to Article 234 EC, the validity of the Community measure concerned in the light of all the rules of international law, subject to two conditions.

44. First, the Community must be bound by those rules (see Joined Cases 21/72 to 24/72 International Fruit Company and Others [1972] ECR 1219, paragraph 7).

45. Second, the Court can examine the validity of Community legislation in the light of an international treaty only where the nature and the broad logic of the latter do not preclude this and, in addition, the treaty's provisions appear, as regards their content, to be unconditional and sufficiently precise (see to this effect, in particular, Case C-344/04 IATA and ELFAA [2006] ECR I-403, paragraph 39).

46. It must therefore be examined whether Marpol 73/78 and UNCLOS meet those conditions.

47. First, with regard to Marpol 73/78, it is to be observed at the outset that the Community is not a party to this Convention.

48. Furthermore, as the Court has already held, it does not appear that the Community has assumed, under the EC Treaty, the powers previously exercised by the Member States in the field to which Marpol 73/78 applies, nor that, consequently, its provisions have the effect of binding the Community (Case C-379/92 Peralta [1994] ECR I-3453, paragraph 16). In this regard, Marpol 73/78 can therefore be distinguished from GATT 1947 within the framework of which the Community progressively assumed powers previously exercised by the Member States, with the consequence that it became bound by the obligations flowing from that agreement (see to this effect, in particular, International Fruit Company and Others , paragraphs 10 to 18). Accordingly, this case-law relating to GATT 1947 cannot be applied to MARPOL 73/78.

49. It is true that all the Member States of the Community are parties to Marpol 73/78. Nevertheless, in the absence of a full transfer of the powers previously exercised by the Member States to the Community, the latter cannot, simply because all those States are parties to Marpol 73/78, be

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bound by the rules set out therein, which it has not itself approved.

50. Since the Community is not bound by Marpol 73/78, the mere fact that Directive 2005/35 has the objective of incorporating certain rules set out in that Convention into Community law is likewise not sufficient for it to be incumbent upon the Court to review the directive's legality in the light of the Convention.

51. Admittedly, as is clear from settled case-law, the powers of the Community must be exercised in observance of international law, including provisions of international agreements in so far as they codify customary rules of general international law (see, to this effect, Case C-286/90 Poulsen and Diva Navigation [1992] ECR I-6019, paragraphs 9 and 10; Case C-405/92 Mondiet [1993] ECR I6133, paragraphs 13 to 15; and Case C-162/96 Racke [1998] ECR I3655, paragraph 45). None the less, it does not appear that Regulations 9 and 11(b) of Annex I to Marpol 73/78 and Regulations 5 and 6(b) of Annex II to that Convention are the expression of customary rules of general international law.

52. In those circumstances, it is clear that the validity of Directive 2005/35 cannot be assessed in the light of Marpol 73/78, even though it binds the Member States. The latter fact is, however, liable to have consequences for the interpretation of, first, UNCLOS and, second, the provisions of secondary law which fall within the field of application of Marpol 73/78. In view of the customary principle of good faith, which forms part of general international law, and of Article 10 EC, it is incumbent upon the Court to interpret those provisions taking account of Marpol 73/78.

53. Second, UNCLOS was signed by the Community and approved by Decision 98/392, thereby binding the Community, and the provisions of that Convention accordingly form an integral part of the Community legal order (see Case C459/03 Commission v Ireland [2006] ECR I4635, paragraph 82).

54. It must therefore be determined whether the nature and the broad logic of UNCLOS, as disclosed in particular by its aim, preamble and terms, preclude examination of the validity of Community measures in the light of its provisions.

55. UNCLOS's main objective is to codify, clarify and develop the rules of general international law relating to the peaceful cooperation of the international community when exploring, using and exploiting marine areas.

56. According to the preamble to UNCLOS, the Contracting Parties agreed to that end to establish through UNCLOS a legal order for the seas and oceans which would facilitate international navigation, which would take into account the interests and needs of mankind as a whole and, in particular, the special interests and needs of developing countries, and which would strengthen peace, security, cooperation and friendly relations among all nations.

57. From this viewpoint, UNCLOS lays down legal regimes governing the territorial sea (Articles 2 to 33), waters forming straits used for international navigation (Articles 34 to 45), archipelagic waters (Articles 46 to 54), the exclusive economic zone (Articles 55 to 75), the continental shelf (Articles 76 to 85) and the high seas (Articles 86 to 120).

58. For all those marine areas, UNCLOS seeks to strike a fair balance between the interests of States as coastal States and the interests of States as flag States, which may conflict. In this connection, as is apparent from numerous provisions of the Convention, such as Articles 2, 33, 34(2), 56 and 89, the Contracting Parties provide for the establishment of the substantive and territorial limits to their respective sovereign rights.

59. On the other hand, individuals are in principle not granted independent rights and freedoms by virtue of UNCLOS. In particular, they can enjoy the freedom of navigation only if they establish a close connection between their ship and a State which grants its nationality to the ship and

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becomes the ship's flag State. This connection must be formed under that State's domestic law. Article 91 of UNCLOS states in this regard that every State is to fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory and for the right to fly its flag, and that there must exist a genuine link between the State and the ship. Under Article 92(1) of UNCLOS, ships are to sail under the flag of one State only and may not change their flag during a voyage or while in a port of call, save in the case of a real transfer of ownership or change of registry.

60. If a ship is not attached to a State, neither the ship nor the persons on board enjoy the freedom of navigation. In this connection, UNCLOS provides inter alia, in Article 110(1), that a warship which encounters a foreign ship on the high seas is justified in boarding it if there is reasonable ground for suspecting that the ship is without nationality.

61. It is true that the wording of certain provisions of UNCLOS, such as Articles 17, 110(3) and 111(8), appears to attach rights to ships. It does not, however, follow that those rights are thereby conferred on the individuals linked to those ships, such as their owners, because a ship's international legal status is dependent on the flag State and not on the fact that it belongs to certain natural or legal persons.

62. Likewise, it is the flag State which, under the Convention, must take such measures as are necessary to ensure safety at sea and, therefore, to protect the interests of other States. The flag State may thus also be held liable, vis-à-vis other States, for harm caused by a ship flying its flag to marine areas placed under those States' sovereignty, where that harm results from a failure of the flag State to fulfil its obligations.

63. Doubt is not cast on the foregoing analysis by the fact that Part XI of UNCLOS involves natural and legal persons in the exploration, use and exploitation of the sea-bed and ocean floor, and subsoil thereof, beyond the limits of national jurisdiction, since the present case does not in any way concern the provisions of Part XI.

64. In those circumstances, it must be found that UNCLOS does not establish rules intended to apply directly and immediately to individuals and to confer upon them rights or freedoms capable of being relied upon against States, irrespective of the attitude of the ship's flag State.

65. It follows that the nature and the broad logic of UNCLOS prevent the Court from being able to assess the validity of a Community measure in the light of that Convention.

66. Consequently, the answer to the first three questions must be that the validity of Directive 2005/35 cannot be assessed:

- either in the light of Marpol 73/78,

- or in the light of UNCLOS.

Question 4

67. By this question, the national court essentially asks whether Article 4 of Directive 2005/35 is invalid on the ground that, by using the term serious negligence', it infringes the general principle of legal certainty.

68. The claimants in the main proceedings and the Greek Government consider that Article 4 of Directive 2005/35 breaches the general principle of legal certainty which requires that rules should be clear and precise so that individuals may ascertain unequivocally what their rights and obligations are. They submit that, under this provision, liability of persons causing discharges of polluting substances is subject to the test of serious negligence, which is not defined at all by Directive 2005/35 and which consequently lacks clarity. Thus, the persons concerned are unable to ascertain

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the degree of severity of the rules to which they are subject.

Findings of the Court

69. The general principle of legal certainty, which is a fundamental principle of Community law, requires, in particular, that rules should be clear and precise, so that individuals may ascertain unequivocally what their rights and obligations are and may take steps accordingly (see Case C-110/03 Belgium v Commission [2005] ECR I-2801, paragraph 30, and IATA and ELFAA , paragraph 68).

70. Furthermore, in obliging the Member States to regard certain conduct as infringements and to punish it, Article 4 of Directive 2005/35, read in conjunction with Article 8 thereof, must also observe the principle of the legality of criminal offences and penalties (nullum crimen, nulla poena sine lege), which is one of the general legal principles underlying the constitutional traditions common to the Member States (Case C-303/05 Advocaten voor de Wereld [2007] ECR I-3633, paragraph 49) and is a specific expression of the general principle of legal certainty.

71. The principle of the legality of criminal offences and penalties implies that Community rules must define clearly offences and the penalties which they attract. This requirement is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable (see, in particular, Advocaten voor de Wereld , paragraph 50, and the judgment of the European Court of Human Rights in Coeme and Others v. Belgium , nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, Reports of Judgments and Decisions 2000-VII, ° 145).

72. It is true that Article 4 of Directive 2005/35, read in conjunction with Article 8 thereof, obliges the Member States to punish ship-source discharges of polluting substances if committed with intent, recklessly or by serious negligence', without defining those concepts.

73. It is, however, to be pointed out, first of all, that those various concepts, in particular that of serious negligence' referred to by the national court's questions, correspond to tests for the incurring of liability which are to apply to an indeterminate number of situations that it is impossible to envisage in advance and not to specific conduct capable of being set out in detail in a legislative measure, of Community or of national law.

74. Next, those concepts are fully integrated into, and used in, the Member States' respective legal systems.

75. In particular, all those systems have recourse to the concept of negligence which refers to an unintentional act or omission by which the person responsible breaches his duty of care.

76. Also, as provided by many national legal systems, the concept of serious' negligence can only refer to a patent breach of such a duty of care.

77. Accordingly, serious negligence' within the meaning of Article 4 of Directive 2005/35 must be understood as entailing an unintentional act or omission by which the person responsible commits a patent breach of the duty of care which he should have and could have complied with in view of his attributes, knowledge, abilities and individual situation.

78. Finally, in accordance with Article 249 EC, Directive 2005/35 must be transposed by each of the Member States into national law. Thus, the actual definition of the infringements referred to in Article 4 of that directive and the applicable penalties are those which result from the rules laid down by the Member States.

79. In view of the foregoing, Article 4 of Directive 2005/35, read in conjunction with Article 8 thereof, does not infringe the general principle of legal certainty in so far as it requires the Member States to punish ship-source discharges of polluting substances committed by serious negligence',

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without defining that concept.

80. It follows that examination of the fourth question has revealed nothing capable of affecting the validity of Article 4 of Directive 2005/35 in the light of the general principle of legal certainty.

Costs

81. 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.

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Opinion of Advocate General Kokott delivered on 20 November 2007. The Queen, à la demande de International Association of Independent Tanker Owners (Intertanko) and Others v Secretary of State for Transport. Reference for a preliminary ruling: High Court of Justice (England & Wales), Queen's Bench Division (Administrative Court) - United Kingdom. Maritime transport - Ship-source pollution - Directive 2005/35/EC - Validity - United Nations Convention on the Law of the Sea - Marpol 73/78 Convention - Legal effects of the Conventions - Ability to rely on them - Serious negligence - Principle of legal certainty. Case C-308/06.

I - Introduction

1. The issue to be examined in this case is whether provisions of Directive 2005/35/EC of the European Parliament and of the Council of 7 September 2005 on ship-source pollution and on the introduction of penalties for infringements (2) are compatible with higher-ranking law.

2. The International Association of Independent Tanker Owners (Intertanko), the International Association of Dry Cargo Shipowners (Intercargo), the Greek Shipping Co-operation Committee, Lloyd's Register and the International Salvage Union (the claimants') have brought before the High Court of Justice a joint action against the United Kingdom's Secretary of State for Transport in connection with the planned implementation of the directive. The abovementioned organisations are major associations within the international maritime transport industry. Intertanko, for instance, represents almost 80% of the world's tanker fleet.

3. The issue in dispute is whether Articles 4 and 5 of Directive 2005/35 are compatible with the United Nations Convention on the Law of the Sea, signed at Montego Bay on 10 December 1982 (3) (the Convention on the Law of the Sea'), to which the Community acceded in 1998, (4) and the 1973 International Convention for the Prevention of Pollution from Ships and the 1978 Protocol thereto (5) (Marpol 73/78'). These provisions lay down criminal liability for discharge violations. Uncertainty arises particularly because the directive appears to provide for a stricter standard of liability than does Marpol 73/78. Under the directive, serious negligence in particular is sufficient, whereas Marpol 73/78 provides for at least recklessness and knowledge that damage will probably result.

4. Furthermore, the question arises as to whether the standard of liability of serious negligence is compatible with the principle of legal certainty.

II - Legal context

A - Community law

5. Directive 2005/35 was based on Article 80(2) EC, which forms the legal basis for measures relating to maritime transport.

6. The reasons for the adoption of the directive are clear in particular from recitals (2) and (3) in the preamble thereto:

(2) The material standards in all Member States for discharges of polluting substances from ships are based upon the Marpol 73/78 Convention; however, these rules are being ignored on a daily basis by a very large number of ships sailing in Community waters, without corrective action being taken.

(3) The implementation of Marpol 73/78 shows discrepancies among Member States and there is thus a need to harmonise its implementation at Community level; in particular, the practices of Member States relating to the imposition of penalties for discharges of polluting substances from ships differ significantly.'

7. Article 3 lays down the scope of the directive:

1. This Directive shall apply, in accordance with international law, to discharges of polluting

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substances in:

(a) the internal waters, including ports, of a Member State, in so far as the Marpol regime is applicable;

(b) the territorial sea of a Member State;

(c) straits used for international navigation subject to the regime of transit passage, as laid down in Part III, section 2, of the 1982 United Nations Convention on the Law of the Sea, to the extent that a Member State exercises jurisdiction over such straits;

(d) the exclusive economic zone or equivalent zone of a Member State, established in accordance with international law; and

(e) the high seas.

2. This Directive shall apply to discharges of polluting substances from any ship, irrespective of its flag, with the exception of any warship, naval auxiliary or other ship owned or operated by a State and used, for the time being, only on government non-commercial service.'

8. In this case doubt is cast on the validity of Articles 4 and 5, which are worded as follows:

Article 4

Infringements

Member States shall ensure that ship-source discharges of polluting substances into any of the areas referred to in Article 3(1) are regarded as infringements if committed with intent, recklessly or by serious negligence. These infringements are regarded as criminal offences by, and in the circumstances provided for in, Framework Decision 2005/667/JHA supplementing this Directive.

Article 5

Exceptions

1. A discharge of polluting substances into any of the areas referred to in Article 3(1) shall not be regarded as an infringement if it satisfies the conditions set out in Annex I, Regulations 9, 10, 11(a) or 11(c) or in Annex II, Regulations 5, 6(a) or 6(c) of Marpol 73/78.

2. A discharge of polluting substances into the areas referred to in Article 3(1)(c), (d) and (e) shall not be regarded as an infringement for the owner, the master or the crew when acting under the master's responsibility if it satisfies the conditions set out in Annex I, Regulation 11(b) or in Annex II, Regulation 6(b) of Marpol 73/78.'

B - International law

1. Convention on the Law of the Sea

9. The Convention on the Law of the Sea contains rules on the prosecution of environmental pollution at sea.

10. The first sentence of Article 211(1) provides for the development of international environmental protection standards:

States, acting through the competent international organisation or general diplomatic conference,

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shall establish international rules and standards to prevent, reduce and control pollution of the marine environment from vessels and promote the adoption, in the same manner, wherever appropriate, of routeing systems designed to minimise the threat of accidents which might cause pollution of the marine environment, including the coastline, and pollution damage to the related interests of coastal States.'

11. The powers of coastal States to make rules with regard to exclusive economic zones are set out in Article 211(5):

Coastal States, for the purpose of enforcement as provided for in section 6, may in respect of their exclusive economic zones adopt laws and regulations for the prevention, reduction and control of pollution from vessels conforming to and giving effect to generally accepted international rules and standards established through the competent international organisation or general diplomatic conference.'

12. Under Article 42(1)(b), provisions similar to those applicable to the exclusive economic zone apply to straits:

(1) Subject to the provisions of this section, States bordering straits may adopt laws and regulations relating to transit passage through straits, in respect of all or any of the following:

...;

(b) the prevention, reduction and control of pollution, by giving effect to applicable international regulations regarding the discharge of oil, oily wastes and other noxious substances in the strait;

...'

13. Individual States' powers to make rules regarding the high seas are in principle excluded by Article 89:

No State may validly purport to subject any part of the high seas to its sovereignty.'

14. Article 218(1), however, provides for the prosecution of discharge offences:

When a vessel is voluntarily within a port or at an off-shore terminal of a State, that State may undertake investigations and, where the evidence so warrants, institute proceedings in respect of any discharge from that vessel outside the internal waters, territorial sea or exclusive economic zone of that State in violation of applicable international rules and standards established through the competent international organisation or general diplomatic conference.'

15. Different provisions apply in the territorial sea. Article 2 governs the sovereignty of a coastal State in this area.

1. The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.

2. This sovereignty extends to the air space over the territorial sea as well as to its bed and subsoil.

3. The sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law.'

16. Article 211(4) contains general rules on environmental protection provisions concerning the territorial sea:

Coastal States may, in the exercise of their sovereignty within their territorial sea, adopt laws and regulations for the prevention, reduction and control of marine pollution from foreign vessels,

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including vessels exercising the right of innocent passage. Such laws and regulations shall, in accordance with Part II, section 3, not hamper innocent passage of foreign vessels.'

17. Article 21 lays down which laws and regulations of the coastal State relating to innocent passage are permitted:

1. The coastal State may adopt laws and regulations, in conformity with the provisions of this Convention and other rules of international law, relating to innocent passage through the territorial sea, in respect of all or any of the following:

...

(f) the preservation of the environment of the coastal State and the prevention, reduction and control of pollution thereof;

...

2. Such laws and regulations shall not apply to the design, construction, manning or equipment of foreign ships unless they are giving effect to generally accepted international rules or standards.

3. ...

4. Foreign ships exercising the right of innocent passage through the territorial sea shall comply with all such laws and regulations and all generally accepted international regulations relating to the prevention of collisions at sea.'

2. Marpol 73/78

18. Marpol 73/78 was agreed within the framework of the International Maritime Organisation (the IMO'). While all of the Member States - in so far as is relevant in this case - have acceded to it, (6) there is no provision for the Community to do so (Article 13).

19. Article 4 of Marpol 73/78 provides as follows:

(1) Any violation of the requirements of the present Convention shall be prohibited and sanctions shall be established therefor under the law of the Administration of the ship concerned wherever the violation occurs. If the Administration is informed of such a violation and is satisfied that sufficient evidence is available to enable proceedings to be brought in respect of the alleged violation, it shall cause such proceedings to be taken as soon as possible, in accordance with its law.

(2) Any violation of the requirements of the present Convention within the jurisdiction of any Party to the Convention shall be prohibited and sanctions shall be established therefor under the law of that Party. Whenever such a violation occurs, that Party shall either:

(a) cause proceedings to be taken in accordance with its law; or

(b) furnish to the Administration of the ship such information and evidence as may be in its possession that a violation has occurred.

(3) Where information or evidence with respect to any violation of the present Convention by a ship is furnished to the Administration of that ship, the Administration shall promptly inform the Party which has furnished the information or evidence, and the Organisation, of the action taken.

(4) ...'

20. Article 9 contains rules on the relationship with other international agreements and on the interpretation of the term jurisdiction'.

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Article 9

(1) ...

(2) Nothing in the present Convention shall prejudice the codification and development of the law of the sea by the United Nations Conference on the Law of the Sea convened pursuant to Resolution 2750 C(XXV) of the General Assembly of the United Nations nor the present or future claims and legal views of any State concerning the law of the sea and the nature and extent of coastal and flag State jurisdiction.

(3) The term jurisdiction in the present Convention shall be construed in the light of international law in force at the time of application or interpretation of the present Convention.'

21. The provisions on oil pollution by shipping are laid down in Annex I to Marpol 73/78. (7) Regulations 9 and 10 contain restrictions prohibiting discharges in special areas within a minimum distance from land or of more than a specific quantity (as a rate of discharge per nautical mile, as a total quantity or as the oil content of the discharge). The discharge from vessels of oil or oily mixtures into the sea is thus prohibited unless a number of conditions are satisfied.

22. However, Regulation 11 of Annex I lays down exceptions to the prohibitions on discharge:

Regulations 9 and 10 of this Annex shall not apply to:

(a) the discharge into the sea of oil or oily mixture necessary for the purpose of securing the safety of a ship or saving life at sea; or

(b) the discharge into the sea of oil or oily mixture resulting from damage to a ship or its equipment:

(i) provided that all reasonable precautions have been taken after the occurrence of the damage or discovery of the discharge for the purpose of preventing or minimising the discharge; and

(ii) except if the owner or the master acted either with intent to cause damage, or recklessly (8) and with knowledge that damage would probably result; or

(c) the discharge into the sea of substances containing oil, approved by the Administration [of the flag State], when being used for the purpose of combating specific pollution incidents in order to minimise the damage from pollution. Any such discharge shall be subject to the approval of any Government in whose jurisdiction it is contemplated the discharge will occur.' (Footnote 8 added.)

23. Annex II (9) to Marpol 73/78 contains provisions similar to those in Annex I. However, these provisions do not apply to oil or oily mixtures but to noxious liquid substances in bulk. Regulation 5 of Annex II prohibits the discharge into the sea of specified substances. Regulation 6(b) of Annex II provides:

Regulation 5 of this Annex shall not apply to:

...

(b) the discharge into the sea of noxious liquid substances or mixtures containing such substances resulting from damage to a ship or its equipment:

(i) provided that all reasonable precautions have been taken after the occurrence of the damage or discovery of the discharge for the purpose of preventing or minimising the discharge; and

(ii) except if the owner or the master acted either with intent to cause damage, or recklessly (10) and with knowledge that damage would probably result.' (Footnote 10 added.)

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III - The reference for a preliminary ruling

24. At the request of the claimants the High Court of Justice has referred the following questions to the Court of Justice for a preliminary ruling:

(1) In relation to straits used for international navigation, the exclusive economic zone or equivalent zone of a Member State and the high seas, is Article 5(2) of Directive 2005/35/EC invalid in so far as it limits the exceptions in Annex I Regulation 11(b) of MARPOL 73/78 and in Annex II Regulation 6(b) of MARPOL 73/78 to the owners, masters and crew?

(2) In relation to the territorial sea of a Member State:

(a) Is Article 4 of the Directive invalid in so far as it requires Member States to treat serious negligence as a test of liability for discharge of polluting substances; and/or

(b) Is Article 5(1) of the Directive invalid in so far as it excludes the application of the exceptions in Annex I Regulation 11(b) of MARPOL 73/78 and in Annex II Regulation 6(b) of MARPOL 73/78?

(3) Does Article 4 of the Directive, requiring Member States to adopt national legislation which includes serious negligence as a standard of liability and which penalises discharges in territorial sea, breach the right of innocent passage recognised in the Convention on the Law of the Sea and, if so, is Article 4 invalid to that extent?

(4) Does the use of the phrase serious negligence' in Article 4 of the Directive infringe the principle of legal certainty and, if so, is Article 4 invalid to that extent?

25. The claimants in the main proceedings, the Kingdom of Denmark, the Republic of Estonia, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Republic of Malta, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland, the European Parliament, the Council of the European Union and the Commission of the European Communities have submitted observations to the Court. All of the abovementioned parties, other than the Kingdom of Denmark and the Republic of Estonia, made submissions at the hearing on 25 September 2007.

IV - Legal appraisal

26. Below I shall first examine various uncertainties as to the admissibility of the request for a preliminary ruling and the jurisdiction of the Court of Justice (see A below). I shall then deal with the first question concerning the standard of liability in respect of discharge offences outside the territorial sea, that is to say, on the high seas, in straits used for international navigation and in the exclusive economic zone. As will be seen, Marpol 73/78 defines definitively the standard of liability to be applied in these areas of the sea by reason of its interaction with the Convention on the Law of the Sea (see B below). By contrast, in the territorial sea, which is to be considered in the second and third questions, Marpol 73/78 has at most the function of a minimum standard - binding only on the Member States but not on the Community - in particular because the Convention on the Law of the Sea does not restrict rule-making powers in this area, which forms part of the territory of the coastal States, to the same extent as in other areas of the sea (see C below). Finally, it will be necessary to examine whether the standard of liability of serious negligence is compatible with the principle of legal certainty (see D below).

A - Admissibility of the request for a preliminary ruling

27. The French Government has doubts as to the admissibility of the reference. It contends that, unlike in British American Tobacco , (11) the referring court has failed to show that the main action concerns the lawfulness of the intended transposition of the directive at issue. Furthermore, it argues, there is no disagreement between the parties to the main proceedings, at least as regards

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the first question.

28. These objections are based on the fact that, in exceptional circumstances, it is for the Court to examine the conditions in which a case has been referred to it by the national court, in order to assess whether it has jurisdiction. (12) It is settled case-law that a reference from a national court may be refused only if it is quite obvious that the interpretation of Community law sought bears no relation to the actual facts of the main action or to its purpose, or where the problem is hypothetical or the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it. (13) Save for such cases, the Court is, in principle, bound to give a preliminary ruling on questions concerning the interpretation of Community law. (14) In this connection the term interpretation' also includes the examination of validity. (15)

29. The French Government provides no evidence that the questions referred or the main action are hypothetical. Rather, it is clear that the main action relates to actual facts and that the questions referred are central to the resolution of this dispute. Nor does the Court require further material on the nature of the main action in order to answer the questions referred to it. On the contrary, since the judgment in British American Tobacco (16) the Court has been aware that in the United Kingdom it is possible to bring an action seeking to prevent implementation of a directive which may result in questions on the validity of that directive being referred to the Court. Therefore, in spite of the French Government's doubts as to its admissibility, the request for a preliminary ruling cannot be refused.

30. Furthermore, Denmark and the Council question whether the Court has jurisdiction to interpret the Convention on the Law of the Sea. The Convention was concluded by the Community and all of its Member States on the basis of shared competence. (17) Therefore, in principle the Court does not have jurisdiction to interpret provisions which fall within the exclusive competence of the Member States. Only in exceptional circumstances may it have the power to interpret such rules in order to establish whether or not they fall within the exclusive competence of the Member States. (18)

31. However, the Court has ruled that, within the specific context of the Convention on the Law of the Sea, a finding that there is shared competence is contingent on the existence of Community rules within the areas covered by the Convention provisions in issue, irrespective of what may otherwise be the scope and nature of those rules. (19) In other words, as regards the Convention on the Law of the Sea the Community at least also has competence for the matters covered by it, if any relevant Community law in fact exists at all, regardless of whether the rules of Community law are definitive or the Member States retain certain margins of discretion.

32. Consequently, the argument put forward by Denmark and the Council that the Court does not have jurisdiction cannot be upheld in this case. It must be assumed that the provisions of the Convention on the Law of the Sea relevant to an examination of Directive 2005/35 at least fall within an area of Community competence shared with the Member States. Were this not the case, the directive would have to be repealed on the ground that it did not have a sufficient legal basis. However, none of the parties disputes the legal basis of the directive.

33. Therefore, the Court of Justice does have jurisdiction to interpret the relevant provisions of the Convention on the Law of the Sea.

B - First question - Liability of persons not referred to in Marpol 73/78

34. The first question concerns the liability of persons not referred to in Marpol 73/78 for discharges outside the territorial sea. The claimants, Greece, Malta and Cyprus consider that the rules in question are incompatible with Marpol 73/78.

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35. Consequently, it is necessary to determine, first of all, whether Marpol 73/78 is the criterion for determining the legality of Directive 2005/35 and, if so, whether Marpol 73/78 limits liability for accidental discharges in the manner alleged by the claimants.

1. Marpol 73/78 as the criterion for determining the legality of Directive 2005/35

36. The parties put forward a variety of arguments which may justify use of Marpol 73/78 as the criterion for determining the legality of Directive 2005/35. Firstly, the Community may be bound by Marpol 73/78 under international law (see (a) below). Secondly, Marpol 73/78 could be indirectly binding on the Community in so far as the Convention on the Law of the Sea restricts the Community's rulemaking powers with reference to the Marpol standards (see (b) below). Thirdly, Marpol 73/78 may be binding by dint of the fact that Directive 2005/35 is intended to harmonise implementation of the Marpol Convention at Community level (see (c) below).

a) Binding effect of Marpol 73/78 on the Community under international law

37. As the Council and the Commission point out, the Court ruled in Peralta that the Community is not bound by the provisions of Marpol 73/78. (20)

38. As at the time of that judgment, the Community is also at present not a party to Marpol 73/78. As a rule, the lawfulness of a Community instrument cannot depend on its conformity with an international agreement to which the Community is not a party. (21)

39. Contrary to the view taken by Cyprus and the United Kingdom, it also does not follow from the judgment in Poulsen and Diva Navigation (22) that the Community is automatically bound by any international law. Although the Court holds that the Community must respect international law in the exercise of its powers, its subsequent comments show that this statement relates to customary international law. (23) In the present case, however, there is no evidence that the relevant provisions of Marpol 73/78 codified customary international law.

40. By contrast, it is not possible to reject out of hand a second hypothesis put forward in Peralta concerning the binding effect of Marpol 73/78 on the Community, namely that the latter assumed the powers previously exercised by the Member States in the field to which this convention applies. (24) This argument put forward by the claimants relates to the case-law on the binding effect of GATT before the Community had acceded to it. (25) In that respect the Court took account of a number of factors.

41. GATT is an agreement of the Member States which was already in existence when the Community was established, but at the time of the judgment in International Fruit Company the relevant trade-policy powers had been transferred in their entirety to the Community. Therefore, the Community alone was able to act within the areas covered by GATT. Accordingly, and with the agreement of both the Member States and the other parties to GATT, the Community acted on behalf of the Member States within the framework of GATT.

42. Unlike in the case of trade policy, in the present case the Community has no exclusive competence under the Treaty to lay down rules on the discharge by ships of pollutants into the sea. This competence - either under Article 80(2) EC concerning transport policy or Article 175 EC concerning policy on the environment (26) - is instead competitive in nature, that is to say, it remains with the Member States so long and in so far as it is not exercised by the Community. (27) Although the Community exercised this competence at the latest when it adopted Directive 2005/35, it should not be concluded that it thereby assumed the relevant areas of competence of the Member States in their entirety since, according to its Article 1(2), the directive merely lays down a minimum standard beyond which the Member States may go, subject to international law.

43. Irrespective of whether or not the Community's competence is now exclusive, there must also

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be doubts as to whether such an assumption of powers resulting from the exercise of competence is sufficient as a basis on which to conclude that the Member States' obligations under international law are binding on the Community. In any event, the assumption of trade-policy powers, to which GATT related, was laid down expressly in the Treaty. Thus, Peralta refers to assumption under the ... Treaty'. (28) Moreover, in a case with similar facts the Court ruled that the Convention on the Grant of European Patents, signed at Munich on 5 October 1973, was not binding, (29) even though Directive 98/44, (30) under examination in that case, had partially harmonised implementation of that convention. (31)

44. Furthermore, it has not been submitted that the Community acted as the successor to the Member States in connection with Marpol 73/78 or that such action was agreed to by the other parties, as in the case of GATT. The Community has merely observer status at the IMO, within the competence of which Marpol 73/78 falls.

45. Therefore, it cannot be validly argued that the Community is bound by Marpol 73/78 on the ground that it has assumed powers of the Member States.

b) Reference by the Convention on the Law of the Sea to Marpol 73/78

46. As most of the parties submitted in the written procedure, Marpol 73/78 may have been incorporated as a test standard into Community law by the Convention on the Law of the Sea.

47. Under Article 300(7) EC, agreements concluded under the conditions set out in that article are to be binding on the institutions of the Community and on Member States. The Convention on the Law of the Sea was signed by the Community and subsequently approved by Decision 98/392. It follows, according to settled case-law, that the provisions of that convention now form an integral part of the Community legal order. (32)

48. International agreements concluded by the Community prevail over provisions of secondary Community legislation. (33) Therefore, the Court reviews the legality of acts of the Community institutions in the light of the provisions of such agreements, subject to the reservation that neither the nature nor the broad logic of the agreement in question precludes such application. In any event, where individuals seek to rely thereon, the provisions in question must, as regards their content, be unconditional and sufficiently precise. (34)

49. In the view of the French Government and the Council, which the Italian, Spanish and Swedish Governments and the Parliament supported at the hearing, both conditions preclude individuals from relying on the Convention on the Law of the Sea.

50. In view of the Court's previous case-law, this submission is surprising. Particularly worthy of note is the judgment in Poulsen and Diva Navigation , the issue in which was whether a prohibition on fishing laid down in a Community fisheries regulation could be invoked in criminal proceedings as against the Danish master of a Panamanian-registered vessel. In that case the Court referred to the Convention on the Law of the Sea as an expression of international customary law even before its entry into force in order to establish that the vessel concerned could be attributed solely to the flag State (35) and to rule out the application to that vessel of the prohibition on fishing in the exclusive economic zone and in the territorial sea. (36) Therefore, the Court already acknowledged in principle that individuals can rely on rules laid down in the Convention on the Law of the Sea. At the hearing the claimants correctly pointed out that it would be completely incomprehensible if they were to be deprived of this opportunity after the Convention on the Law of the Sea had entered into force.

51. Nor does the case-law since the entry into force of the Convention on the Law of the Sea contain any indications to that effect. Thus, for example, the Court has derived the liability of flag

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States under international law from Article 94 of the Convention on the Law of the Sea (37) and recently defined the territorial scope of the Sixth VAT Directive (38) on the basis of the rules on States' sovereign rights in the different sea areas. (39) These rules are also once more of interest in the present case.

52. In those cases, however, the Court did not examine either the nature or the broad logic of the Convention on the Law of the Sea or establish whether the provisions here in question are, as regards their content, unconditional and sufficiently precise. It is therefore necessary to examine the objections to the application of the provisions of the Convention on the Law of the Sea in this case.

53. An important motivating factor for the Council appears to lie in the fact that non-member countries do not, to its knowledge, apply the Convention on the Law of the Sea in their national law. It submits, in particular, that clarification by the courts of matters relating to interpretation of the Convention on the Law of the Sea is generally avoided. Even if this submission were correct, it would not automatically preclude application in Community law. (40) Instead, the Convention on the Law of the Sea must be examined.

54. With regard to the nature and broad logic of the Convention on the Law of the Sea, the Council, in particular, emphasises its focus on global matters to be regulated at international level and in accordance with the principle of reciprocity. It contends that territorial questions and the functions assigned to States per se are also involved. Finally, the Convention on the Law of the Sea provides for a variety of dispute resolution procedures which confer on the contracting States a degree of flexibility.

55. In brief, the submission seeks to apply the case-law on the particular nature of the GATT and WTO Agreements to the Convention on the Law of the Sea. However, the argument concerning reciprocity in particular is at odds with the nature of the Convention on the Law of the Sea as a constitution of the sea', which was repeatedly put forward at the hearing. According to the fourth recital in its preamble, the Convention seeks to establish an objective legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilisation of their resources ...'.

56. The reference to peaceful use is directed precisely also at individuals involved in maritime transport. This is emphasised by the rules on non-military shipping. Traditionally such shipping is operated for the most part by private individuals who have a vital interest in States complying with the rules on maritime transport laid down in the Convention on the Law of the Sea. This is true, for example, of the rules on innocent passage, which will be addressed below, but also more generally of the rules on competence relating to ship-source pollution.

57. The dispute-settlement schemes provided for by the Convention on the Law of the Sea do not prevent the Court from referring to the provisions of the Convention to examine the legality of secondary Community law. These rules do not establish exclusive competence on the part of other institutions to interpret the Convention on the Law of the Sea. On the contrary, the freedom of the contracting States, emphasised by the Council, to agree on dispute-settlement procedure freely amongst themselves pursuant to Article 280 of the Convention on the Law of the Sea rules out any exclusive powers. (41)

58. Contrary to what is argued by some, the flexibility', or rather the possibility, of choosing the dispute-settlement procedure is by no means an indication of the flexibility of the other provisions of the Convention on the Law of the Sea. Neither the rules on dispute settlement nor any other provision of the Convention on the Law of the Sea provide the contracting States, in general terms, with flexibility or opportunities to derogate from the rules of the Convention.

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59. The Convention on the Law of the Sea therefore constitutes the criterion for the legality of the actions of Community institutions. The degree to which individuals can rely on it can consequently be determined solely on the basis of each respective relevant provision. Such provisions must, as regards their content, be unconditional and sufficiently precise.

60. This case does not relate to the powers of Member States to adopt rules on ships flying their respective flags. Rather, the first question concerns the rules which Article 4 and Article 5(2) of Directive 2005/35 lay down concerning all ship-source pollution in straits, in the exclusive economic zone or on the high seas, regardless of whether or not the ships involved are flagged to a Member State. The Court has already held that the power to make rules in these areas, that is to say, outside the sovereign territory of the Member States, must be determined in accordance with the Convention on the Law of the Sea. (42) The rules relevant to the first question are laid down in Articles 87, 89, 218(1), 55, 58, 211(5) and 42(1)(b) of the Convention on the Law of the Sea.

61. Article 87(1)(a) guarantees freedom of navigation on the high seas. Article 89 prohibits States in principle from subjecting any part of the high seas to their sovereignty. However, under Article 218(1), when a vessel is voluntarily within a port or at an off-shore terminal of a State, that State may undertake investigations. Where the evidence so warrants, the harbour State may institute proceedings in respect of any discharge from that vessel outside the internal waters, territorial sea or exclusive economic zone of that State, on condition that the discharge violates applicable international rules and standards established through the competent international organisation or general diplomatic conference. (43) Such proceedings presuppose that the State concerned is entitled to impose penalties for such discharges on the high seas.

62. Under Article 58(1) of the Convention on the Law of the Sea, the freedom of navigation applies also in the exclusive economic zone. The sovereignty of the coastal State over this zone is functional and under Article 55 of the Convention on the Law of the Sea is limited to the competence conferred on it by that convention. (44) Under Article 211(5), coastal States, for the purpose of enforcement as provided for in Section 6 of the Convention on the Law of the Sea, may in respect of their exclusive economic zones adopt laws and regulations for the prevention, reduction and control of pollution from vessels which conform and give effect to generally accepted international rules and standards established through the competent international organisation or general diplomatic conference.

63. By reason of this function, straits used for international navigation are subject to special provisions set out in Part III of the Convention on the Law of the Sea. Under Article 42(1)(b), States bordering straits may adopt laws and regulations relating to transit passage through straits in respect of, inter alia, the prevention, reduction and control of pollution, by giving effect to applicable international regulations regarding the discharge of oil, oily wastes and other noxious substances in the strait.

64. Consequently, it is clear from these provisions that the Community, in the exercise of the powers assumed by Member States, may lay down penalties for discharges into the sea areas here in issue where they infringe generally recognised international rules.

65. These provisions are not unconditional in so far as they require the adoption of corresponding international standards. However, the Commission correctly points out that this condition is satisfied by Marpol 73/78. As is clear in particular from recital (2) in the preamble to Directive 2005/35 and from Article 1(1) thereof, the generally recognised international rules are the requirements laid down in Marpol 73/78. None of the parties contends that these requirements are not sufficiently clear and unconditional.

66. Whether or not the provisions in question are directly applicable and - correlatively - whether

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they confer rights on individuals is not conclusive for the purpose of responding to the request for a preliminary ruling. Even the legal bases of the Treaties are in principle not directly applicable in the sense that individuals can derive from them rights or legal consequences to their benefit. Nevertheless, individuals may question the legality of rules of secondary law by contesting the legal basis thereof. (45) That is precisely the situation in the present case: it is here necessary to examine whether the Community is entitled under the Convention on the Law of the Sea to adopt the contested provisions of Directive 2005/35.

67. However, even if the Court were to regard the rights of individuals as an essential prerequisite for the application of the abovementioned provisions as a test of legality, the situation would be no different. In Poulsen and Diva Navigation (46) it referred to the freedom of navigation under Article 87(1)(a) and Article 58(1) of the Convention on the Law of the Sea. The Community may encroach on these rights outside the territorial sea only in so far as the Convention on the Law of the Sea confers rule-making powers on it.

68. Since, under the Convention on the Law of the Sea, only rules on discharges which implement Marpol 73/78 are permitted outside the territorial sea, the Community may not, for the sea areas in question, adopt more extensive rules. (47)

69. By contrast, Italy's view that more stringent protective measures could be adopted and applied outside the territorial sea in spite of these provisions is unconvincing. It is true that States must protect the marine environment, as expressed in particular in Article 192 of the Convention on the Law of the Sea. However, this duty is given concrete expression outside the territorial sea by the abovementioned provisions, which give effect to the common international standards developed pursuant to Article 211(1). This reference to common standards is justified by the fact that unilateral measures could place an unreasonable burden on international shipping. This is particularly true on the high seas, where it is possible to imagine a large number of different standards of protection applying in parallel.

70. Consequently, through the reference in the above provisions of the Convention on the Law of the Sea concluded by the Community Marpol 73/78 is the test standard applicable to Directive 2005/35 outside the territorial sea. In this respect it should be borne in mind that under the Convention on the Law of the Sea only rules which comply with Marpol 73/78, that is to say, rules which implement the standard of protection laid down therein, are permitted. By contrast, rules which go beyond Marpol 73/78 are not permitted in these sea areas.

c) Implementation of Marpol 73/78

71. The claimants in particular relied for the examination of Directive 2005/35 on the basis of Marpol 73/78 also on the fact that the directive is designed to harmonise implementation of that convention in the Member States. I will examine this argument at this juncture in the alternative in case the Court does not apply the Convention on the Law of the Sea as the criterion for the legality of the directive.

72. As the claimants and the Danish, Greek, Maltese, Swedish and Cypriot Governments point out, there are a number of factors which suggest that Directive 2005/35 should not derogate from Marpol 73/78. According to Article 1(1), the purpose of the directive is to incorporate international standards for ship-source pollution into Community law. According to recital (2) in the preamble, these standards are set out in Marpol 73/78, to which Article 2(1) (48) of the directive refers in the form of a dynamic reference. According to recital (3) in the preamble, implementation of this convention by the Member States is to be harmonised by the directive. In particular, according to recital (15), (49) penalties for violations of these international standards are to be established. However, no express indications of an intended derogation from Marpol 73/78 are to be found in

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the wording of Directive 2005/35.

73. The assumption that the Community is bound through the implementation of obligations under international law is also based on case-law developed in connection with GATT. It is true that, given their nature and structure, GATT and the WTO Agreements are not in principle among the rules in the light of which the Court is to review the legality of measures adopted by the Community institutions. (50) However, where the Community has intended to implement a particular obligation assumed in the context thereof, or where the Community measure refers expressly to the precise provisions of those agreements, it is for the Court to review the legality of the Community measure in question in the light thereof. (51)

74. However, this case-law is based on the fact that GATT and the WTO Agreements form part of Community law and are therefore in principle binding on the Community per se. (52) By contrast, in the case of the implementation of Marpol 73/78 by Directive 2005/35 no obligation has been assumed by the Community.

75. None the less, the Court has at least intimated that Directive 98/44 should be reviewed in the light of the Convention on the Grant of European Patents, (53) even though it was only the Member States, and not the Community, that were parties to it. (54) As grounds for embarking on the examination, the Court stated that it was argued that the directive imposed obligations on the Member States, fulfilment of which would breach their own obligations under international law, even though the directive itself claimed not to affect those obligations. (55)

76. However, there is no discernible legal basis for examining secondary law on the basis of international-law obligations of the Member States which the Community has not itself assumed. Rather, such an examination would run counter to the finding made in the judgment in Netherlands v Parliament and Council that the Community is not bound by the Member States' obligations under international law. (56)

77. Accordingly, the Community can in principle require the Member States to take measures which run counter to their obligations under international law. This is already demonstrated by Article 307 EC, which governs inconsistencies between pre-existing international agreements and Community law. Even if the Member States' obligations under pre-existing agreements are initially unaffected by conflicts with Community law, the Member States must nevertheless take all appropriate measures to put an end to such conflicts. This may even require the denunciation of international agreements. (57) Member States cannot in principle invoke agreements concluded after accession as against Community law. (58)

78. A conflict between Community law and Member States' obligations under international law will, however, always give rise to problems and is likely to undermine the practical effectiveness of the relevant provisions of Community law and/or of international law. It is therefore sensible and dictated by the principle of cooperation between Community institutions and Member States that efforts be made to avoid conflicts, particularly in the interpretation of the relevant provisions. This applies in particular where the Community measure concerned - as in this case - seeks to achieve the harmonised implementation of Member States' obligations under international law.

79. Nevertheless, more extensive binding effects on the Community cannot arise from agreements of the Member States which the Community has not adopted. Therefore, the implementation objective of Directive 2005/35 also does not mean that Marpol 73/78 can be used as a criterion for determining the legality of that directive.

2. Compatibility of Article 4 of Directive 2005/35, in conjunction with Article 5(2) thereof, with the Convention on the Law of the Sea, in conjunction with Marpol 73/78

80. The first question concerns the compatibility of Article 5(2) of Directive 2005/35 with Marpol

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73/78.

81. Firstly, Article 4 of Directive 2005/35 lays down general standards of liability applicable to all, including, in particular, liability for serious negligence. However, in Article 5 it restricts this standard of liability with express reference to the relevant provisions of the Marpol 73/78 Convention relating to the vessel's owner, the master or the crew when acting under the master's responsibility. This restriction applies in specific areas of the sea, namely in straits, in the exclusive economic zone and on the high seas. The first question covers only these areas of the sea and not the territorial sea to be classified as territory of the coastal States, which I will deal with below in connection with the second and third questions. However, this question rightly also extends to the validity of Article 4, since any repeal of Article 5(2) in isolation would not safeguard the effectiveness of the Marpol regulations concerned but rather reduce it further.

82. Regulation 9 of Annex I and Regulation 5 of Annex II to Marpol 73/78 prohibit discharges. However, these prohibitions do not apply where the exceptions laid down respectively in Regulations 11 and 6 of the annexes apply. Under subparagraph (b)(ii) of each of these regulations, the prohibitions are not to apply to discharge resulting from damage to a ship or its equipment except if the owner or the master acted either with intent to cause damage, or recklessly and with knowledge that damage would probably result.

83. When the wording of these provisions is compared in isolation with Directive 2005/35, two essential differences appear. Firstly, under Marpol 73/78 the acts of persons other than the owner or master appear to be completely irrelevant in the case of discharge resulting from damage. Discharge would appear to be prohibited only where one of these two persons acted with intent or recklessly and with knowledge that damage would probably result. By contrast, under Article 4 of the directive anyone can in principle be liable in respect of a discharge. Secondly, the criterion of personal liability under Article 4 of the directive, namely intent, recklessness or serious negligence , does not, in terms of its wording, correspond with the Marpol 73/78 criterion.

a) Liability of persons other than the master and the owner

84. On the basis of an interpretation founded solely on its wording, the directive goes further than Marpol 73/78 when it provides that, in the event of damage, the acts of persons other than the master or owner are sufficient to activate the prohibition on discharge. It has been argued by some that it is incompatible with the Community's international obligations to provide for the liability of these other persons in respect of discharges.

85. It may, admittedly, be pointed out, as the Parliament does, that Marpol 73/78 is silent as regards other persons. However, that would merely rule out conflict with Marpol 73/78. The Community would still be bound by the provisions of the Convention on the Law of the Sea, which, in the sea areas under consideration here, permits in respect of all persons only rules which give effect to the standard of protection laid down in Marpol 73/78. Therefore, the Community would not be free to lay down rules on other cases in these areas at its own discretion but would rather be precluded from doing so.

86. However, as Denmark, France, the Council and the Commission in particular correctly point out, basing oneself strictly on the wording of Marpol 73/78 would lead to absurd results. Even discharges resulting from intentional damage to a ship or its equipment would be permitted as long as neither the master nor the owner acted with intent or recklessly.

87. It is thus necessary not only to interpret Marpol 73/78 in isolation on the basis of its wording, but also to take account of its objectives and its function within the framework of the Convention on the Law of the Sea. According to the fourth paragraph of the preamble thereto, the overarching objective of Marpol 73/78 is to achieve the complete elimination of intentional pollution and the

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minimisation of accidental pollution.

88. The exceptions under Regulation 11(b)(ii) of Annex I and Regulation 6(b)(ii) of Annex II to Marpol 73/78 are intended primarily to establish the standard of care to be met in order to avoid accidental pollution. If each State established its own standard of fault and these standards even applied cumulatively on the high seas, it would be difficult for shipping to assess its respective liability.

89. On the other hand, it is not possible to discern any objective of Marpol 73/78 which would require that, or even merely explain why, the master and owner alone should avoid accidental pollution. Although both these persons bear responsibility for the vessel as a whole, it cannot be ruled out in general that other persons will also bear responsibility and cause damage resulting in discharge.

90. The relevant provisions of the Convention on the Law of the Sea are also intended to facilitate effective protection of the marine environment. This is to be achieved on the basis of common international standards in order to make the requirements imposed on shipping predictable. It is not necessary to restrict liability to the master and owner in order to do so.

91. Moreover, the exclusion of all liability on the part of other persons would lead to a completely different result to that of the second sentence of Article III(4) of the International Convention of 29 November 1969 on Civil Liability for Oil Pollution Damage, (59) as amended by the 1992 Protocol. (60) Unlike Marpol 73/78, this provision expressly provides that in principle the owner alone bears civil liability and a number of other persons such as, for example, the crew, charterers or servants and agents, do not. These persons are, however, liable if they act with intent or recklessly and with the knowledge that damage would probably result.

92. This is demonstrated in two ways. Firstly, the exclusion of certain persons from liability for oil pollution must be assumed only where such exclusion is expressly laid down and, secondly, liability in the event of intentional or reckless acts in the knowledge that damage will probably occur is not restricted to the owner and the master.

93. Consequently, Regulation 11(b)(ii) of Annex I and Regulation 6(b)(ii) of Annex II must be construed as referring to the master and owner merely by way of example. Where, in exceptional circumstances, other persons also are responsible for discharges resulting from damage, the same conditions apply to them as apply to the master and the owner.

94. Therefore, Directive 2005/35 infringes neither Marpol 73/78 nor the Convention on the Law of the Sea by making persons other than the master and the owner liable for discharges resulting from damage.

b) Criteria relating to personal liability

95. The effect of Article 5(2) of Directive 2005/35, however, appears to be that persons other than the owner, the master or the crew when acting under the master's responsibility are not judged by whether they acted with intent to cause damage or recklessly and with knowledge that damage leading to discharge would probably result. Rather, their liability under Article 4 of the directive is determined by whether they caused a discharge with intent, recklessly or by serious negligence. In the view of the claimants and some Member States, this standard of liability is stricter than Marpol 73/78.

96. As has been shown, (61) the Convention on the Law of the Sea prohibits the Community from laying down in the sea areas concerned stricter standards of liability that those provided for in Marpol 73/78. This must apply in particular to persons other than the master and the owner. The latter have a particular responsibility to avoid damage to the vessel which could result in the discharge of polluting substances. If they are liable only for intent and recklessness in the knowledge

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that damage was probable, other persons could not be subject to stricter liability.

The term recklessly' in Article 4 of Directive 2005/35

97. Liability for reckless acts under Article 4 of Directive 2005/35 could be stricter than Marpol 73/78, since Article 4 makes no reference to knowledge that damage will probably result. Furthermore, the language versions of the directive do not tally as regards this term. In particular, at least the Greek, Maltese and Portuguese versions seem to speak of simple negligence, (62) that is to say, a lower form of fault than serious negligence. In addition, the terms used for recklessness in the respective legal systems are not always defined precisely. However, in spite of the differences in the language versions, Article 4 of Directive 2005/35 must be interpreted uniformly in all the Member States by reference to the purpose and general scheme of the rules concerned. (63)

98. Since Article 4 of Directive 2005/35 adopts the terminology used in Marpol 73/78, at least in the English, French and Spanish versions, that is to say, in the three Community languages in which Marpol 73/78 is binding, it must be concluded that the term recklessly' is intended to incorporate the standard of liability in Marpol 73/78 for unintentional acts.

99. This reading is also consistent with the requirement that provisions of secondary law must, so far as is possible, be interpreted in a manner that is consistent with international agreements concluded by the Community. (64) Where the directive uses different terms in other language versions, they must also be construed in this manner.

100. Under Marpol 73/78, liability for unintentional discharge is characterised by two features, that is to say, first, knowledge that damage would probably result and, second, recklessness. The requirement relating to knowledge makes it clear that the perpetrator must have been aware of the risks posed by his actions, as is generally the case where the standard of liability in regard to recklessness is applied in common-law jurisdictions. It is not sufficient that he ought to have been aware of those risks. (65)

101. Consequently, the term recklessly' in Article 4 of Directive 2005/35 must be construed as meaning that, for recklessness to exist, there must be knowledge that damage would probably result. Interpreted thus, it is not contrary to Marpol 73/78 or to the Convention on the Law of the Sea.

The concept of serious negligence' in Article 4 of Directive 2005/35

102. There could, however, be conflict with Marpol 73/78 in so far as Article 4 of Directive 2005/35 provides for liability in respect of serious negligence.

103. The concept of serious negligence' may take on significantly different meanings within the legal systems of the various Member States. (66) I am unaware of a definition in Community law. However, the Court has developed criteria for application of the term obvious negligence' within the meaning of the second indent of Article 239(1) of the Customs Code. (67) These are the complexity of the provisions non-compliance with which has resulted in the customs debt being incurred, and the professional experience of, and care taken by, the trader. (68)

104. The experience of the trader is a subjective criterion, whilst care describes the criterion that all traders must satisfy. (69) Therefore, serious negligence describes a particularly grave breach of the duties of care. Knowledge that damage will probably result, however, is not essential for there to be serious negligence. Interpreted thus, this standard of liability would be stricter than Marpol 73/78.

105. It must be assumed that this interpretation, in the sense of a strict criterion, is consistent with the legislature's objectives in adopting Directive 2005/35. Since the legislature introduced serious negligence in addition to the two standards of liability referred to in Marpol 73/78, the intention was therefore to create a further basis for liability. (70)

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106. The establishment of a stricter criterion is also suggested by the exception from liability laid down in Article 5(2) of Directive 2005/35, which refers to Marpol 73/78. This exception can have practical effect only if a different and stricter standard of liability than that laid down in Marpol 73/78 applies in principle to the categories of persons covered.

107. However, provisions of secondary Community law must, so far as possible, be interpreted in a manner that is consistent with the international agreements concluded by the Community. Under Article 300(7) EC, those agreements are binding on the institutions. Secondary law may not infringe them. They have primacy over secondary law. (71)

108. Accordingly, interpretation in conformity with international law must be given priority over other methods of interpretation. This requirement is limited only by rules and principles which take precedence over the Community's obligations under international law. Such rules and principles include, for example, general legal principles and in particular the principle of legal certainty. Therefore, an interpretation contra legem is not possible. (72)

109. In this sense the phrase serious negligence' can be interpreted restrictively (73) as not going beyond Marpol 73/78. As a survey undertaken by the Research and Documentation Service of the Court shows, recklessness in the knowledge that damage will probably result, as required by Marpol 73/78, is treated in many legal systems as a form of the serious negligence which Directive 2005/35 lays down as a standard of liability. In Germany one would probably speak of bewusste grobe Fahrlässigkeit ' (deliberate serious negligence). (74) Therefore, the particularly significant breach of the duty of care necessary for there to be serious negligence can, for the purposes of Regulation 11(b)(ii) of Annex I and Regulation 6(b)(ii) of Annex II to Marpol 73/78, be limited to recklessness in the knowledge that damage will probably result.

110. This interpretation would not fully exhaust the wording of the directive since knowledge that damage will probably result is not normally necessary for serious negligence. However, it would in any event remain within the bounds of the wording. At the same time, the scope of serious negligence would be much more precisely defined since circumstances beyond the control of the person causing the damage would have significantly less relevance in comparison with the subjective circumstance of knowledge.

111. Interpreted thus, as required by the Community's obligations under international law, Article 4 of Directive 2005/35, in conjunction with Article 5(2) thereof, does not go beyond Marpol 73/78 and is therefore also not contrary to the Convention on the Law of the Sea when applied to acts in straits, in the exclusive economic zone and on the high seas.

112. Consequently, examination of the first question referred to the Court has revealed no factor of such a kind as to bring into question the validity of provisions of Directive 2005/35.

C - Second and third questions - liability in the territorial sea

113. The second and third questions concern the standard of liability of serious negligence in the territorial sea and should therefore be dealt with together.

114. They are based on the fact that, under Articles 4 and 5 of Directive 2005/35, in the territorial sea all persons, that is to say, also the owner, the master and the crew when acting under the master's responsibility, are subject to the standard of liability of serious negligence. The exception provided for in Article 5(2) of Directive 2005/35 applies only to the areas referred to in Article 3(1)(c), (d) and (e), that is to say, to straits, the exclusive economic zone and the high seas, but not to the territorial sea, which is referred to in subparagraph (b).

115. These questions would be resolved if the concept of serious negligence had, in respect of events in the territorial sea, the same content as it does in respect of events in straits, in the

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exclusive economic zone and on the high seas. Were that the case, a discharge resulting from serious negligence would, in accordance with the foregoing considerations, presuppose recklessness in the knowledge that damage was probable. This interpretation would ensure a uniform interpretation of the concept of serious negligence within Directive 2005/35 and at the same time rule out any conflict with Marpol 73/78.

116. However, the narrow interpretation of the concept of serious negligence outside the territorial sea is merely the result of efforts to avoid a breach of the Community's obligations under international law. Against that, the wording, the legislative context and aspects of the legislative procedure suggest that serious negligence must be construed more broadly, (75) that is to say, as a serious breach of duties of care without, however, any need for knowledge that damage is probable.

117. Consequently, the transposition of this narrow interpretation of the concept of serious negligence to the territorial sea can be justified only if it is required by the Community's obligations under international law.

118. Article 2 of the Convention on the Law of the Sea states that the sovereignty of a coastal State extends to the territorial sea (paragraph 1) and is to be exercised subject to the convention and to other rules of international law (paragraph 3). Under Article 211(4), coastal States may, in the exercise of their sovereignty within their territorial sea, adopt laws and regulations for the prevention, reduction and control of marine pollution from foreign vessels. This applies expressly also to vessels exercising the right of innocent passage. Such laws and regulations may not, in accordance with Part II, section 3, of the Convention on the Law of the Sea, hamper innocent passage of foreign vessels. By contrast to the situation outside the territorial sea, there is no reference to generally accepted international standards.

119. The claimants, Malta, Greece and Cyprus take the view that liability for serious negligence infringes the right of innocent passage. They rely in particular on Article 19(2)(h) of the Convention on the Law of the Sea. Under that provision, passage is no longer innocent where a vessel causes wilful and serious pollution contrary to the convention. They contend that this accordingly rules out liability for serious negligence.

120. However, this argument overlooks the fact that rules on environmental protection are also permitted in connection with innocent passage. As, for example, Denmark and Estonia point out, Article 21(1)(f) of the Convention on the Law of the Sea expressly makes clear that the coastal State may adopt laws and regulations, in conformity with the provisions of the convention and other rules of international law, relating to innocent passage through the territorial sea, in respect of the preservation of the environment of the coastal State and the prevention, reduction and control of pollution thereof. Under Article 21(4), foreign ships must comply with these laws during innocent passage. Here too no provision is made in principle for the binding effect of generally accepted international standards. Under Article 21(2), such binding effect applies only in regard to the design, construction, manning or equipment of foreign ships.

121. It is not necessary to examine here to what point this rule-making power of the coastal States extends. It is possible that this power does not countenance environmental-protection provisions where they would prevent passage completely. Restrictions on the sovereignty of coastal States could also affect the enforcement of penalties on vessels at sea. Article 4 of Directive 2005/35, however, does not go that far. In particular, passage is not prohibited and no particular enforcement measures against vessels en route are required. Rather, the Member States are merely to prohibit certain acts which are not necessary for passage. In this respect the relatively low standard of care laid down in Marpol 73/78 is raised only slightly. That must be possible as a rule on prevention and reduction of environmental pollution within the meaning of Article 21(1)(f) of the Convention on the Law of the Sea.

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122. Contrary to the submissions of Cyprus, the reference to other rules of international law in Article 2(3) and Article 21(1)(f) of the Convention on the Law of the Sea does not mean that the Community is bound by Marpol 73/78 in the territorial sea. Since the Community is not party to that convention and the Convention on the Law of the Sea does not refer to Marpol 73/78 in respect of the territorial sea, it does not contain any separate rule of international law in respect of the Community. (76)

123. Consequently, Estonia, Denmark, Spain, France, Sweden, the United Kingdom, the Parliament, the Council and the Commission are correct in their respective submissions that the Convention on the Law of the Sea does not restrict the power to make laws on environmental protection within the territorial sea, by contrast to the sea areas examined in the response to the first question, to the implementation of internationally accepted standards, and in particular not to the implementation of Marpol 73/78. This has to be the conclusion reached because the territorial sea is deemed to be part of the territory of the coastal State and the latter therefore does not require to be authorised by the Convention on the Law of the Sea to make rules.

124. The claimants, Malta, Greece and Cyprus further submit that Marpol 73/78 precludes the contracting States from adopting stricter provisions in the territorial sea also. They claim that Marpol 73/78 constitutes a definitive compromise with regard to the prosecution of environmental pollution resulting from discharges from ships. Therefore, these parties to the proceedings clearly conclude that Marpol 73/78 permits discharges that are not prohibited by the convention.

125. In my view, (77) however, this submission cannot bring into question the validity of Directive 2005/35 because under that directive Marpol 73/78 is not binding on the Community unless reference is made to it in the Convention on the Law of the Sea. Only in the alternative, should the Court reach a different conclusion, for example on the basis of the judgment in Neth erlands v Parliament and Council , I will therefore examine whether Marpol 73/78 requires that the restrictive interpretation for events outside the territorial sea should also be applied in regard to the territorial sea.

126. The wording of Marpol 73/78 does not indicate that it seeks to establish definitive rules on prohibited discharges from ships also within the territorial sea. Marpol 73/78 requires that certain discharges be prohibited, investigated and prosecuted. The relevant provisions are to be found in Articles 1, 4, and 6 of the Convention and in Annex I, Regulation 9, and Annex II, Regulation 5. As is submitted in the order for reference and also by the claimants, Malta and Cyprus, under Article 14(1) the contracting States are bound by Annexes I and II in their entirety.

127. These provisions define a minimum standard for provisions to protect against discharges of polluting substances from ships into the sea which is binding on the States that are parties to Marpol 73/78. As has already been shown, by reason of the interaction with provisions of the Convention on the Law of the Sea this minimum standard is the only permitted standard of protection in the exclusive economic zone, in straits and on the high seas.

128. However, among the provisions of Marpol 73/78 referred to there is only one, that is to say, the prohibition on the discharge of oil set out in Regulation 9 of Annex I, that could possibly be construed as express authorisation for certain forms of discharge. That is because that provision states that discharges are prohibited except when all the following conditions are satisfied'. These conditions concern the discharge of small amounts of oil during navigation. Nor are they prohibited by Directive 2005/35 since Article 5(1) incorporates this exception in full. Therefore, in this case it is not necessary to decide whether Marpol 73/78 actually allows such discharges.

129. By contrast, the standard of liability laid down by Regulation 11(b)(ii) of Annex I to Marpol 73/78 has, in terms of regulation, an entirely different function from the exception contained in Regulation 9. Regulation 9 does not apply unless the owner or the master acted with intent to cause

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damage or recklessly and with knowledge that damage would probably result. The same applies with regard to the interaction between Regulation 5 of Annex II and Regulation 6(b)(ii). Consequently, in these circumstances Marpol 73/78 contains no rules on discharge caused by damage. The absence of rules cannot normally be construed as authorisation.

130. Thus, whilst no authorisation can be discerned, there is evidence in the wording of Marpol 73/78 that stricter rules are to be permitted under certain circumstances. In particular, Article 9(2) states expressly that Marpol 73/78 is not to prejudice the jurisdiction of coastal States as laid down within the framework of the Convention on the Law of the Sea. As already shown, the Convention on the Law of the Sea does, however, allow stricter protective provisions in the territorial sea.

131. Furthermore, the second paragraph in the preamble to Marpol 73/78 recognises that, inter alia, negligent and accidental release constitutes a serious source of pollution. It would therefore be surprising if Marpol 73/78 were to exempt these forms of discharge under all circumstances.

132. This is not precluded by the universal purport within the meaning of the fifth paragraph in the preamble, which is highlighted by the claimants. This relates only to the substances covered, namely to supplementing the rules on oil pollution with rules on the discharge of chemicals. On the other hand, this paragraph does not make it clear whether the standards of liability are to apply in a definitive and universal manner.

133. It would therefore be going too far to claim, as Greece does, that stricter protective provisions are possible only where Marpol 73/78 makes express provision for them. Even though the contracting States were unable to agree on such stricter rules, as Greece and the claimants submit, it by no means follows that in Marpol 73/78 they agreed on a definitive standard of protection for all areas of the sea.

134. Although, according to the claimants' submissions, a proposal by Canada to lay down the power to adopt stricter provisions in Marpol 73/78 was rejected at the time, the Commission correctly points out that the material on the history of Marpol 73/78 submitted by the claimants indicates instead that the issue of stricter standards of protection should, in the view of many of the parties to the negotiations, be governed by the Convention on the Law of the Sea. (78)

135. In so far as stricter standards were discussed, during the negotiations the States were essentially concerned with ensuring that the requirements on vessels laid down in Marpol 73/78 were not unilaterally rendered more stringent. This is at present ensured, with regard to the territorial sea, by a reference in Article 21(2) of the Convention on the Law of the Sea to international shipping standards, that is to say, in particular Marpol 73/78. (79) By contrast, there is precisely no such reference with regard to the standards of liability.

136. Therefore, the background to Marpol 73/78 also suggests that it did not lay down definitive rules. It must instead be concluded that the coastal States' powers derive from the Convention on the Law of the Sea, which does not make Marpol 73/78 binding in respect of the territorial sea.

137. Consequently, in the area of the territorial sea neither the Convention on the Law of the Sea nor Marpol 73/78 require a narrow interpretation of the concept of serious negligence in conformity with the standard of liability under Regulation 11(b)(ii) of Annex I and Regulation 6(b)(ii) of Annex II to Marpol 73/78.

138. In summary, it must therefore be stated that examination of the second and third questions referred to the Court has disclosed no factor of such a kind as to bring into question the validity of provisions of Directive 2005/35.

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D - Fourth question - the principle of legal certainty

139. By the fourth question, the High Court wishes to find out whether use of the concept of serious negligence in Article 4 of Directive 2005/35 infringes the principle of legal certainty. In this respect it has particularly in mind the danger that the Member States will not implement and apply this concept in a uniform manner. In its view, further clarifications are necessary to guide the practice of the Member States.

140. None of the parties appears to object to the concept of serious negligence where it is construed - as advocated here in respect of the high seas, the straits and the exclusive economic zone - in conformity with Marpol 73/78 as recklessness in the knowledge that damage will probably result. Nor is it likely that the referring court would have any objections in this regard since the meaning of serious negligence is specified clearly by this interpretation.

141. This position is noteworthy since even the terminology of Marpol 73/78 does not ensure uniform application within the Community. In fact, a survey undertaken by the Research and Documentation Service of the Court shows that the notion of recklessness does not exist in all legal systems of the Community. It is sometimes implemented as serious negligence. The German implementation of Marpol 73/78 uses the standard of simple negligence even though the standard of recklessness does exist in German criminal law. In comparison with this disparate situation Directive 2005/35 contributes to the uniform application of Marpol 73/78 in the Community in accordance with recital (3) in its preamble.

142. However, here the only issue can be whether the concept of serious negligence in relation to events in the territorial sea , where the interpretation of that concept is not restricted to the standard of liability laid down in Marpol 73/78, is compatible with the principle of legal certainty.

143. The principle of legal certainty requires, in particular, that rules should be clear and precise, so that individuals may ascertain unequivocally what their rights and obligations are and may take steps accordingly. (80) In connection with criminal offences and penalties it is given concrete expression by the principle of legality (nullum crimen, nulla poena sine lege) which is laid down in particular in Article 7(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). (81) This principle implies that legislation must define clearly offences and the penalties which they attract. That condition is met in the case where the individual concerned is in a position, on the basis of the wording of the relevant provision and with the help of the interpretative assistance given by the courts, to know which acts or omissions will make him criminally liable. (82)

144. However, Directive 2005/35 does not have to meet this criterion since it cannot, as a directive, contain directly effective penal provisions. (83) Such provisions must be adopted by the Member States. Where the provisions of the directive are not sufficiently precise to satisfy the requirements relating to legality, it is for the national legislature to rectify the situation at the time of implementation in the light of the circumstances of the national legal system. (84) It is not the validity of the directive but at most its harmonising effect that is thereby brought into question.

145. However, even if it were desired to apply the principle of legality to provisions of a directive that were not directly applicable, Article 4 of Directive 2005/35 would satisfy the requirements of that principle. It requires that the standard of liability of serious negligence be laid down and applied in the territorial sea. It is not disputed that at least the notion of negligence exists in the various legal systems and can, in different forms, also form a basis for criminal liability. The breach of duties of care, which is also highlighted by the claimants, is the decisive factor. As the Court has ruled with regard to obvious negligence, duties of care must be established on

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two bases: firstly, on the basis of an objective criterion which applies to all persons of the category concerned and, secondly, on the basis of what can be expected of the person responsible for the action, in particular with regard to his experience. (85)

146. Great prudence certainly has to be exercised when assuming such duties of care in relation to maritime transport and in particular to the transport of dangerous substances. In principle society accepts the risks associated with lawful navigation. Therefore, where duties of care are not expressly laid down in special bodies of rules, they must be accepted as unanimously as possible within the circles concerned (lege artis) before they can have criminal implications. This applies especially in connection with Article 4 of Directive 2005/35 since the standard of liability of serious negligence used therein requires a greater degree of misfeasance than does simple negligence.

147. Therefore, merely reading the directive is not sufficient to identify the duties of care to be met. That is, however, not necessary to satisfy the requirement of foreseeability. This notion depends to a considerable degree on the content of the provisions in issue, the field they are designed to cover and the number and status of those to whom they are addressed. The requirement of foreseeability may still be satisfied even if the person concerned has to take expert advice to assess, to a degree that is reasonable in the circumstances, the consequences which a given activity may entail. This is particularly true in relation to persons carrying on a professional activity, for example those working in professional maritime transport, who are used to having to proceed with a high degree of caution when pursuing their occupation. They can on this account be expected to exercise special care in assessing the risks that such an activity entails. (86)

148. Although it must consequently be concluded that ultimately only the courts are able to define precisely duties of care, this is none the less compatible with Article 7 of the ECHR. That provision cannot be read as outlawing the gradual clarification of the rules on criminal liability and the ongoing development of criminal law through judicial interpretation on a case-by-case basis, provided that the resultant development is consistent with the essence of the offence and is sufficiently foreseeable. (87) I know of no case in which the European Court of Human Rights has objected to the application of the terms negligence' or serious negligence' in criminal law.

149. Moreover, seamen can be expected not to stretch their conduct to the limits of what is permitted under criminal law but rather to exercise greater care than is required under that law. This is indicated by the risks to body, life, ship and the cargo entrusted to them, which are associated with seafaring and were highlighted at the hearing. Furthermore, in the case of damage caused by oil pollution at least, there are risks as regards largely no-fault civil liability under the International Convention on Civil Liability for Oil Pollution. (88)

150. In so far as the referring court is concerned about non-uniform implementation and application in the Member States, it should first be borne in mind that under Article 1(2) of Directive 2005/35 the Member States are free to adopt more stringent protective measures in conformity with international law. Consequently, the directive does not lay down a definitive, uniform standard but merely minimum requirements which by their nature do not call for uniform transposition in the Member States.

151. Furthermore, the present case helps define more specifically the concept of serious negligence contained in Article 4 of Directive 2005/35. If the Court concurs with my view, it will be made clear in particular that this concept can have a different meaning in the territorial sea to that which it has in other sea areas, in respect of which it must be interpreted in line with Marpol 73/78.

152. Under Article 234 EC, the courts of the Member States may also bring a matter before the Court where they are uncertain in other respects. Under certain circumstances, the courts of last instance are actually required to do so, for example where the case-law of the higher national courts

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is inconsistent. (89)

153. This judicial safeguarding of the uniform implementation and application of Directive 2005/35 is complemented by the Commission's duty under Article 211 EC to ensure compliance with secondary law and, where necessary, to bring Treaty-infringement proceedings under Article 226 EC.

154. Finally, the argument put forward by the claimants and Greece that liability for serious negligence in the case of grave accidents could be open to abuse does not demonstrate that the principle of legal certainty or of the legality of criminal law has been infringed. Abuse can never be ruled out with complete certainty. In particular, the more recent examples from France and Spain cited as evidence demonstrate that it does not take Directive 2005/35 to subject seamen to prosecution which they consider to be excessive.

155. In so far as the claimants allege a defective statement of reasons, no examination is necessary since these doubts have already been rejected by the referring court. (90) Since Directive 2005/35 is a measure having general application and the preamble may therefore be limited to indicating the general situation which led to its adoption, on the one hand, and the general objectives which it is intended to achieve, (91) on the other, a defective statement of reasons would also appear to be rather unlikely in this case.

156. Therefore, examination of the fourth question referred to the Court has also disclosed no factor of such a kind as to bring into question the validity of provisions of Directive 2005/35.

V - Conclusion

157. I accordingly propose that the Court give the following answer to the questions referred to it for a preliminary ruling:

Examination of the questions referred has disclosed no factor of such a kind as to bring into question the validity of Directive 2005/35/EC of the European Parliament and of the Council of 7 September 2005 on shipsource pollution and on the introduction of penalties for infringements.

(1) .

(2) - OJ 2005 L 255, p. 11.

(3) - Third United Nations Conference on the Law of the Sea, Official Documents, vol. XVII, 1984, Doc. A/Conf.62/122, pp. 157-231.

(4) - Council Decision 98/392/EC of 23 March 1998 concerning the conclusion by the European Community of the United Nations Convention of 10 December 1982 on the Law of the Sea and the Agreement of 28 July 1994 relating to the implementation of Part XI thereof (OJ 1998 L 179, p. 1).

(5) - UN Treaty Series, vol. 1341, No 22484.

(6) - According to the information provided by the IMO at http:www.imo.org/Conventions/mainframe.asp?topic_id=248, visited on 2 May 2007. Annex VI has yet to be ratified by Austria, the Czech Republic, Ireland, Hungary, Malta, Portugal and Slovakia, and Malta has also yet to ratify Annex IV.

(7) - The annex was supplemented and restructured by Resolution MEPC.117(52) of 15 October 2004, which has been in force since 1 January 2007. Regulations 9, 10 and 11 under consideration in the present case remained substantively unchanged but are now laid down in Regulations 15, 34 and 4. For the sake of simplicity, the previous numbering is used.

(8) - The authentic language versions use the following terms: English: recklessly; French: témérairement (foolhardily, rashly); Spanish: imprudencia temeraria (foolhardy imprudence or thoughtlessness); and Russian: (presumptuously, arrogantly, impudently). The official German translation of the

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Marpol Convention, Annex to Bundesgesetzblatt 1996, II, p. 18, and also the reproduction of the relevant Marpol provisions in the annex to the directive translate this, in my view incorrectly, as fahrlässig '. To me a more correct translation would be leichtfertig ', as in, for example, Article 25 of the Convention for the Unification of Certain Rules relating to International Carriage by Air, signed at Warsaw on 12 October 1929 (First convention for the unification of civil aviation law) (Reichsgesetzblatt 1933, II, p. 1039), as amended by the Protocol to Amend the Convention for the Unification of Certain Rules relating to International Carriage by Air, done at The Hague on 28 September 1955 (Bundesgesetzblatt 1958, II, p. 292), and Article 4 of the Convention on Limitation of Liability for Maritime Claims, done in London on 19 November 1976 (Bundesgesetzblatt 1986, II, p. 786), which are couched in identical terms. See also Paragraph 435 of the Handelsgesetzbuch (German Commercial Code).

(9) - The annex was supplemented and restructured by Resolution MEPC.118(52) of 15 October 2004, which has been in force since 1 January 2007. Regulation 6 under consideration in the present case is now Regulation 3 and establishes an exception to all the requirements on a discharge of the substances covered by Annex II. For the sake of simplicity, the previous wording and numbering are used.

(10) - See footnote 8.

(11) - Case C491/01 British American Tobacco (Investments) and Imperial Tobacco [2002] ECR I11453.

(12) - Joined Cases C295/04 to C298/04 Manfredi and Others [2006] ECR I6619, paragraph 27.

(13) - See, inter alia, Case C415/93 Bosman [1995] ECR I4921, paragraph 61, and Case C344/04 IATA and ELFAA [2006] ECR I403, paragraph 24.

(14) - See Bosman , paragraph 59, and IATA and ELFAA , paragraph 24, both cited in footnote 13.

(15) - IATA and ELFAA , cited in footnote 13, paragraph 24.

(16) - Cited in footnote 11.

(17) - Case C459/03 Commission v Ireland (MOX plant ')[2006] ECR I4635, paragraph 83.

(18) - See Case C431/05 Merck Genéricos - Produtos Farmacêuticos [2007] ECR I0000, paragraph 33.

(19) - Commission v Ireland (MOX plant '), cited in footnote 17, paragraph 108.

(20) - Case C379/92 Peralta [1994] ECR I3453, paragraph 16.

(21) - Case C377/98 Netherlands v Parliament and Council [2001] ECR I7079, paragraph 52.

(22) - Case C286/90 Poulsen and Diva Navigation [1992] ECR I6019.

(23) - Poulsen and Diva Navigation , cited in footnote 22, paragraphs 9 and 10. As regards the binding effect of customary international law, see also Case C162/96 Racke [1998] ECR I3655, paragraph 45.

(24) - Peralta , cited in footnote 20.

(25) - Joined Cases 21/72, 22/72, 23/72 and 24/72 International Fruit Company and Others [1972] ECR 1219, paragraph 10 et seq.

(26) - See the Opinion delivered by Advocate General Mazak on 28 June 2007 in Case C440/05 Commission v Council [2007] ECR I0000, point 65.

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(27) - See Case 22/70 Commission v Council (AETR ') [1971] ECR 263, paragraphs 17 and 18, and Opinion 1/03 (Lugano Convention) [2006] ECR I1145, paragraph 114 et seq.

(28) - Cited in footnote 20.

(29) - Netherlands v Parliament and Council , cited in footnote 21, paragraph 52.

(30) - Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions (OJ 1998 L 213, p. 13).

(31) - See recital (9) in the preamble to Directive 98/44.

(32) - Commission v Ireland , cited in footnote 17, paragraph 82; see also IATA and ELFAA , cited in footnote 13, paragraph 36, and Merck , cited in footnote 18, paragraph 31.

(33) - Case C61/94 Commission v Germany [1996] ECR I3989, paragraph 52; Case C286/02 Bellio F.lli [2004] ECR I3465, paragraph 33; and IATA and ELFAA , cited in footnote 13, paragraph 35.

(34) - Case 12/86 Demirel [1987] ECR 3719, paragraph 14; Racke , cited in footnote 23, paragraph 31; and IATA and ELFAA , cited in footnote 13, paragraph 39.

(35) - Poulsen and Diva Navigation , cited in footnote 22, paragraphs 13 and 15.

(36) - Poulsen and Diva Navigation , cited in footnote 22, paragraph 25.

(37) - Case C410/03 Commission v Italy [2005] ECR I3507, paragraphs 53 and 54.

(38) - Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1), as amended by Council Directive 2002/93/EC of 3 December 2002 (OJ 2002 L 331, p. 27).

(39) - Case C111/05 Aktiebolaget NN [2007] ECR I2697, paragraph 57 et seq.

(40) - Case 104/81 Kupferberg [1982] ECR 3641, paragraph 18.

(41) - See Kupferberg , cited in footnote 40, paragraph 20, on special institutional frameworks for the implementation of an agreement.

(42) - Aktiebolaget NN , cited in footnote 39, paragraph 59.

(43) - However, this competence appears not yet or rarely to be utilised fully in practice between States and whether it is recognised as international customary law would appear to be a matter of dispute. The argument that it is so recognised is supported by Patricia Birnie and Alan Boyle, International Law & the Environment , 2 nd edition, Oxford 2002, 376. For the opposite view, see Farkhanda Zia-Mansoor, International Regime and the EU Developments for Preventing and Controlling Vessel-Source Oil Pollution', European Environmental Law Review 2005, 165 (170) and Alan Khee-Jin Tan, Vessel-Source Marine Pollution , Cambridge, 2006, p. 221.

(44) - See Aktiebolaget NN , cited in footnote 39, paragraph 59.

(45) - See, for example, Case C210/03 Swedish Match [2004] ECR I11893, paragraph 27 et seq., and Joined Cases C453/03, C11/04, C12/04 and C194/04 ABNA and Others [2005] ECR I10423, paragraph 52 et seq.

(46) - Cited in footnote 22, paragraph 25.

(47) - Naturally, rules may also be justified by other international standards. In this case, however, Marpol 73/78 alone is relevant.

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(48) - In the German version this provision is incomplete and also barely comprehensible as the first line of the definition is missing.

(49) - In the German version of the directive this is incorrectly designated recital (14) since the actual recital (14) on comitology is missing in the German version.

(50) - International Fruit Company , cited in footnote 25, paragraph 21 et seq.; Case 266/81 SIOT [1983] ECR 731, paragraph 28; Case C280/93 Germany v Council [1994] ECR I4973, paragraph 109; Case C149/96 Portugal v Council [1999] ECR I8395, paragraph 47; Joined Cases C27/00 and C122/00 Omega Air and Others [2002] ECR I2569, paragraph 93; Case C76/00 P Petrotub and Republica v Council [2003] ECR I79, paragraph 53; Case C93/02 P Biret International v Council [2003] ECR I10497, paragraph 52; Case C377/02 Van Parys [2005] ECR I1465, paragraph 39; and Case C351/04 Ikea Wholesale [2007] ECR I0000, paragraph 29.

(51) - Case 70/87 Fediol v Commission [1989] ECR 1781, paragraph 19 et seq.; Case C69/89 Nakajima v Council [1991] ECR I2069, paragraph 31; and Germany v Council , paragraph 111, Portugal v Council , paragraph 49, Biret International , paragraph 53, and Van Parys , paragraph 40, all cited in footnote 50.

(52) - International Fruit Company , cited in footnote 25, paragraphs 10 and 13 et seq. Today this binding effect arises from Article 300(7) EC, since the Community has acceded to the WTO Agreements.

(53) - Netherlands v Parliament and Council , cited in footnote 21, paragraphs 61 and 62.

(54) - Netherlands v Parliament and Council , cited in footnote 21, paragraphs 51 and 52.

(55) - Netherlands v Parliament and Council , cited in footnote 21, paragraphs 55 and 56. See Article 1(2) of Directive 98/44.

(56) - Netherlands v Parliament and Council , cited in footnote 21, paragraphs 51 and 52.

(57) - Case C84/98 Commission v Portugal [2000] ECR I5215, paragraph 58.

(58) - Case C466/98 Commission v United Kingdom (open skies ') [2002] ECR I9427, paragraphs 26 and 27. This applies at least where the relevant Community powers already existed at the time the agreement was concluded.

(59) - German version in the German Bundesgesetzblatt 1975, II, p. 305.

(60) - The Protocol is printed in OJ 2004 L 78, p. 32. A complete version of the convention is to be found at, for example, http:www.iopcfunds.org/npdf/Conventions%20English.pdf.

(61) - See point 60 et seq. above.

(62) - Greek: , Maltese: b'mod imprudenti, Portuguese: com mera culpa.

(63) - See, for example, Case 29/69 Stauder [1969] ECR 419, paragraph 3; Case C300/05 ZVK [2006] ECR I11169, paragraph 16; and Case C56/06 Euro Tex [2007] ECR I0000, paragraph 27.

(64) - Commission v Germany , cited in footnote 33, paragraph 52; Case C341/95 Bettati [1998] ECR I4355, paragraph 20; Bellio F.lli , cited in footnote 33, paragraph 33; and Case C306/05 SGAE [2006] I11519, paragraph 35.

(65) - However, this does not rule out the possibility of deducing the perpetrator's knowledge from objective circumstances indicating that he was aware of the risk.

(66) - Opinion of Advocate General Léger in Case C173/03 Traghetti del Mediterraneo [2006] ECR I5177, point 100.

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(67) - Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1).

(68) - Case C48/98 Söhl & Söhlke [1999] ECR I7877, paragraph 56.

(69) - See the application in Case C156/00 Netherlands v Commission [2003] ECR I2527, paragraph 99.

(70) - As regards the territorial sea, this is evident from the preamble to Common position (EC) No 3/2005 adopted by the Council on 7 October 2004 with a view to the adoption of Directive 2005/..../EC of the European Parliament and of the Council of... on ship-source pollution and on the introduction of sanctions for infringements, OJ 2005 C 25 E, p. 29 (at p. 39).

(71) - Commission v Germany , cited in footnote 33, paragraph 52, and Bellio F.lli , cited in footnote 33, paragraph 33.

(72) - See Case C105/03 Pupino [2005] ECR I5285, paragraphs 44 and 47, on interpretation in conformity with framework decisions, and Case C212/04 Adeneler and Others [2006] ECR I6057, paragraph 110, on interpretation in conformity with a directive.

(73) - As regards restrictive interpretation in conformity with fundamental rights, see Case C540/03 Parliament v Council (family reunification ') [2006] ECR I5769, in particular paragraph 97 et seq.

(74) - Wolfram Gass, in: Ebenroth/Boujong/Joost, Handelsgesetzbuch , 1st edition 2001, º 435, paragraph 5.

(75) - See point 103 et seq. above.

(76) - See point 37 et seq. above.

(77) - See point 71 et seq. above.

(78) - See also Tan, cited in footnote 43 above, p. 184 et seq.

(79) - Moreover, a joint statement by various Member States in respect of a case before the US Supreme Court, to which the claimants refer, related to stricter requirements on ships and their crew but not to a stricter standard of liability (Annex 16 to the claimants' written observations). This case concerned stricter rules of the State of Washington (see the Petition for a Writ of Certiorari of the United States in Case No 98-1701, United States of America v Gary Locke and Others , http:www.usdoj.gov/osg/briefs/1998/2pet/7pet/98-1701.pet.aa.pdf, p. 9). However, highlighting the need for uniform standards for ships and crews in that statement is not inconsistent with advocating stricter standards of liability.

(80) - Case 169/80 Gondrand Frères and Garancini [1981] ECR 1931, paragraph 17; Case C143/93 Van Es Douane Agenten [1996] ECR I431, paragraph 27; Case C110/03 Belgium v Commission [2005] ECR I2801, paragraph 30; and IATA and ELFAA , cited in footnote 13, paragraph 68.

(81) - See also Case C303/05 Advocaten voor de Wereld [2007] ECR I0000, paragraph 49, with reference to the judgments in Joined Cases C74/95 and C129/95 X [1996] ECR I6609, paragraph 25, and Joined Cases C189/02 P, C202/02 P, C205/02 P to C208/02 P and C213/02 P Dansk Rørindustri and Others v Commission [2005] ECR I5425, paragraphs 215 to 219.

(82) - Advocaten voor de Wereld , cited in footnote 81, paragraph 50, with reference to the European Court of Human Rights judgment of 22 June 2000 in Coeme and Others v Belgium , Reports 2000VII, p. 1, º 145. See also the European Court of Human Rights judgments of 29 March 2006 in Achour v France , º 41, and of 15 November 1996 in Cantoni v France , Reports 1996V, p. 1627, º 29.

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(83) - See in that regard the judgment of the Court of Justice in X , cited above in footnote 81, paragraphs 24 and 25, with reference to the judgments of the European Court of Human Rights of 25 May 1993 in Kokkinakis v Greece , Series A No 260-A, º 52, and of 22 November 1995 in S.W. v United Kingdom and C.R. v United Kingdom , Series A No 335B, º 35, and No 335C, º 33. See also the judgments of the Court of Justice in Case 63/83 Kirk [1984] ECR 2689, paragraph 22, Case 80/86 Kolpinghuis Nijmegen [1987] ECR 3969, paragraph 13, Case C168/95 Arcaro [1996] ECR I4705, paragraph 42, Case C60/02 Criminal proceedings against X [2004] ECR I651, paragraph 61 et seq.; and Dansk Rørindustri and Others v Commission , cited in footnote 81, paragraph 221. See also in detail in that regard my Opinions in Case C457/02 Niselli [2004] ECR I10853, point 53 et seq., and in Joined Cases C387/02, C-391/02 and C403/02 Berlusconi [2004] ECR I3565, point 140 et seq.

(84) - The obvious course of action with regard to liability outside the territorial sea would be to make direct use of the wording in Marpol 73/78 rather than of the unclear wording of Article 4 of Directive 2005/35.

(85) - See point 103 above.

(86) - Dansk Rørindustri and Others v Commission , cited in footnote 81, paragraph 219, with reference to the European Court of Human Rights judgment in Cantoni , cited in footnote 82, º 35.

(87) - Judgments of the European Court of Human Rights in S.W. , cited in footnote 83, º 36, and C.R., cited in footnote 83, º 34, Streletz, Keßler and Krenz v Germany , 22 March 2001, Reports 2001II, º 50, and Radio France and Others v France , 30 March 2004, Reports 2004-II, º 20.

(88) - See point 91 above.

(89) - Case C495/03 Intermodal Transports [2005] ECR I8151, paragraphs 38 and 39, with further references.

(90) - Case C408/95 Eurotunnel and Others [1997] ECR I6315, paragraphs 33 and 34.

(91) - IATA and ELFAA , cited in footnote 13, paragraph 67.

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AUTLANG	German
NATIONA	United Kingdom
PROCEDU	Reference for a preliminary ruling
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Action brought on 16 May 2006 - Commission of the European Communities v French Republic

(Case C-222/06)

Language of the case: French

Parties

Applicant: Commission of the European Communities (represented by: D. Maidani and G. Braun, acting as Agents)

Defendant: French Republic

Form of order sought

declare that, by failing to adopt the laws, regulations and administrative provisions necessary to comply with Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 amending Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering[1], the French Republic has failed to fulfil its obligations under that directive;

order the French Republic to pay the costs.

Pleas in law and main arguments

The period for transposing the directive expired on 15 June 2003.

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[1] - OJ 2001 L 344, p. 76.

Judgment of the Court (Third Chamber)
of 28 June 2007
Criminal proceedings against Giovanni Dell'Orto. Reference for a preliminary ruling: Tribunale di Milano - Italy. Police and judicial cooperation in criminal matters - Framework Decision 2001/220/JHA -Directive 2004/80/EC- Concept of victim' in criminal proceedings - Legal person - Return of property seized in the course of criminal proceedings. Case C-467/05.

1. Preliminary rulings - Question on the interpretation of a Framework Decision adopted under Title VI of the EU Treaty

(Art. 234 EC; Arts 35 EU and 46(b) EU)

2. Preliminary rulings - Jurisdiction of the Court - Police and judicial cooperation in criminal matters

(Art. 234 EC; Arts 35 EU and 46(b) EU)

3. Acts of the institutions - Temporal application - Procedural rules

4. European Union - Police and judicial cooperation in criminal matters - Standing of victims in criminal proceedings - Framework Decision 2001/220

(Council Framework Decision 2001/220, Arts 1(a), 2(1) and 8(1))

1. The fact that an order for reference concerning the interpretation of a Framework Decision adopted under Title VI of the EU Treaty does not mention Article 35 EU, but refers to Article 234 EC, cannot of itself make the reference for preliminary ruling inadmissible. That conclusion is reinforced by the fact that the EU Treaty neither expressly nor by implication lays down the form in which the national court must present its reference for a preliminary ruling.

(see para. 36)

2. In accordance with Article 46(b) EU, the system under Article 234 EC is capable of being applied to Article 35 EU, subject to the conditions laid down by that provision. Like Article 234 EC, Article 35 EU makes reference to the Court of Justice for a preliminary ruling subject to the condition that the national court considers that a decision on the question is necessary in order to enable it to give judgment', meaning that the case-law of the Court of Justice on the admissibility of references under Article 234 EC is, in principle, transposable to references for a preliminary ruling submitted to the Court of Justice under Article 35 EU.

It follows that the presumption that questions referred by national courts for a preliminary ruling are relevant may be rebutted only in exceptional cases, where it is quite obvious that the interpretation which is sought of the provisions of Union law referred to in the questions bears no relation to the actual facts of the main action or to its purpose or where the problem is hypothetical or the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it. Save for such cases, the Court is, in principle, required to give a ruling on questions concerning the interpretation of the acts referred to in Article 35(1) EU.

(see paras 34, 39-40)

3. Procedural rules are generally held to apply to all proceedings pending at the time when they enter into force, whereas substantive rules are usually interpreted as not applying to situations existing before their entry into force.

The question as to the power of the national court to take a decision concerning the return to the victim of property which has been seized in criminal proceedings relates to procedural rules, with the result that there is no obstacle deriving from the temporal application of the law which

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precludes the taking into account, in proceedings on that question, of the relevant provisions of Framework Decision 2001/220 on the standing of victims in criminal proceedings, with a view to the interpretation of the applicable national law in conformity with those provisions.

(see paras 48-49)

4. Framework Decision 2001/220 on the standing of victims in criminal proceedings must be interpreted as meaning that, in criminal proceedings and, in particular, in enforcement proceedings following a judgment which resulted in a final criminal conviction, the concept of victim' for the purposes of the Framework Decision does not include legal persons who have suffered harm directly caused by acts or omissions that are in violation of the criminal law of a Member State.

To interpret the Framework Decision as also applying to legal' persons who maintain that they have suffered harm directly caused by a criminal act, would contradict the very letter of Article 1(a) of that Framework Decision, which applies only to natural persons who have suffered harm directly caused by conduct which infringes the criminal law of a Member State. In addition, there is no indication in any other provision of the Framework Decision that the European Union legislature intended to extend the concept of victim for the purposes of the application of the Framework Decision to legal persons. The converse is in fact the case, as several provisions of the Framework Decision, particularly Articles 2(1) and (2) and 8(1) confirm that the legislature's objective was to limit its scope exclusively to natural persons who are victims of harm resulting from a criminal act.

That interpretation cannot be invalidated by Directive 2004/80 relating to compensation to crime victims. Even supposing that the provisions of a directive adopted on the basis of the EC Treaty were capable of having any effect on the interpretation of the provisions of a Framework Decision based on the Treaty on European Union and that the concept of victim for the purposes of the directive could be interpreted to include legal persons, the directive and the Framework Decision are not on any analysis linked in a manner which would call for a uniform interpretation of the concept in question.

(see paras 53-55, 57-58, 60, operative part)

In Case C-467/05,

REFERENCE for a preliminary ruling under Article 234 EC from the judge in charge of preliminary investigations at the Tribunale di Milano (Italy), made by decision of 6 October 2005, received at the Court on 27 December 2005, in the criminal proceedings against

Giovanni Dell'Orto,

joined party:

Saipem SpA,

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, J. Kluka, J.N. Cunha Rodrigues (Rapporteur), A. O Caoimh and P. Lindh, Judges,

Advocate General: J. Kokott,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 1 February 2007,

after considering the observations submitted on behalf of:

- Mr Dell'Orto, by M. Brusa, avvocato,

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- the Italian Government, by I.M. Braguglia, acting as Agent, and D. Del Gaizo, avvocato dello Stato,

- Ireland, by D. O'Hagan, acting as Agent, and N. Travers BL,

- the Netherlands Government, by H.G. Sevenster, C. ten Dam and M. de Grave, acting as Agents,

- the Austrian Government, by H. Dossi, acting as Agent,

- the United Kingdom Government, by E. O'Neill, acting as Agent, and J. Turner, Barrister,

- the Commission of the European Communities, by M. Condou-Durande, E. Righini and L. Visaggio, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 8 March 2007,

gives the following

Judgment

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

Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings must be interpreted as meaning that, in criminal proceedings and, in particular, in enforcement proceedings following a judgment which resulted in a final criminal conviction, such as those in the main action, the concept of victim' for the purp oses of the Framework Decision does not include legal persons who have suffered harm directly caused by acts or omissions that are in violation of the criminal law of a Member State.

1. This reference for a preliminary ruling concerns the interpretation of Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings (OJ 2001 L 82, p. 1; the Framework Decision') and of Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims (OJ 2004 L 261, p. 15; the Directive').

2. The reference was presented in criminal enforcement proceedings following a judgment which resulted in a final criminal conviction, brought before the judge in charge of preliminary investigations at the Tribunale di Milano (District Court, Milan), acting as the judge responsible for enforcement, and concerning the return of assets placed under sequestration.

Legal context

European Union law

The Framework Decision

3. Article 1 of the Framework Decision provides:

For the purposes of this Framework Decision:

(a) victim shall mean a natural person who has suffered harm, including physical or mental injury, emotional suffering or economic loss, directly caused by acts or omissions that are in violation of the criminal law of a Member State;

...

(c) criminal proceedings shall be understood in accordance with the national law applicable;

(d) proceedings shall be broadly construed to include, in addition to criminal proceedings, all contacts of victims as such with any authority, public service or victim support organisation in connection with their case, before, during, or after criminal process;

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...'

4. Article 2 of the Framework Decision provides:

1. Each Member State shall ensure that victims have a real and appropriate role in its criminal legal system. It shall continue to make every effort to ensure that victims are treated with due respect for the dignity of the individual during proceedings and shall recognise the rights and legitimate interests of victims with particular reference to criminal proceedings.

2. Each Member State shall ensure that victims who are particularly vulnerable can benefit from specific treatment best suited to their circumstances.'

5. In accordance with Article 8(1) of the Framework Decision:

Each Member State shall ensure a suitable level of protection for victims and, where appropriate, their families or persons in a similar position, particularly as regards their safety and protection of their privacy, where the competent authorities consider that there is a serious risk of reprisals or firm evidence of serious intent to intrude upon their privacy.'

6. Under Article 9 of the Framework Decision:

1. Each Member State shall ensure that victims of criminal acts are entitled to obtain a decision within reasonable time-limits on compensation by the offender in the course of criminal proceedings, except where, in certain cases, national law provides for compensation to be awarded in another manner.

...

3. Unless urgently required for the purpose of criminal proceedings, recoverable property belonging to victims which is seized in the course of criminal proceedings shall be returned to them without delay.'

7. In accordance with the third indent of Article 17 of the Framework Decision, each Member State shall bring into force the laws, regulations and administrative provisions necessary for the purposes of the implementation of the articles cited in paragraphs 3 to 6 of this judgment by 22 March 2002 at the latest.

The Directive

8. Under Article 1 of the Directive:

Member States shall ensure that where a violent intentional crime has been committed in a Member State other than the Member State where the applicant for compensation is habitually resident, the applicant shall have the right to submit the application to an authority or any other body in the latter Member State.'

9. Article 2 of the Directive provides:

Compensation shall be paid by the competent authority of the Member State on whose territory the crime was committed.'

10. Article 12 of the Directive is worded as follows:

1. The rules on access to compensation in cross-border situations drawn up by this Directive shall operate on the basis of Member States' schemes on compensation to victims of violent intentional crime committed in their respective territories.

2. All Member States shall ensure that their national rules provide for the existence of a scheme on compensation to victims of violent intentional crimes committed in their respective territories,

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which guarantees fair and appropriate compensation to victims.'

11. Article 17 of the Directive provides:

This Directive shall not prevent Member States, in so far as such provisions are compatible with this Directive, from:

(a) introducing or maintaining more favourable provisions for the benefit of victims of crime or any other persons affected by crime;

(b) introducing or retaining provisions for the purpose of compensating victims of crime committed outside their territory, or any other person affected by such a crime, subject to any conditions that Member States may specify for that purpose.'

12. Article 18(1) and (2) of the Directive provides:

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 1 January 2006 at the latest, with the exception of Article 12(2), in which case the date of compliance shall be 1 July 2005. They shall forthwith inform the Commission thereof.

2. Member States may provide that the measures necessary to comply with this Directive shall apply only to applicants whose injuries result from crimes committed after 30 June 2005.'

National legislation

13. In accordance with Article 263 of the Italian Code of Criminal Procedure, as amended by Law No 134 of 12 June 2003 (CPP'):

1. The return of property placed under sequestration shall be ordered by the judge provided that there remains no doubt as to its ownership.

...

3. Where there is a dispute as to the ownership of property placed under sequestration, the judge shall refer the case, in so far as it concerns the return, to the civil court with territorial jurisdiction competent at first instance, while maintaining sequestration during this period.'

...

6. Once the judgment is no longer subject to appeal, the judge responsible for enforcement shall take steps to return the property.'

14. Article 444 CPP provides:

1. The accused and the public prosecutor may request the court to apply an alternative sanction, of a kind and extent appropriate, or a financial penalty, reduced to a maximum of one third of the quantum, or a sentence of imprisonment which, taking into account the circumstances and reduced to a maximum of one third of the quantum, does not exceed five years, alone or accompanied by a financial penalty.

2. If there is an agreement, even of the party who did not make the request, and provided there has been no acquittal..., the court, on the basis of the documents before it, assuming that the characterisation of the facts and the application and comparison of the circumstances of the case made by the parties are correct and that the sanction indicated is adequate, shall by judgment impose that sanction, mentioning in the operative part that it was requested by the parties. In cases where a civil party joins the proceedings, the court shall not give judgment on that claim;...

...'

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15. Article 665(1) CPP provides:

Unless provided otherwise by law, only the judge who took the decision in the case is competent to enforce that decision.'

The main action and the questions referred for a preliminary ruling

16. It is apparent from the order for reference that criminal proceedings were brought before the Tribunale di Milano against Mr Dell'Orto and other accused persons in respect of the offence of giving false information about companies (false accounting), with the further intention of committing the offences of aggravated embezzlement and of unlawful financing of political parties. Several companies belonging to the Italian group ENI were among the persons affected by those crimes, including Saipem SpA (Saipem'), which joined those criminal proceedings as a civil party.

17. According to the order for reference, Mr Dell'Orto and the other accused persons embezzled large sums of money belonging to those companies by obtaining remuneration for fictional consultancy activities provided to offshore companies with which one of the accomplices was institutionally linked, appropriating part of those sums for themselves. In particular, Mr Dell'Orto appropriated for himself a sum of EUR 1 064 069.78 which belonged to Saipem, a sum which was placed under sequestration by the Italian courts in the course of the criminal proceedings. Such a protective measure had, in particular, the main and specific goal of guaranteeing that the civil obligations arising from the crime would be met.

18. The criminal proceedings resulted in the issue of a judgment by the judge in charge of the preliminary investigations at the Tribunale di Milano on 4 May 1999, which became res judicata on 5 June 1999, applying a penalty on the basis of Article 444 CPP, that is by a means known as by settlement'. Mr Dell'Orto was sentenced by this judgment to a term of imprisonment and a fine, the sentence being suspended. No decision was taken as to the fate of the sum placed under sequestration.

19. Saipem obtained the return of the above sum following an order of that judge made on 3 December 1999. That order was set aside by a judgment of the Corte suprema di cassazione (Supreme Court of Cassation) of 8 November 2001. That judgment pointed out in particular that, as the judgment of 4 May 1999 made no decision on the sum placed under sequestration, the criminal court lacked the power to order its return to Saipem.

20. Following the judgment of 8 November 2001, Mr Dell'Orto requested the judge in charge of preliminary investigations to order Saipem in turn to return the sum in question, given that it might again be placed under sequestration in anticipation of a decision on its possible return. According to Mr Dell'Orto, it is for the civil court to take that decision pursuant to Article 263(3) CPP, on the ground that there is a dispute as to the ownership of that sum.

21. By order of 18 July 2003, the judge in charge of preliminary investigations at the Tribunale di Milano ordered the transfer of the case-file to the civil court, rejecting Mr Dell'Orto's request as to the remainder.

22. That order was annulled by a judgment of 21 April 2005 of the Corte suprema di cassazione, which sent the case back to the same judge. According to that judgment, if, pursuant to Article 263(3) CPP, the dispute as to the ownership of the seized property is decided by the civil court judge in interim proceedings, that does not thereby deprive the criminal court judge of the power to take measures regarding the safe keeping of the property pending resolution of the dispute as to its ownership, with the result that it is for the judge in charge of preliminary investigations at the Tribunale di Milano to adopt the appropriate measures for the purposes of actually placing under sequestration the sum which has in the meantime been returned to Saipem'.

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23. The proceedings before the court making the reference were therefore reopened in order to ensure the enforcement of the second judgment of the Corte suprema di cassazione.

24. According to the court making the reference, there cannot in the main action be any remaining dispute as to ownership' of the sums placed under sequestration, of such a kind as to justify the opening of interim proceedings before the civil court judge. The assets placed under sequestration are not owed to a third party and should be returned to Saipem pursuant to Article 2037 of the Italian Civil Code, and it follows from the examination of the documents in the case-file that Mr Dell'Orto has never questioned that the sums in question are the property of that company.

25. The court making the reference considers that, in reality, a purely procedural obstacle precludes it from itself ordering the return of the sums in question to Saipem, the question being one as to the power of the judge responsible for enforcement to take a decision on the return of the sums placed under sequestration following a judgment on application of the penalty imposed under Article 444 CPP. According to the case-law of the Corte suprema di cassazione, in particular the abovementioned judgment of 8 November 2001, the judge with responsibility for enforcement does not have the power to take a decision concerning return to the victim of the property seized following a judgment issued under Article 444, which makes no provision in that regard.

26. In that context, the court making the reference raises the question of the applicability of the principles set out in Articles 2 and 9 of the Framework Decision.

27. It asks, in particular, whether those articles of the Framework Decision are applicable from the point of view of their personal scope, as the victim is not a natural person but a legal person.

28. Article 1(a) of the Framework Decision provides that it applies to a natural person' who has suffered harm. The court making the reference nevertheless asks whether it is possible to interpret the Framework Decision, when read in the light of Articles 12 and 17 of the Directive, to mean that it also applies to any other person who is the victim of a crime, and, in particular, to legal persons. If this is the case, the principle referred to in Article 9(3) of the Framework Decision, according to which property seized in the course of criminal proceedings which belongs to victims shall be returned to them without delay, is applicable in the main action. In accordance with the case-law of the Court (Case C-105/03 Pupino [2005] ECR I-5285), the national judge is obliged, in so far as possible, to interpret the provisions of the CPP concerning the extent of the decision-making powers of the judge responsible for enforcement, with regard to the return of property seized in the course of criminal proceedings, in conformity with Article 9(3) of the Framework Decision, which sanctions a simplified procedure in order to obtain the objectives established by the legislation relating to the compensation of victims.

29. The court making the reference comments moreover that the Court has held with regard to certain forms of procedure which bar further prosecution and are analogous to that resulting from a judgment reached by settlement' for the purposes of Article 444 CPP, that they are to be considered as equivalent to a judgment which finally disposes of a case and closes the criminal proceedings (Joined Cases C-187/01 and C-385/01 Gözütok and Brügge [2003] ECR I-1345).

30. Since, in the main action, the dispute as to the return of sums placed under sequestration arises following the closure of criminal proceedings by the judgment of 4 May 1999, the national court making the reference also raises the question of the applicability of the principles referred to in Articles 2 and 9 of the Framework Decision in the specific context of criminal enforcement proceedings which follow the closure of the criminal proceedings proper.

31. In those circumstances, the judge in charge of preliminary investigations at the Tribunale di Milano decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

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(1) Can the rules referred to in Articles 2 and 9 of the Framework Decision ... apply in criminal proceedings, in general, to any party affected by a crime , by virtue of Article 1 et seq. of the Directive ... or of other provisions of Community law?

(2) Can the rules referred to in Articles 2 and 9 of the Framework Decision ... apply in criminal proceedings for enforcement following a judgment which resulted in a final criminal conviction (and thus also following a judgment applying a penalty as provided for in Article 444 of the Code of Criminal Procedure) to any party affected by a crime , by virtue of Article 1 et seq. of the Directive... or of other provisions of Community law?'

The questions referred for a preliminary ruling

Admissibility

32. Several governments which have submitted observations in the course of these proceedings have cast doubt upon the admissibility of the reference for a preliminary ruling.

33. The United Kingdom Government submits that the reference for a preliminary ruling is inadmissible because it is based on Article 234 EC whereas the interpretation sought concerns the Framework Decision, that is an act adopted under Title VI of the Treaty on European Union. In such a case, the reference should be based exclusively on Article 35(1) EU, whereas Article 234 EC is not applicable. Ireland maintains that, since the conditions for application of Article 35 EU are met in this case, the mistaken reliance on Article 234 EC as the basis for the reference should not preclude the Court from giving a reply to the questions referred by the court making the reference.

34. First of all, it should be noted that, in accordance with Article 46(b) EU, the provisions of the EC and EAEC Treaties concerning the powers of the Court of Justice and the exercise of those powers, including the provisions of Article 234 EC, apply to the provisions of Title VI of the Treaty on European Union under the conditions laid down by Article 35 EU. Contrary to what is argued by the United Kingdom Government, it therefore follows that the system under Article 234 EC is capable of being applied to the Court's jurisdiction to give preliminary rulings by virtue of Article 35 EU, subject to the conditions laid down by that provision (see, to that effect, Pupino , paragraphs 19 and 28).

35. It is established that the Italian Republic indicated, by a declaration which took effect on 1 May 1999, the date on which the Treaty of Amsterdam came into force, that it accepts the jurisdiction of the Court to rule on the validity and interpretation of the acts referred to in Article 35 EU in accordance with the rules laid down in paragraph 3(b) of that article. It is also undisputed that the Framework Decision, based on Articles 31 EU and 34 EU, is one of the acts referred to in Article 35(1) EU on which the Court may rule in a reference for a preliminary ruling (Pupino , paragraphs 20 and 22) and it is accepted that the judge in charge of preliminary investigations at the Tribunale di Milano, acting in proceedings such as those in the main action, must be considered as a court or tribunal of a Member State for the purposes of Article 35 EU.

36. In those circumstances, and regardless of the fact that the questions referred for a preliminary ruling also concern the interpretation of a directive adopted under the EC Treaty, the fact that the order for reference does not mention Article 35 EU, but refers to Article 234 EC, cannot of itself make the reference for a preliminary ruling inadmissible. This conclusion is reinforced by the fact that the Treaty on European Union neither expressly nor by implication lays down the form in which the national court must present its reference for a preliminary ruling (see, by analogy, with regard to Article 234 EC, Case 13/61 De Geus [1962] ECR 45, 50).

37. The Netherlands Government questions the admissibility of the reference for a preliminary ruling on the ground that the factual and legislative context is not defined sufficiently in the

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order for reference. According to that government, the relevance of the questions asked does not emerge from it sufficiently clearly, since, in the absence of further clarification of the applicable national law, it is impossible to confirm whether, as submitted by the court making the reference, a question is raised concerning the interpretation of that law in conformity with the Framework Decision, which in any event lacks direct effect.

38. The Austrian Government submits that Italian law prevents the court making the reference from taking a decision in the main action on questions of a civil law nature, with the consequence that the questions referred for a preliminary ruling are hypothetical.

39. The Court observes that, like Article 234 EC, Article 35 EU makes reference to the Court of Justice for a preliminary ruling subject to the condition that the national court considers that a decision on the question is necessary in order to enable it to give judgment', meaning that the case-law of the Court of Justice on the admissibility of references under Article 234 EC is, in principle, transposable to references for a preliminary ruling submitted to the Court of Justice under Article 35 EU (Pupino , paragraph 29).

40. It follows that the presumption that questions referred by national courts for a preliminary ruling are relevant may be rebutted only in exceptional cases, where it is quite obvious that the interpretation which is sought of the provisions of Union law referred to in the questions bears no relation to the actual facts of the main action or to its purpose or where the problem is hypothetical or the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it. Save for such cases, the Court is, in principle, required to give a ruling on questions concerning the interpretation of the acts referred to in Article 35(1) EU (Pupino , paragraph 30).

41. Furthermore, the need to provide an interpretation of Community law which will be of use to the national court presupposes that the latter sets out the factual and legislative context of the questions it is asking or, at the very least, explains the factual circumstances on which those questions are based. In that regard, it is essential that the national court should give at the very least some explanation of the reasons for the choice of the provisions of Union law which it requires to be interpreted and on the link it establishes between those provisions and the national legislation applicable to the dispute (see, inter alia, with regard to Article 234 EC, Case C-295/05 Asemfo [2007] ECR I-0000, paragraphs 32 and 33).

42. The information provided in orders for reference must not only be such as to enable the Court to reply usefully but must also enable the governments of the Member States and other interested parties to submit observations pursuant to Article 23 of the Statute of the Court of Justice (see, inter alia, Case C-303/05 Advocaten voor de Wereld [2007] ECR I-0000, paragraph 20).

43. As is evident from paragraphs 16 to 30 of this judgment, the order for reference sets out the underlying facts of the main action and the provisions of applicable national law which are directly relevant and it explains the reasons why the court making the reference is seeking an interpretation of the Framework Decision, and also the link between the latter and the national legislation applicable in the matter.

44. Contrary to the argument submitted by the Austrian Government, it is not obvious that an interpretation of national law in conformity with the Framework Decision in the main action is impossible, this being a matter for the national court to determine (see, to that effect, Pupino , paragraph 48).

45. In those circumstances, it is not obvious that the interpretation which is sought of the provisions of the Framework Decision referred to in the questions raised bears no relation to the actual facts of the main action or to its purpose or that the problem is hypothetical or that the Court lacks the factual or legal material necessary to give a useful answer to those questions.

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46. Finally, the information contained in the order for reference is also sufficient to ensure that the parties to the main action, the Member States, the Council of the European Union and the Commission of the European Communities are able to submit their observations pursuant to Article 23 of the Statute of the Court of Justice, as is, moreover, indicated by the observations lodged by the parties who have intervened in these proceedings.

47. During the written procedure before the Court, the question was raised whether the Framework Decision can be considered as applicable from a temporal perspective to a set of facts which, as in the main action, occurred well before adoption of the Framework Decision on 15 March 2001, let alone the period prescribed for its implementation, which expired on 22 March 2002 with regard inter alia to Article 9 of the Framework Decision.

48. In that regard, it must be recalled that, according to settled case-law, procedural rules are generally held to apply to all proceedings pending at the time when they enter into force, whereas substantive rules are usually interpreted as not applying to situations existing before their entry into force (see, inter alia, Case C-293/04 Beemsterboer Coldstore Services [2006] ECR I-2263, paragraph 21 and case-law cited).

49. The question which is at the centre of the main proceedings, that is the power of the national court to take a decision concerning the return to the victim of property which has been seized in criminal proceedings, relates to procedural rules, with the result that there is no obstacle deriving from the temporal application of the law which precludes the taking into account, in those proceedings, of the relevant provisions of the Framework Decision with a view to the interpretation of the applicable national law in conformity with those provisions.

50. The reference for a preliminary ruling is therefore admissible.

The questions referred for a preliminary ruling

51. By its two questions, which it is appropriate to examine together, the court making the reference asks essentially whether the Framework Decision must be interpreted as meaning that, in criminal proceedings, and, more specifically, in enforcement proceedings following a judgment resulting in a final criminal conviction, such as that at issue in the main proceedings, the concept of victim' for the purposes of the Framework Decision includes legal persons who have suffered harm directly caused by acts or omissions that are in violation of the criminal law of a Member State.

52. Article 1(a) of the Framework Decision defines victim', for the purposes of the Framework Decision, as a natural' person who has suffered harm, including physical or mental injury, emotional suffering or economic loss, directly caused by acts or omissions that are in violation of the criminal law of a Member State.

53. It follows from the wording of this provision that the Framework Decision applies only to natural persons who have suffered harm directly caused by conduct which infringes the criminal law of a Member State.

54. To interpret the Framework Decision to mean that it would also apply to legal' persons who, like the civil party to the main action, maintain that they have suffered harm directly caused by a criminal act, would contradict the very letter of Article 1(a) of the Framework Decision.

55. In addition, there is no indication in any other provision of the Framework Decision that the European Union legislature intended to extend the concept of victim for the purposes of the application of the Framework Decision to legal persons. The converse is in fact the case, as several provisions of the Framework Decision confirm that the legislature's objective was to limit its scope exclusively to natural persons who are victims of harm resulting from a criminal act.

56. In that regard, apart from Article 1(a) of the Framework Decision, which refers, so far as

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the principal categories of harm are concerned, to physical or mental injury and to emotional suffering, reference should also be made to Article 2(1) of the Framework Decision, which obliges each Member State to make every effort to ensure that victims are treated with due respect for the dignity of the individual, Article 2(2), which refers to the specific treatment from which victims who are particularly vulnerable can benefit, and also Article 8(1) of the Framework Decision, which obliges the Member States to ensure a suitable level of protection to the family of the victim or to persons in a similar position.

57. The Directive is not of such a kind as to invalidate this interpretation. The Framework Decision and the Directive govern different matters. The Directive sets up a system of cooperation to facilitate access to compensation to victims of crimes in cross-border situations. It seeks to ensure that where a violent intentional crime has been committed in a Member State other than that in which the victim is habitually resident, the victim shall receive compensation from the former Member State. The Framework Decision, on the other hand, aims to approximate the legislation of the Member States concerning the protection of the interests of the victim in criminal proceedings. It seeks to ensure that the offender makes reparation for the harm suffered by the victim.

58. Even supposing that the provisions of a directive adopted on the basis of the EC Treaty were capable of having any effect on the interpretation of the provisions of a framework decision based on the Treaty on European Union and that the concept of victim for the purposes of the directive could be interpreted to include legal persons, the directive and the framework decision are not on any analysis linked in a manner which would call for a uniform interpretation of the concept in question.

59. Moreover, a situation such as that in the main action does not fall within the scope of the Directive. As is evident from paragraph 57 of this judgment, the Directive provides for compensation only where a violent intentional crime has been committed in a Member State other than that in which the victim is habitually resident, whereas the main action relates to offences of false accounting, aggravated embezzlement and unlawful financing of political parties committed substantially on the territory of the Member State in which the victim resides.

60. The answer to the questions referred is therefore that the Framework Decision must be interpreted as meaning that, in criminal proceedings and, in particular, in enforcement proceedings following a judgment which resulted in a final criminal conviction, such as those in the main action, the concept of victim' for the purposes of the Framework Decision does not include legal persons who have suffered harm directly caused by acts or omissions that are in violation of the criminal law of a Member State.

Costs

61. Since these proceedings are, for the parties to the main action, 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.

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32001F0220-A02P2 : N 56
32001F0220-A08P1 : N 5 56
32001F0220-A09 : N 6
32001F0220-A17T3 : N 7
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32004L0080-A01 : N 8
32004L0080-A02 : N 9
32004L0080-A12 : N 10
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PROCEDU Reference for a preliminary ruling

ADVGEN Kokott

JUDGRAP Cunha Rodrigues

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Opinion of Advocate General Kokott delivered on 8 March 2007. Criminal proceedings against Giovanni Dell'Orto. Reference for a preliminary ruling: Tribunale di Milano - Italy. Police and judicial cooperation in criminal matters - Framework Decision 2001/220/JHA -Directive 2004/80/EC- Concept of victim' in criminal proceedings - Legal person - Return of property seized in the course of criminal proceedings. Case C-467/05.

I - Introduction

1. In the present case, it is necessary to clarify whether Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings (2) in conjunction with Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims (3) requires funds embezzled from a public limited company which has suffered harm to be repaid in criminal proceedings. In particular, the question arises whether, contrary to the definition contained in Article 1(a), the concept of victim in the Framework Decision not only covers natural persons but should be extended to legal persons. In this respect the referring court relies on the Directive, which does not contain any definition of victims.

II - Legal framework

A - The law of the European Union and of the European Communities

2. Under Article 1(a) of Framework Decision 2001/220, victim means a natural person who has suffered harm, including physical or mental injury, emotional suffering or economic loss, directly caused by acts or omissions that are in violation of the criminal law of a Member State'.

3. Article 2(1) describes in general terms how the interests of victims are to be taken into consideration:

Each Member State shall ensure that victims have a real and appropriate role in its criminal legal system. It shall continue to make every effort to ensure that victims are treated with due respect for the dignity of the individual during proceedings and shall recognise the rights and legitimate interests of victims with particular reference to criminal proceedings.'

4. Article 9 of the Framework Decision concerns the right to compensation in the course of criminal proceedings:

1. Each Member State shall ensure that victims of criminal acts are entitled to obtain a decision within reasonable time-limits on compensation by the offender in the course of criminal proceedings, except where, in certain cases, national law provides for compensation to be awarded in another manner.

2. ...

3. Unless urgently required for the purpose of criminal proceedings, recoverable property belonging to victims which is seized in the course of criminal proceedings shall be returned to them without delay.'

5. The seventh recital in the preamble to the Framework Decision explains the relationship to civil procedure:

Measures to assist victims of crime, and in particular the provisions regarding compensation and mediation, do not concern arrangements under civil procedure.'

6. Directive 2004/80 concerns compensation granted by the State to crime victims. It contains rules to facilitate compensation in cross-border situations. The main basic principles are laid down in the first two articles:

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Article 1

Right to submit an application in the Member State of residence

Member States shall ensure that where a violent intentional crime has been committed in a Member State other than the Member State where the applicant for compensation is habitually resident, the applicant shall have the right to submit the application to an authority or any other body in the latter Member State.

Article 2

Responsibility for paying compensation

Compensation shall be paid by the competent authority of the Member State on whose territory the crime was committed.'

7. In contrast to the original Commission proposal, no attempt was made to harmonise the rules on compensation. However, the sixth recital states:

Crime victims in the European Union should be entitled to fair and appropriate compensation for the injuries they have suffered, regardless of where in the European Community the crime was committed.'

8. Article 12 of Directive 2004/80 provides in this regard:

1. The rules on access to compensation in cross-border situations drawn up by this Directive shall operate on the basis of Member States' schemes on compensation to victims of violent intentional crime committed in their respective territories.

2. All Member States shall ensure that their national rules provide for the existence of a scheme on compensation to victims of violent intentional crimes committed in their respective territories, which guarantees fair and appropriate compensation to victims.'

9. Article 17(a) states that the Member States may, independently of the Directive, introduce or maintain more favourable provisions for the benefit of victims of crime or any other persons affected by crime, in so far as such provisions are compatible with the Directive.

B - Italian law

10. Italy does not appear to have expressly transposed the definition of victim under Article 1(a) of Framework Decision 2001/220.

11. Article 262 and Article 263 of the Italian Codice di procedura penale (Code of Criminal Procedure) govern the return of goods seized in criminal proceedings. The decision on return falls within the jurisdiction of the criminal court in principle. If, however, ownership is disputed, it must refer the dispute to the competent civil court.

12. In addition, provision is made in Article 74 et seq. and Article 538 et seq. of the Italian Codice di procedura penale for decisions on claims for damages by victims in the course of criminal proceedings.

III - Facts of the case and questions referred for a preliminary ruling

13. By a suspended sentence delivered in a judgment of 4 May 1999 based on a settlement with the public prosecutor's office, a term of imprisonment of 18 months and a fine were imposed on Giovanni

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Dell'Orto and other defendants for the offences of giving false company information made with the intention, inter alia, of committing the offences of aggravated embezzlement and unlawful financing of political parties to the detriment of Saipem SpA. That judgment is now final.

14. While the preliminary investigations were still in progress, Mr Dell'Orto transferred a sum of EUR 1 064 069.78 which, according to the referring court, is part of the embezzled amount and is still the property of Saipem, from a foreign account to Italy. The Italian account was placed under protective sequestration.

15. In the judgment no order was made as regards the sequestered sum. Subsequently, on application by Saipem, an order of 3 December 1999 required that sum to be returned to it. That order was executed on 10 December 1999 when the amount in that current account was withdrawn and the account was closed.

16. The referring court does not make clear which court convicted Mr Dell'Orto or ruled on the return of the sequestered money, but in both cases it appears to have been the referring court itself.

17. On 8 November 2001 the Corte di cassazione (Court of Cassation) set aside that order. The restitution of the money was not covered in the settlement with the public prosecutor's office. No order on restitution could therefore be made in the criminal proceedings.

18. Following further interlocutory decisions, the referring court, as the court responsible for enforcement, must now decide on further measures to be taken in respect of the contested sum of money. In order to prepare that decision, it asks the Court of Justice the following questions:

(a) Can the rules referred to in Articles 2 and 9 of Framework Decision 2001/220/JHA apply in criminal proceedings, in general, to any party affected by crime, by virtue of Article 1 et seq. of Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims or of other provisions of Community law?

(b) Can the rules referred to in Articles 2 and 9 of Framework Decision 2001/220 apply in criminal proceedings for enforcement following a judgment which resulted in a final criminal conviction (and thus also following a judgment applying a penalty as provided for in [a settlement with the public prosecutor's office]) (4) to any party affected by crime, by virtue of Article 1 et seq. of Directive 2004/80?'

19. Mr Dell'Orto, Ireland, Italy, the Netherlands, Austria, the United Kingdom and the Commission took part in the proceedings.

IV - Assessment

20. The referring court requests an interpretation of Framework Decision 2001/220 in the light of Directive 2004/80. In accordance with the Court's findings in Pupino on the principle of the conformity of interpretation in relation to framework decisions, it wishes to interpret national law so far as possible in the light of the wording and purpose of the Framework Decision in order to attain the result which it pursues and thus comply with Article 34(2)(b) EU. (5) In the main action it clearly expects to be required by the Framework Decision to give a ruling on the return of the seized money to Saipem.

A - The admissibility of the reference for a preliminary ruling

21. The United Kingdom considers the reference for a preliminary ruling to be inadmissible. The referring court relies on Article 234 EC, but requests an interpretation of provisions of a framework decision, a legal act under Article 34(2)(b) EU. However, a reference for a preliminary ruling on the interpretation of Union law can only be made in accordance with Article 35(1) EU. Ireland takes a similar view, but considers that the error committed by the referring court can be rectified

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because such a reference would be admissible under Article 35 EU.

22. As Ireland argued in the oral procedure, it is obviously not possible on the pretext of referring questions on Community law under Article 234 EC actually to submit to the Court of Justice questions on the interpretation of Union law which are admissible only subject to the additional conditions laid down in Article 35 EU. Nevertheless, the extent to which a reference on Community law may relate to Union law in respect of the mutual influence of both legal orders, which is still to be addressed, could raise practically difficult questions of definition. These do not have to be decided here, however.

23. The United Kingdom's argument that the present reference for a preliminary ruling is inadmissible is not convincing in any case. As the Court has found, under Article 46(b) EU the provisions of the EC, ECSC and EAEC Treaties concerning the powers of the Court of Justice and the exercise of those powers, including the provisions of Article 234 EC, apply to the provisions of Title VI of the Treaty on European Union under the conditions laid down by Article 35 EU. It follows that the system under Article 234 EC is capable of being applied to the Court's jurisdiction to give preliminary rulings by virtue of Article 35 EU, subject to the conditions laid down by that provision. (6)

24. Therefore references concerning Union law - under Article 35 EU - are in principle requests within the meaning of Article 234 EC. The admissibility of a request cannot depend on the extent to which the national court refers expressly to those provisions. Rather it is contingent on compliance with the relevant requirements under Article 35 EU in particular in the case of questions on Union law.

25. The most important condition under Article 35 EU, in the view of the United Kingdom and Ireland in particular, is probably that the Member State in question must accept the jurisdiction of the Court of Justice to give preliminary rulings on Union law. Neither Member State has made any declaration to that effect. As Ireland also acknowledges, however, it is beyond doubt in the present case that the referring court has the power to make a reference. Italy indicated by a declaration which took effect on 1 May 1999, the date on which the Treaty of Amsterdam came into force, that it accepted the jurisdiction of the Court of Justice to rule on the validity and interpretation of the acts referred to in Article 35 EU in accordance with the rules laid down in paragraph 3(b) of that article. (7)

26. Furthermore, the relevance of the reference for a preliminary ruling to the national court's decision is challenged by various governments.

27. With regard to the need for relevance to the decision, the Court has held, applying the case-law on Article 234 EC to Article 35 EU, that the presumption that questions referred by national courts for a preliminary ruling are relevant may be rebutted only in exceptional cases, where it is quite obvious that the interpretation of Union law sought bears no relation to the actual facts of the main action or to its purpose, or where the problem is hypothetical or the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted. Save for such cases, the Court is, in principle, required to give a ruling on questions concerning the interpretation of the acts referred to in Article 35(1) EU. (8)

28. The Netherlands Government contends that the reference for a preliminary ruling does not contain any material to indicate which provisions of Italian law are to be interpreted in conformity with the Framework Decision. Since the Framework Decision cannot be applied directly, such material is necessary.

29. According to settled case-law, an interpretation of Community law which will be of use to the national court is possible only if in the order making the reference the national court defines

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the factual and legal context of the questions it is asking or, at the very least, explains the factual circumstances on which those questions are based. The information must not least give the governments of the Member States and other interested parties the opportunity to submit observations pursuant to Article 23 of the Statute of the Court of Justice. In that connection it must be borne in mind that only the decisions making references are notified to the interested parties. (9)

30. Consequently, the referring court must define the legal context in so far as is necessary for a useful answer to the question submitted. On the other hand, it is not required to show that a desired conforming interpretation is actually possible. In Pupino the Court held that mere doubts as to the possibility of an interpretation of national law in conformity with the Framework Decision do not result in the inadmissibility of the request, but that interpretation must be obviously impossible. Where this is not obvious, it is for the national court to determine whether, in this case, a conforming interpretation of national law is possible. (10) This position is also logical because it is not for the Court of Justice to interpret national law - including interpreting in conformity with Union law or Community law - in the context of a reference for a preliminary ruling.

31. It might therefore have been helpful to learn more about the provisions which the referring court wishes to interpret in conformity with the Framework Decision, (11) but the lack of relevant material does not prevent a useful answer being given to the questions submitted.

32. The Austrian Government goes even a step further than the Netherlands Government, arguing that under Italian law a ruling may not be given on a victim's claims under civil law in criminal proceedings for enforcement. The reference for a preliminary ruling is therefore hypothetical. However, that argument does not hold either because it does not give any grounds for obvious doubts as to the possibility of an interpretation of national law in conformity with the Framework Decision.

33. Greater importance must be attached to Ireland's doubts that Framework Decision 2001/220 may have legal effects in the main proceedings from the point of view of time. Mr Dell'Orto's conviction dates from 4 May 1999, whilst the contested money was placed under protective sequestration on 29 December 1997 and its alleged embezzlement or misappropriation occurred even earlier. However, the period within which the relevant provisions of the Framework Decision had to be implemented did not end until 22 March 2002, and the period for Directive 2004/80 did not end until 1 July 2005 or 1 January 2006. If then the Framework Decision cannot have any legal effects for the restitution of the alleged proceeds for reasons of time, an interpretation of Italian law in conformity with the Framework Decision is precluded and the reference for a preliminary ruling is irrelevant to the main proceedings.

34. As stated in my Opinion in Pupino , however, an interpretation in conformity with a Framework Decision is not precluded by the fact that the incidents to be investigated took place at a time before the adoption of the Framework Decision. According to settled case-law, procedural rules are generally held to apply to all proceedings pending at the time when they enter into force. (12) The Court obviously did not regard the issue of applicability as regards time as an obstacle to interpretation in conformity with the Framework Decision either, as it did not address that point in Pupino. As in Pupino , the main proceedings concern points of procedural law, namely jurisdiction to give a ruling on whether bank balances seized in the course of criminal proceedings are to be paid to an undertaking which has suffered harm. Accordingly, Ireland waived its reservations in the oral procedure.

35. In so far as rulings must still be made in the present case, the application of Framework Decision 2001/220 in the main proceedings is therefore possible ratione temporis.

36. A final doubt regarding the relevance of the request concerns the lawfulness of Framework Decision 2001/220. If the Framework Decision is unlawful and therefore inapplicable, it cannot require

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interpretation in conformity with the Framework Decision either, and the questions for interpretation are irrelevant for the purposes of the main proceedings.

37. In this respect I wish to recall that in the Opinion in Pupino I expressed doubts as to its legal basis, but concluded that the Court does not have to consider those doubts of its own motion since in any event no serious doubts arise. (13) The adoption of the Framework Decision on the chosen legal basis appears at least to be defensible. Consequently, the Court did not consider this question in Pupino. Since neither the referring court nor the parties in the present case raise the question of the legal basis of the Framework Decision, there is no reason to give that point further detailed consideration in the present case.

38. The reference for a preliminary ruling is therefore admissible.

B - The questions referred for a preliminary ruling

39. In order to give an answer to the questions asked by the referring court concerning the interpretation of Framework Decision 2001/220 in the light of Directive 2004/80, consideration must be given, first of all, to the possibilities and limits of the mutual influence of legal acts based on the EC Treaty and the Treaty on European Union (see Section 1 below). Taking those findings into account, it is then necessary to interpret the Framework Decision (see Sections 2 and 3 below).

1. The relationship between Union and Community law in respect of interpretation

40. Ireland and the United Kingdom in particular argue that in interpreting a Union framework decision consideration should not be given to a Community directive (adopted later). They are two distinct legal orders which must be sharply differentiated. This view is at least partially well founded. However, it cannot be fully concurred with.

41. It should be made clear, first of all, that any mutual influence in interpretation presupposes a corresponding scope for differing interpretations. An interpretation contra legem would not really be compatible with the principle of legal certainty. (14)

42. As the United Kingdom in particular argues, even where scope for differing interpretations exists, the different competences under the Treaty on European Union and the EC Treaty prevent rules of the other legal order being applied by way of interpretation for which there is no legal basis in the receiving legal order. Any interpretation must take account of the legal bases of the measure to be interpreted and may not therefore lead to a result that would no longer be compatible with the legal basis.

43. This applies in particular to the incorporation of the content of Community law into Union law, since according to Article 47 EU that Treaty does not affect the EC Treaty. It is therefore the task of the Court to ensure that acts which, according to the Council, fall within the scope of the Treaty on European Union do not encroach upon the powers conferred by the EC Treaty on the Community. (15)

44. If these limits are observed, transfers between Community law and Union law are already laid down in the Treaties. The Union and the Community coexist as separate but integrated legal orders. (16) Under the third paragraph of Article 1 EU, the Union is founded on the European Communities. Under the first paragraph of Article 3 EU, the Union is served by a single institutional framework which ensures the consistency and the continuity of the activities carried out in order to attain its objectives while respecting and building upon the acquis communautaire. In addition, Article 61(a) and (e) EC provides that measures under Title IV of the EC Treaty together with measures under Title VI of the EU Treaty contribute to the establishment of an area of freedom, security and justice.

45. In Pupino the Court thus found that it is perfectly comprehensible that the authors of the

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Treaty on European Union should have considered it useful to make provision, in the context of Title VI of that Treaty, for recourse to legal instruments with effects similar to those provided for by the EC Treaty, in order to contribute effectively to the pursuit of the Union's objectives. (17) Of course, the same also applies to the Union's rule-making activity. Regulatory techniques, approaches to problems and concepts which have proven themselves in Community secondary law can also be used for Union legislation.

46. In Union law the same substance should therefore be attached to elements taken over from Community law as in Community law. However, this applies only in so far as it is not precluded by the special character of Union law, for example the exclusion of the direct effect of framework decisions. Even on the basis of a coherent interpretation, the differences laid down in the Treaties between supranational Community law and Union law, which is based more heavily on traditional international law, should not be confused.

47. However, the marked separation of rule-making powers possibly even requires mutually complementary legal acts of Union and Community law to be adopted. For example, amendments to the Schengen Implementing Convention regarding the Schengen information system are made by parallel legal acts on the basis of Article 66 EC and Article 30(1)(a) and (b) EU, Article 31(a) and (b) EU and Article 34(2)(c) EU. (18) In accordance with their common aim, such legal acts are to be interpreted as being seamlessly interwoven. In this connection it may be particularly appropriate to give a uniform interpretation to definitions.

48. In precisely these cases, contrary to the view taken by Ireland, it may be necessary to interpret the earlier legal act of one legal order in the light of a subsequently adopted legal act of the other legal order. Conversely, it may also be appropriate in this situation to interpret the subsequent legal act in the light of the earlier law which it is to supplement.

49. The interpretation of measures of Union law in the light of Community law is therefore possible, but it is necessary to observe the limits stemming from the differences between the Union and the Community - in particular regarding their competences and the forms of action available to them.

2. The concept of victim

50. By its first question, the referring court is seeking to ascertain whether legal persons can also be victims within the meaning of Framework Decision 2001/220. This is of interest because all the relevant provisions of the Framework Decision, and above all Articles 2 and 9, are effective only vis-à-vis victims. However, I will show below that the view that legal persons could be regarded as victims within the meaning of the Framework Decision is incorrect even taking into consideration Directive 2004/80.

(a) Framework Decision 2001/220

51. As all the parties stress, Saipem is not a victim as defined in Article 1(a) of Framework Decision 2001/220 since under that provision the concept of victim is restricted to natural persons.

52. Ireland and the Commission rightly state that the history of that definition suggests that it does not extend to legal persons. The restriction to natural persons was intended originally because it is consistent with the Portuguese initiative for the Framework Decision. The Commission points out that its communication on crime victims, (19) which preceded the initiative, also related solely to natural persons. In the legislative procedure the Council did examine the inclusion of legal persons, (20) but that did not lead to the definition of victim being broadened accordingly.

53. This historical background also militates against the view, which Ireland believes is conceivable, that the natural persons behind a legal person should be regarded as victims of a crime against the legal person. If these indirect victims were also intended to have been protected, it would

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have been more logical also to regard legal persons as victims. Moreover, the main proceedings do not concern claims made by natural persons who have suffered indirect harm, but claims made by a legal person which has suffered direct harm. The question does not therefore arise whether indirect injury can give grounds for status as a victim within the meaning of Framework Decision 2001/220.

54. However, consideration of the natural persons behind a legal person refutes a further objection raised by the United Kingdom against extending the concept of victims to legal persons. The United Kingdom argues that the objective laid down in Article 29 EU of providing citizens with a high level of safety within an area of freedom, security and justice necessarily refers to natural persons. However, that cannot prevent the Union legislature offering legal persons exactly the same protection as natural persons since crime against legal persons ultimately also affects natural persons, that is their owners or their employees. Furthermore, such crime can also affect the citizens' individual feelings of safety.

55. Irrespective of the general aim of Title VI of the Treaty on European Union, the restricted definition of victim under Framework Decision 2001/220 is nevertheless consistent with its other provisions and its clear objectives.

56. Whilst in principle the other provisions of the Framework Decision could also be applied partially to legal persons if they were to be regarded as victims, as Austria rightly states, some elements of the Framework Decision are effective solely vis-à-vis natural persons. The harm, physical or mental injury, emotional suffering or economic loss suffered by a victim and mentioned in Article 1(a) of Framework Decision 2001/220 by way of example affect only natural persons in the vast majority of cases. Regard should also be had to Article 2(1). Under that provision, victims are to be treated with due respect for the dignity of the individual. Similarly, it is difficult to imagine the increased protection for victims who are particularly vulnerable under Article 2(2) in the case of legal persons. The provisions governing protection for victims and their families under Article 8 cannot be applied to legal persons either.

57. There could be reason to include legal persons in the concept of victim at most if failure to take them into consideration were incompatible with higher-ranking law, that is to say in particular with the fundamental rights, mentioned by Ireland, which the Union observes under Article 6(2) EU. In this respect the main question that arises is whether the difference in treatment of natural and legal persons is compatible with the general principle of equality. Under that principle, comparable situations are not to be treated differently and different situations are not to be treated alike unless such treatment is objectively justified. (21)

58. However, even having regard to the principle of equality, the Union legislature was permitted only to lay down rules governing the treatment of natural persons. Legal persons can also be harmed by crimes, but the definition of victim in Article 1(a) of Framework Decision 2001/220 shows that harm to natural persons often does not stop at material losses, but can take on very different dimensions than is the case with legal persons, in the form of physical or mental injury and emotional suffering. Furthermore, natural persons are often much more heavily reliant on protection in criminal proceedings than legal persons, which generally have professional support. These are objective reasons for giving preferential treatment to natural persons who have been victims of crime.

59. It should also be pointed out that the Framework Decision does not prevent the Member States from taking their own measures in so far as legal persons also require protection in criminal proceedings. (22)

60. Consequently, Framework Decision 2001/220 does not contain anything - even having regard to fundamental rights - to suggest that the definition of victim should be extended beyond its wording to legal persons.

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(b) Directive 2004/80

61. First of all, as the United Kingdom points out, the present case cannot result in the application of Directive 2004/80 regardless of the interpretation given to the concept of victim. The Directive provides for compensation only in the event of a violent intentional crime, whereas the money at issue comes from misappropriation or embezzlement. Furthermore, the crime took place at least mainly, if not exclusively, in the Member State in which the registered office of the victim - Saipem - was located. The Directive, on the other hand, governs compensation where the crime has been committed in another Member State. Lastly, the Directive allows the Member States to limit compensation to claimants whose injury is the result of crimes committed after 30 June 2005; in the present case, the crime was committed about a decade earlier.

62. However, Directive 2004/80 should be seen in the broader context of Framework Decision 2001/220. The Directive too seeks to protect victims and makes express reference to the Framework Decision in its fifth recital. As the Commission states, both legal acts are complementary, at least as regards the aim of protecting victims.

63. As the United Kingdom and the Commission rightly stress, however, the two legal acts have different objects; on the one hand the Framework Decision - in so far as it is relevant here - relates to compensation by the offender and on the other the Directive concerns compensation by the State.

64. The two legal acts are not therefore in a close complementary relationship. A uniform interpretation of the concept of victim is not absolutely necessary for their functioning, but is instead of systematic interest. In particular, it could facilitate implementation and practical application in the Member States. The low importance of this interest in having a coherent interpretation in itself raises doubts that Directive 2004/80 is actually capable of justifying a broader interpretation of the concept of victim in Framework Decision 2001/220, by way of analogy for example.

65. However, a broader interpretation of the concept of victim in Framework Decision 2001/220 is likewise not necessary on the basis of Directive 2004/80 because it is not apparent that the latter regards legal persons as victims.

66. Unlike Framework Decision 2001/220, Directive 2004/80 does not contain any express definition of victim. This can be explained by its drafting history. The Commission proposal for a directive on compensation to crime victims aimed not only to facilitate access to cross-border compensation to victims but also to introduce a common minimum standard for compensation to victims. In that connection it contained a definition of victim restricted to natural persons and covered only personal injury. (23)

67. However, the Council did not harmonise compensation to victims. (24) The only rule on claims for compensation in the Directive is found in Article 12 of Directive 2004/80, which provides that the Member States must guarantee fair and appropriate compensation to victims of violent intentional crimes. Furthermore, it follows from Article 2 that the compensation is to be paid by State authorities.

68. According to its wording, Article 12 of Directive 2004/80 can also cover legal persons as victims because they too can suffer harm as a result of violent intentional crimes in other Member States. (25) It cannot therefore be ruled out that the Community legislature broadened the category of victims benefiting from protection beyond the original aims of the Commission proposal for a directive.

69. However, the Netherlands Government, the Austrian Government and the United Kingdom Government take the view that only natural persons could be victims of violent intentional crime within the meaning of Directive 2004/80. In support of that view they argue that the restriction to natural

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persons follows from the objective laid down in the first recital of abolishing obstacles to the free movement of persons and services, from the judgment in Cowan (26) referred to in the second recital, which calls for the protection of natural persons, and from the reference in the fifth recital to Framework Decision 2001/220, which defines only natural persons as possible victims. Moreover, in forgoing the harmonisation proposed by the Commission, the Council presumably did not intend to broaden the category of those benefiting from protection beyond the Commission proposal so as to include legal persons.

70. Thus, while the wording of Directive 2004/80 permits the concept of victim to be extended to natural and legal persons, there are a number of reasons to restrict it to natural persons. Although it is not necessary in the present case to arrive at a final definition of the scope of the concept of victim under the Directive, it cannot in any case result in the concept of victim under Framework Decision 2001/220 being extended beyond the wording of the definition.

71. Nor can Article 17 of Directive 2004/80, which is mentioned by the referring court, justify extending the concept of victim to legal persons. As Austria, Italy, the Netherlands, the United Kingdom and the Commission rightly argue, that provision gives the Member States the option to adopt more generous national rules. The Member States may therefore also regard legal persons as victims. That does not mean, however, that they are required to do so.

72. Only natural persons are therefore victims within the meaning of Framework Decision 2001/220, even taking into consideration Directive 2004/80.

3. The application of Article 9 of Framework Decision 2001/220 in criminal proceedings for enforcement

73. By the second question, the referring court wishes to ascertain whether the rights of the victim under Article 2 and Article 9 of Framework Decision 2001/220 continue to exist even in the course of criminal proceedings for enforcement. Since, based on the answer to the first question, no victim within the meaning of the Framework Decision is affected in the present case, some of the parties take the view that this question is purely hypothetical.

74. However, under Article 234 EC, the Court has repeatedly held that it has jurisdiction to give preliminary rulings on questions concerning Community provisions in situations where the facts of the cases being considered by the national courts were outside the scope of Community law but where those provisions had been rendered applicable by domestic law. (27) This should also apply in the case of the provisions of Union law.

75. It cannot be ruled out in the present case that a broader concept of victim applies in principle in Italian law with the result that legal persons also benefit from the procedures that are used for natural persons when they wish to assert their rights as victims. This is suggested by the fact that Italy has not expressly transposed the definition of victim laid down in Article 1(a) of Framework Decision 2001/220 (28) and the fact that the relevant Italian provisions apparently do not use any special definition of victim either. (29)

76. Should Italian law provide for a uniform application of those provisions irrespective of whether the victims are natural or legal persons, the requirements laid down in the Framework Decision relating to proceedings for enforcement may be of interest to the referring court. The Court should therefore also answer this question.

77. The question essentially concerns the interpretation of Article 9(1) and (3) of the Framework Decision, which governs compensation to victims and the return of their property.

78. The referring court clearly assumes that restitution is a possibility in the present case. In addition, Article 9(3) provides that, unless urgently required for the purpose of criminal proceedings, recoverable property belonging to victims which is seized in the course of criminal proceedings

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must be returned to them without delay.

79. Since the money to be returned was presumably transferred to the offender's accounts as bank deposits, however, it would seem possible that, contrary to the description given by the referring court, the money did not remain the property of Saipem. Consequently, the possibility of compensation to the victim should not be ignored either. In this respect, under Article 9(1) of Framework Decision 2001/220, each Member State must ensure that victims of criminal acts are entitled to obtain a decision within reasonable time-limits on compensation by the offender in the course of criminal proceedings, except where, in certain cases, national law provides for compensation to be awarded in another manner. It is not necessary here to give definitive clarification of the kinds of rights that are covered by the concept of compensation. However, it is clear that pecuniary loss is covered, in particular since Article 1(a) mentions economic loss expressly as an example of harm suffered by a victim.

80. In contrast to the first question, Directive 2004/80 has no obvious bearing on interpretation. This is in keeping with its object of ensuring compensation for victims without undertaking detailed harmonisation. It does not therefore contain any rules on compensation by the offender or the return of seized property to the victim. Nor does it concern criminal proceedings since compensation granted to victims by the State is typically dealt with in separate proceedings under public law.

(a) Compensation

81. With regard to compensation, under Article 9(1) of Framework Decision 2001/220, each Member State must ensure that victims of criminal acts are entitled to obtain a decision within reasonable time-limits on compensation by the offender in the course of criminal proceedings, except where, in certain cases, national law provides for compensation to be awarded in another manner.

82. Accordingly, victims are to be given the right to obtain a decision on compensation by the offender in the course of criminal proceedings. There is one proviso, however. In certain cases the Member States may provide for compensation to be awarded in another manner. However, that does not mean that the Member States are entirely free to determine the manner in which compensation is granted to victims but only that another manner may be used in certain cases. As a general rule, victims must be free to obtain a decision in the course of criminal proceedings.

83. The aim of linking the criminal proceedings with the decision on compensation is to spare victims the burden and the risks of additional court proceedings. Where the criminal proceedings clarify certain points or can clarify them without any great difficulty, the legitimate interests of victims within the meaning of Article 2(1) of Framework Decision 2001/220 are recognised if the criminal court incorporates those findings directly into the relevant decisions.

84. This aim would have been satisfied in the main proceedings if a decision had been taken on compensation for Saipem as far as possible in the criminal court judgment.

85. However, as the Commission rightly states, Framework Decision 2001/220 does not govern classification of the decision in domestic criminal proceedings. The Framework Decision would thus permit the court first to decide on the sentence and to decide on compensation by the offender in subsequent proceedings based on the findings from the criminal proceedings. However it would have to be ensured that this subsequent decision is taken within reasonable time-limits, as laid down by Article 9(1).

86. In the absence of express provision in Framework Decision 2001/220, as the Netherlands in particular argues, it depends on national law whether this is actually possible. If national law - even interpreted in the light of the Framework Decision - no longer permits a decision on compensation after the offender has been convicted, the courts must take such a decision before or at the same time as the sentence, depending on the provision made by national law in this regard.

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87. Moreover, I do not consider it possible to require a victim's right to a decision on compensation to be maintained throughout criminal proceedings for enforcement. Otherwise there would be a danger that such rights could be asserted years after the courts had dealt with offences. Irrespective of any loss of rights through lapse of time, this is not only contrary to the right to a decision within reasonable time-limits under Article 9(1) of Framework Decision 2001/220, but it would also be inappropriate. The advantages of a joint or at least concurrent decision by the same court on the sentence and on compensation would be lost.

88. At the same time, this would often affect proceedings in which regard is not had to the Framework Decision either during the proceedings leading to the sentence or in the judgment. This can be seen in the present case. The sentence dates from 1999, from a time when the Framework Decision did not yet exist. It could not yet therefore require the competent court to decide on claims for compensation or to clarify any necessary facts when the sentence was delivered. Where a decision on compensation has not yet been taken in such cases, it cannot therefore be expected either that a future decision would take precedence over a decision in civil proceedings.

89. Consequently, Article 9(1) of Framework Decision 2001/220 does not preclude a decision within reasonable time-limits on compensation to the victim in the course of criminal proceedings for enforcement, but does not require such a decision.

(b) The return of property

90. The return of property is governed by Article 9(3) of Framework Decision 2001/220. Under that provision, unless urgently required for the purpose of criminal proceedings, recoverable property seized in the course of criminal proceedings shall be returned to the victims without delay.

91. In contrast to Article 9(1) of Framework Decision 2001/220 concerning compensation, Article 9(3) does not make any provision regarding the decision on the victim's property. Consequently, the Commission takes the view that the provision is applicable only where ownership of the property is undisputed. Like the Austrian Government, however, the Commission takes the view that a dispute over property is a matter for civil law and is not therefore covered in accordance with the seventh recital in the preamble to the Framework Decision.

92. With their reference to the seventh recital in the preamble to Framework Decision 2001/220, the Commission and the Austrian Government fail to recognise that the recital mentions only civil procedure, but not the civil law in Government. It would be contrary to the decision on compensation by the offender provided for in Article 9(1) if the Framework Decision was without prejudice to matters of civil law. The decision on compensation by the offender is generally a matter for civil law.

93. None the less, Article 9(3) of Framework Decision 2001/220 does not provide for a decision on property. In principle, that provision therefore concerns the return of undisputed property, for example items belonging to a victim which were seized as evidence. As Ireland is perfectly correct in observing, Article 9(3) of Framework Decision 2001/220 is only a concrete expression of the fundamental right to property in this regard.

94. Furthermore, the proposed return of property cannot be prevented by just any dispute over ownership. If, for example, in criminal proceedings it has been established with legally binding effect for the purpose of those proceedings who the property belongs to, for example in the case of stolen goods in order to allow a conviction for theft, that finding must also be relevant for the purposes of the return of the property. That approach alone satisfies the requirement laid down in Article 2(1) of Framework Decision 2001/220 that the legitimate interests of victims in criminal proceedings must be recognised. A factual finding which is sufficient to convict an offender must also be effective for the assessment of the return of the victim's property.

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95. On the other hand, the victim cannot claim the return of disputed property where the criminal proceedings did not produce such findings. In thi s respect the Member States are free to leave the dispute over the property for the civil courts to decide. The question possibly arises as to the extent to which Framework Decision 2001/220 requires the court to make appropriate findings where these are not absolutely necessary for the conclusion of the criminal proceedings. However, this question is not of interest in the present case because any findings had already been made when Mr Dell'Orto was convicted or at least can no longer be amended retrospectively.

96. It must therefore be stated that seized property must be returned to the victim immediately pursuant to Article 9(3) of Framework Decision 2001/220 if the victim's ownership of the property is undisputed or has been established with legally binding effect in criminal proceedings.

V - Conclusion

97. I therefore propose that the Court give the following answers to the questions referred to it for a preliminary ruling:

(1) Only natural persons are victims within the meaning of Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings, even taking into consideration Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims.

(2) Article 9(1) of Framework Decision 2001/220 does not preclude a decision within reasonable time-limits on compensation to the victim in the course of criminal proceedings for enforcement, but does not require such a decision.

(3) Seized property must be returned to the victim immediately pursuant to Article 9(3) of Framework Decision 2001/220 if the victim's ownership of the property is undisputed or has been established with legally binding effect in criminal proceedings.

(1) .

(2) - OJ 2001 L 82, p. 1.

(3) - OJ 2004 L 261, p. 15 (language versions for the EU-15).

(4) - My addition.

(5) - Case C-105/03 Pupino [2005] ECR I5285, paragraph 43. It should be noted in relation to the Court's finding that in the German and English translations of the judgment the terms interpretation conforming to the directive', which are not relevant to framework decisions, were wrongly used at first. This translation error has now been corrected.

(6) - Pupino (cited in footnote 5), paragraph 19. See also Case C-354/04 P Gestoras Pro Amnistía and Others v Council [2007] ECR I-0000, paragraph 54, and Case C-355/04 P Segi and Others v Council [2007] ECR I-0000, paragraph 54.

(7) - Information concerning the date of entry into force of the Treaty of Amsterdam (OJ 1999 L 114, p. 56).

(8) - Pupino (cited in footnote 5), paragraph 29 et seq., with further references to the case-law under Article 234 EC.

(9) - Case C-217/05 Confederacion Española de Empresarios de Estaciones de Servicio [2006] ECR I-11987, paragraphs 26 to 28, and my Opinion in the same case, point 33, each with further references.

(10) - Pupino (cited in footnote 5), paragraph 48.

(11) - See point 79 below.

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(12) - Opinion in Case C-105/03 Pupino [2005] ECR I5285, point 43, with reference to the judgments in Joined Cases 212/80 to 217/80 Salumi and Others [1981] ECR 2735, paragraph 9; Joined Cases C-121/91 and C-122/91 CT Control Rotterdam and JCT Benelux v Commission [1993] ECR I-3873, paragraph 22; Case C-61/98 De Haan [1999] ECR I-5003, paragraphs 13 and 14; and Joined Cases C-361/02 and C-362/02 Tsapalos [2004] ECR I6405, paragraph 19.

(13) - Opinion in Pupino (cited in footnote 12), points 48 to 52.

(14) - Pupino (cited in footnote 5), paragraphs 44 and 47.

(15) - Case C-170/96 Commission v Council (transit visas) [1998] ECR I2763, paragraph 16, and Case C-176/03 Commission v Council (protection of the environment through criminal law) [2005] ECR I7879, paragraph 39.

(16) - Case T-306/01 Yusuf and Al Barakaat International Foundation v Council and Commission [2005] ECR II3533, paragraph 156.

(17) - Cited in footnote 5, paragraph 36.

(18) - See, for example, Council Decision 2004/201/JHA and Council Regulation (EC) No 378/2004 of 19 February 2004 on procedures for amending the Sirene Manual (OJ 2004 L 64, pp. 5 and 45).

(19) - The Commission refers to its communication to the Council, the European Parliament and the Economic and Social Committee - Crime victims in the European Union - Reflections on standards and action (COM(1999) 349 final).

(20) - Results of the discussions of the Working Party on Cooperation in Criminal Matters of 19 and 20 June 2000 (Council document 9720/00 of 26 June 2000, p. 3, footnote 3) and report by the Working Party on Cooperation in Criminal Matters of 11 July 2000 (Council document 10387/00 of 14 July 2000, p. 7, footnote 1).

(21) - Case 203/86 Spain v Council [1988] ECR 4563, paragraph 25; Joined Cases C-248/95 and C249/95 SAM Schiffahrt and Stapf [1997] ECR I-4475, paragraph 50; Case C-292/97 Karlsson and Others [2000] ECR I-2737, paragraph 39; Joined Cases C-27/00 and C-122/00 Omega Air and Others [2002] ECR I-2569, paragraph 79; Case C-137/00 Milk Marque and National Farmers' Union [2003] ECR I-7975, paragraph 126; Case C-304/01 Spain v Commission [2004] ECR I-7655, paragraph 31; and Case C-210/03 Swedish Match [2004] ECR I-11893, paragraph 70.

(22) - Nor does it contain any provisions that might legitimise discrimination against legal persons by the Member States. In this respect Framework Decision 2001/220 differs from the rule discussed in my Opinion in Case C-540/03 Parliament v Council (family reunification) [2006] ECR I-5769, point 99 et seq., which appeared to justify transposition that was contrary to fundamental rights.

(23) - COM(2002) 562 final (OJ 2003 C 45E, p. 69 et seq.).

(24) - See the Presidency option paper, Council document 7752/04 of 26 March 2004, for the Council discussions of 30 March 2004 and the resulting draft, Council document 8033/04 of 5 April 2004.

(25) - See, for example, Case C-265/95 Commission v France [1997] ECR I6959.

(26) - Case 186/87 [1989] ECR 195, paragraph 19.

(27) - Case C-28/95 Leur-Bloem [1997] ECR I-4161, paragraph 27, and Case C-130/95 Giloy [1997] ECR I-4291, paragraph 23. See also Case C231/89 Gmurzynska-Bscher [1990] ECR I4003, paragraph 24; Joined Cases C-297/88 and C-197/89 Dzodzi [1990] ECR I-3763, paragraph 36; Case C-1/99 Kofisa Italia [2001] ECR I-207, paragraph 21; Case C-170/03 Feron [2005] ECR I-2299, paragraph 11; and Case C-3/04 Poseidon Chartering [2006] ECR I 2505, paragraph 15.

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(28) - See Commission document SEC(2004) 102, p. 3, http:ec.europa.eu/justice_home/doc_centre/criminal/doc/sec_2004_0102_fr.pdf. This is an annex to the report from the Commission on the basis of Article 18 of the Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings, available only in French (COM(2004) final of 16 April 2004).

(29) - Article 74 et seq. and Article 538 et seq. of the Italian Codice di procedura penale seems to apply to compensation to victims in criminal proceedings and Article 262 and Article 263 of the Italian Codice di procedura penale to the return of seized property.

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32004L0080-A17 : N 71
32004L0080-A17LA : N 9
61986J0203 : N 57
61987J0186 : N 69
61995J0248 : N 57
61997J0292 : N 57
62000J0027 : N 57
62000J0137 : N 57
62000J0304 : N 57
62001A0306 : N 44
62003J0105 : N 20 30 45
62003J0210 : N 57
62005J0217 : N 29

SUB	Justice and home affairs
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PROCEDU	Reference for a preliminary ruling
ADVGEN	Kokott
JUDGRAP	Cunha Rodrigues
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Judgment of the Court (Grand Chamber)
of 23 October 2007
Commission of the European Communities v Council of the European Union. Action for annulment - Articles 31(1)(e) EU, 34 EU and 47 EU - Framework Decision 2005/667/JHA - Enforcement of the law against ship-source pollution - Criminal penalties - Community competence - Legal basis - Article 80(2) EC. Case C-440/05.

In Case C440/05,

APPLICATION for annulment under Article 35(6) EU, brought on 8 December 2005,

Commission of the European Communities, represented by W. Bogensberger and R. Troosters, acting as Agents, with an address for service in Luxembourg,

applicant,

supported by:

European Parliament, represented by M. Gomez-Leal, J. Rodrigues and A. Auersperger Mati, acting as Agents, with an address for service in Luxembourg,

intervener,

v

Council of the European Union, represented by J.-C. Piris and J. Schutte, and by K. Michoel, acting as Agents,

defendant,

supported by:

Kingdom of Belgium, represented by M. Wimmer, acting as Agent,

Czech Republic, represented by T. Boek, acting as Agent,

Kingdom of Denmark, represented by J. Molde, acting as Agent,

Republic of Estonia, represented by L. Uibo, acting as Agent,

Hellenic Republic, represented by S. Chala and A. Samoni-Rantou, acting as Agents, with an address for service in Luxembourg,

French Republic, represented by E. Belliard, G. de Bergues and S. Gasri, acting as Agents,

Ireland, represented by D. O'Hagan, E. Fitzsimons and N. Hyland, acting as Agents, with an address for service in Luxembourg,

Republic of Latvia, represented by E. Balode-Buraka and E. Broks, acting as Agents,

Republic of Lithuania, represented by D. Kriauinas, acting as Agent,

Republic of Hungary, represented by P. Gottfried, acting as Agent,

Republic of Malta, represented by S. Camilleri, acting as Agent, and P. Grech, Deputy Attorney General,

Kingdom of the Netherlands, represented by H.G. Sevenster and M. de Grave, acting as Agents,

Republic of Austria, represented by C. Pesendorfer, acting as Agent, with an address for service in Luxembourg,

Republic of Poland, represented by E. Oniecka-Tamecka, acting as Agent,

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Portuguese Republic, represented by L. Fernandes and M.L. Duarte, acting as Agents,

Slovak Republic, represented by R. Prochazka, acting as Agent,

Republic of Finland, represented by E. Bygglin, acting as Agent, with an address for service in Luxembourg,

Kingdom of Sweden, represented by K. Wistrand, acting as Agent, with an address for service in Luxembourg,

United Kingdom of Great Britain and Northern Ireland, represented by E. O'Neill, D.J. Rhee and D. Anderson, acting as Agents, with an address for service in Luxembourg,

interveners,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas, K. Lenaerts and A. Tizzano, Presidents of Chambers, R. Schintgen (Rapporteur), J.N. Cunha Rodrigues, M. Ilei, J. Malenovsku, T. von Danwitz, A. Arabadjiev and C. Toader, Judges,

Advocate General: J. Mazak,

Registrar: R. Grass,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 28 June 2007,

gives the following

Judgment

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

1. Annuls Council Framework Decision 2005/667/JHA of 12 July 2005 to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution;

2. Orders the Council of the European Union to pay the costs;

3. Orders the Kingdom of Belgium, the Czech Republic, the Kingdom of Denmark, the Republic of Estonia, the Hellenic Republic, the French Republic, Ireland, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, the Slovak Republic, the Republic of Finland, the Kingdom of Sweden, and the United Kingdom of Great Britain and Northern Ireland and also the European Parliament to bear their own costs.

1. By its application, the Commission of the European Communities is seeking annulment of Council Framework Decision 2005/667/JHA of 12 July 2005 to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution (OJ 2005 L 255, p. 164) (the Framework Decision' or Framework Decision 2005/667').

Legal context and background to the dispute

2. On 12 July 2005, acting on the initiative of the Commission, the Council of the European Union adopted Framework Decision 2005/667.

3. Based on Title VI of the EU Treaty, in particular on Articles 31(1)(e) EU and 34(2)(b) EU, the Framework Decision constitutes, as is clear from the first five recitals in its preamble, the instrument by which the European Union intends to approximate criminal-law legislation of the Member

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States by requiring them to provide for criminal penalties in order to combat ship-source pollution caused with intent or by serious negligence.

4. The Framework Decision supplements Directive 2005/35/EC of the European Parliament and of the Council of 7 September 2005 on ship-source pollution and on the introduction of penalties for infringements (OJ 2005 L 255, p. 11), with a view to strengthening maritime safety by approximating the legislation of the Member States.

5. Framework Decision 2005/667 provides that the Member States are to adopt a certain number of criminal-law-related measures with a view to attaining the objective pursued by Directive 2005/35, namely to ensure a high level of safety and environmental protection in relation to maritime transport.

6. Article 1 of the Framework Decision states:

For the purposes of this framework decision, the definitions provided for in Article 2 of Directive 2005/35/EC shall apply.'

7. Article 2 of the Framework Decision provides:

1. Subject to Article 4(2) of this framework decision, each Member State shall take the measures necessary to ensure that an infringement within the meaning of Articles 4 and 5 of Directive 2005/35/EC shall be regarded as a criminal offence.

2. Paragraph 1 shall not apply to crew members in respect of infringements that occur in straits used for international navigation, exclusive economic zones and on the high seas where the conditions set out in Annex I, Regulation 11(b) or in Annex II, Regulation 6(b), of the Marpol 73/78 Convention are satisfied.'

8. Article 3 of the Framework Decision provides:

Each Member State shall, in accordance with national law, take the measures necessary to ensure that aiding, abetting or inciting an offence referred to in Article 2 is punishable.'

9. Article 4 of the Framework Decision is worded as follows:

1. Each Member State shall take the measures necessary to ensure that the offences referred to in Articles 2 and 3 are punishable by effective, proportionate and dissuasive criminal penalties which shall include, at least for serious cases, criminal penalties of a maximum of at least between one and three years of imprisonment.

2. In minor cases, where the act committed does not cause a deterioration of the quality of the water, a Member State may provide for penalties of a different type from those laid down in paragraph 1.

3. The criminal penalties provided for in paragraph 1 may be accompanied by other penalties or measures, in particular fines, or the disqualification for a natural person from engaging in an activity requiring official authorisation or approval, or founding, managing or directing a company or a foundation, where the facts having led to his/her conviction show an obvious risk that the same kind of criminal activity may be pursued again.

4. Each Member State shall take the measures necessary to ensure that the intentionally committed offence referred to in Article 2 is punishable by a maximum of at least between five and ten years of imprisonment where the offence caused significant and widespread damage to water quality, to animal or vegetable species or to parts of them and the death or serious injury of persons.

5. Each Member State shall take the measures necessary to ensure that the intentionally committed offence referred to in Article 2 is punishable by a maximum of at least between two and five years of imprisonment where:

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(a) the offence caused significant and widespread damage to water quality, to animal or vegetable species or to parts of them; or

(b) the offence was committed within the framework of a criminal organisation within the meaning of Council Joint Action 98/733/JHA of 21 December 1998 on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union [OJ 1998 L 351, p. 1], irrespective of the level of the penalty referred to in that Joint Action.

6. Each Member State shall take the measures necessary to ensure that the offence referred to in Article 2, when committed with serious negligence, is punishable by a maximum of at least between two and five years of imprisonment where the offence caused significant and widespread damage to water quality, to animal or vegetable species or to parts of them and the death or serious injury of persons.

7. Each Member State shall take the measures necessary to ensure that the offence referred to in Article 2, when committed with serious negligence, is punishable by a maximum of at least between one and three years of imprisonment where the offence caused significant and widespread damage to water quality, to animal or vegetable species or to parts of them.

8. Regarding custodial penalties, this Article shall apply without prejudice to international law and in particular Article 230 of the 1982 United Nations Convention on the Law of the Sea.'

10. According to Article 5 of the Framework Decision:

1. Each Member State shall take the measures necessary to ensure that legal persons can be held liable for the offences referred to in Articles 2 and 3, committed for their benefit by any persons acting either individually or as part of an organ of the legal person, who have a leading position within the legal person, based on:

(a) a power of representation of the legal person, or

(b) an authority to take decisions on behalf of the legal person, or

(c) an authority to exercise control within the legal person.

2. Apart from the cases provided for in paragraph 1, Member States shall take the measures necessary to ensure that a legal person can be held liable where lack of supervision or control by a person referred to in paragraph 1 has made possible the commission of the offence referred to in Article 2 for the benefit of the legal person by a person under its authority.

3. The liability of a legal person under paragraphs 1 and 2 shall not exclude criminal proceedings against natural persons who are involved as perpetrators, instigators or accessories in the offences referred to in Articles 2 and 3.'

11. Article 6 of the Framework Decision provides:

1. Each Member State shall take the measures necessary to ensure that a legal person held liable pursuant to Article 5(1) is punishable by effective, proportionate and dissuasive penalties. The penalties:

(a) shall include criminal or non-criminal fines, which, at least for cases where the legal person is held liable for offences referred to in Article 2, are:

(i) of a maximum of at least between EUR 150 000 and EUR 300 000;

(ii) of a maximum of at least between EUR 750 000 and EUR 1 500 000 in the most serious cases, including at least the intentionally committed offences covered by Article 4(4) and (5);

(b) may, for all cases, include penalties other than fines, such as:

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(i) exclusion from entitlement to public benefits or aid;

(ii) temporary or permanent disqualification from engaging in commercial activities;

(iii) placing under judicial supervision;

(iv) a judicial winding-up order;

(v) the obligation to adopt specific measures in order to eliminate the consequences of the offence which led to the liability of the legal person.

2. For the purpose of the implementation of paragraph 1(a), and without prejudice to the first sentence of paragraph 1, Member States in which the euro has not been adopted shall apply the exchange rate between the euro and their currency as published in the Official Journal of the European Union on 12 July 2005.

3. A Member State may implement paragraph 1(a) by applying a system, whereby the fine is proportionate to the turnover of the legal person, to the financial advantage achieved or envisaged by the commission of the offence, or to any other value indicating the financial situation of the legal person, provided that such system allows for maximum fines, which are at least equivalent to the minimum for the maximum fines established in paragraph 1(a).

4. A Member State that implements the framework decision in accordance with paragraph 3 shall notify the General Secretariat of the Council and the Commission that it intends to do so.

5. Each Member State shall take the measures necessary to ensure that a legal person held liable pursuant to Article 5(2) is punishable by effective, proportionate and dissuasive penalties or measures.'

12. Article 7(1) of the Framework Decision specifies the factual characteristics of the offences in respect of which the Member States are to take the measures necessary to establish their jurisdiction, so far as is permitted by international law.

13. Under Article 7(4) of the Framework Decision, when an offence is subject to the jurisdiction of more than one Member State, the relevant Member States are to strive to coordinate their actions appropriately, in particular as regards the conditions for prosecution and the detailed arrangements for mutual assistance. Article 7(5) of the Framework Decision specifies the connecting factors to be taken into account in that context.

14. Article 8 of the Framework Decision provides:

1. Where a Member State is informed of the commission of an offence to which Article 2 applies or of the risk of the commission of such an offence which causes or is likely to cause imminent pollution, it shall immediately inform such other Member States as are likely to be exposed to this damage, and the Commission.

2. Where a Member State is informed of the commission of an offence to which Article 2 applies or of the risk of the commission of such an offence which is likely to fall within the jurisdiction of a Member State, it shall immediately inform that other Member State.

3. Member States shall without delay notify the flag State or any other State concerned of measures taken pursuant to this framework decision, and in particular Article 7.'

15. According to Article 9 of the Framework Decision:

1. Each Member State shall designate existing contact points, or, if necessary, create new contact points, in particular for the exchange of information as referred to in Article 8.

2. Each Member State shall inform the Commission which of its departments acts or act as contact

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points in accordance with paragraph 1. The Commission shall notify the other Member States of these contact points.'

16. Under Article 10 thereof, the Framework Decision is to have the same territorial scope as Directive 2005/35.

17. Article 11 of the Framework Decision provides:

1. Member States shall adopt the measures necessary to comply with the provisions of this framework decision by 12 January 2007.

2. By 12 January 2007, Member States shall transmit to the General Secretariat of the Council and to the Commission the texts of the provisions transposing into their national law the obligations imposed on them by this framework decision. On the basis of that information and a written report by the Commission, the Council shall, by 12 January 2009 at the latest, assess the extent to which Member States have complied with this framework decision.

3. By 12 January 2012, the Commission shall, on the basis of information supplied by the Member States on the practical application of the provisions implementing this framework decision, submit a report to the Council and make any proposals it deems appropriate which may include proposals to the effect that Member States shall, concerning offences committed in their territorial sea or in their exclusive economic zone or equivalent zone, consider a ship flying the flag of another Member State not to be a foreign ship within the meaning of Article 230 of the 1982 United Nations Convention on the Law of the Sea.'

18. In accordance with Article 12 thereof, the Framework Decision entered into force on the day following that of its publication in the Official Journal of the European Union.

19. Article 1 of Directive 2005/35 provides:

1. The purpose of this Directive is to incorporate international standards for ship-source pollution into Community law and to ensure that persons responsible for discharges are subject to adequate penalties as referred to in Article 8, in order to improve maritime safety and to enhance protection of the marine environment from pollution by ships.

2. This Directive does not prevent Member States from taking more stringent measures against ship-source pollution in conformity with international law.'

20. Article 2 of Directive 2005/35 provides:

For the purpose of this Directive:

1. Marpol 73/78 shall mean the International Convention for the Prevention of Pollution from Ships, 1973 and its 1978 Protocol, in its up-to-date version;

2. polluting substances shall mean substances covered by Annexes I (oil) and II (noxious liquid substances in bulk) to Marpol 73/78;

3. discharge shall mean any release howsoever caused from a ship, as referred to in Article 2 of Marpol 73/78;

4. ship shall mean a seagoing vessel, irrespective of its flag, of any type whatsoever operating in the marine environment and shall include hydrofoil boats, air-cushion vehicles, submersibles and floating craft.'

21. According to Article 3 of that directive:

1. This Directive shall apply, in accordance with international law, to discharges of polluting substances in:

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(a) the internal waters, including ports, of a Member State, in so far as the Marpol regime is applicable;

(b) the territorial sea of a Member State;

(c) straits used for international navigation subject to the regime of transit passage, as laid down in Part III, section 2, of the 1982 United Nations Convention on the Law of the Sea, to the extent that a Member State exercises jurisdiction over such straits;

(d) the exclusive economic zone or equivalent zone of a Member State, established in accordance with international law; and

(e) the high seas.

2. This Directive shall apply to discharges of polluting substances from any ship, irrespective of its flag, with the exception of any warship, naval auxiliary or other ship owned or operated by a State and used, for the time being, only on government non-commercial service.'

22. Article 4 of that directive provides:

Member States shall ensure that ship-source discharges of polluting substances into any of the areas referred to in Article 3(1) are regarded as infringements if committed with intent, recklessly or by serious negligence. These infringements are regarded as criminal offences by, and in the circumstances provided for in, Framework Decision 2005/667... supplementing this Directive.'

23. According to Article 8 of Directive 2005/35:

1. Member States shall take the necessary measures to ensure that infringements within the meaning of Article 4 are subject to effective, proportionate and dissuasive penalties, which may include criminal or administrative penalties.

2. Each Member State shall take the measures necessary to ensure that the penalties referred to in paragraph 1 apply to any person who is found responsible for an infringement within the meaning of Article 4.'

24. At the time of adoption both of Directive 2005/35 and the Framework Decision, the Commission made statements in order to dissociate itself from the double-text' approach taken by the Council. The statement relating to the Framework Decision reads as follows:

Given the importance of combating ship-source pollution, the Commission is in favour of the discharge of polluting substances by ships being made a criminal offence and of penalties being adopted at national level in the event of the infringement of Community regulations concerning ship-source pollution.

The Commission is, however, of the opinion that the Framework Decision is not the appropriate legal instrument with which to impose on Member States an obligation to criminalise the illicit discharge of polluting substances at sea and to establish corresponding criminal penalties at national level.

The Commission - as it is arguing in the Court of Justice in its appeal C176/03 [Case C176/03 Commission v Council [2005] ECR I7879] against the Framework Decision on the protection of the environment through criminal law - considers that, within the competences which it possesses for the purpose of achieving the objectives set out in Article 2 of the Treaty establishing the European Community, the Community is empowered to require Member States to provide for penalties - including, if appropriate, criminal penalties - at national level, where this proves necessary in order to achieve a Community objective.

This is the case with regard to questions of ship-source pollution, for which Article 80(2) of

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the Treaty establishing the European Community constitutes the legal basis.

Pending the ruling on C176/03, if the Council adopts the Framework Decision in spite of this Community competence, the Commission reserves all the rights conferred upon it by the Treaty.'

25. Considering that the Framework Decision had not been adopted on the correct legal basis and that Article 47 EU had thereby been infringed, the Commission brought the present action.

The action

26. By order of the President of the Court of 25 April 2006, leave to intervene in support of the forms of order sought by the Commission and the Council respectively was granted, on the one hand, to the European Parliament and, on the other, to the Kingdom of Belgium, the Czech Republic, the Kingdom of Denmark, the Republic of Estonia, the Hellenic Republic, the French Republic, Ireland, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, the Slovak Republic, the Republic of Finland, the Kingdom of Sweden and the United Kingdom of Great Britain and Northern Ireland.

27. By order of 28 September 2006, the President of the Court granted the Republic of Slovenia leave to intervene in support of the forms of order sought by the Council.

Arguments of the parties

28. The Commission considers that, by virtue of the legal basis used for its adoption, the Framework Decision infringes Article 47 EU and must therefore be annulled.

29. According to the Commission, it is clear from the judgment in Case C176/03 Commission v Council , the implications of which extend beyond Community policy on environmental protection, that regard must be had to the aim and content of a measure in order to determine the appropriate legal basis for its adoption. Although the Court noted in that judgment that criminal law does not, as a rule, fall within the Community's sphere of competence, it recognised that the Community does have an implied competence linked to a specific legal basis and may therefore adopt appropriate criminal-law measures, provided that there is a need to combat failure to implement Community objectives and that the aim of those measures is to ensure that the Community policy in question is fully effective. The Court did not define the scope of the Community legislature's competence in criminal-law matters, since it did not draw any distinctions based on the nature of the criminal-law measures in question.

30. In the present case, the preamble to the Framework Decision states that its purpose is to supplement and thereby ensure the effectiveness of the system established by Directive 2005/35, which was adopted on the basis of Article 80(2) EC.

31. As to the content of the Framework Decision, the Commission submits that the measures provided for in Articles 1 to 10 thereof all relate to criminal law and concern conduct which must be regarded as reprehensible under Community law.

32. According to the Commission, the criterion requiring that there be a need, laid down by the Court in Case C176/03 Commission v Council , is also fulfilled in the present case. Firstly, the Council implicitly acknowledged as much in adopting the Framework Decision, since the third indent of the second paragraph of Article 29 EU provides that the Member States may approximate their legislation on criminal matters only where necessary'. Secondly, given the specific features of the conduct covered by Directive 2005/35, all the provisions of that framework decision are necessary in order to ensure that the system established by the directive is effective.

33. The Commission adds that, contrary to what the Council contends, the Court does not require

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an additional criterion, relating to the transversal' nature of the Community policy in question, to be satisfied in order for a degree of competence in criminal-law matters to be recognised as accruing to the Community. Moreover, such a criterion would, for most areas of Community law, preclude the possibility of any form of criminal-law protection under Community law, even where there was clearly a need for criminal-law measures to be taken.

34. As to the argument that the Council was free to act on the basis of Title VI of the EU Treaty to adopt measures relating to the criminal law of the Member States, since it had decided, as it was entitled to do under Article 80(2) EC, not to specify the penalties further in Directive 2005/35, the Commission states that Article 80(2) EC does not contain conditions for the existence of Community competence as such, but only for the exercise of that competence. The Council could, of course, have decided that the Member States remained competent. If it had, however, the Member States would have had to take action separately, since Article 47 EU precludes reliance on Title VI of the EU Treaty.

35. The Commission adds that the Framework Decision does not harmonise the type and level of applicable criminal penalty, as the Member States retain a certain latitude in that regard and the national courts have discretion to adjust the penalties to suit the individual case. Thus, the provisions of Framework Decision 2005/667 do not differ fundamentally from those of Article 5(1) of Council Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law (OJ 2003 L 29, p. 55), which was annulled by the Court in Case C176/03 Commission v Council.

36. Criminal law does not, of course, constitute an independent Community policy area. The fact remains, however, that the Community has an ancillary criminal-law competence, which it may exercise if necessary. The criterion of need, applied by the Court in Case C176/03 Commission v Council , applies only in relation to the exercise of that competence, not to the question whether such a competence exists.

37. In the light of the functional approach taken by the Court in Case C176/03 Commission v Council , and the fact that the measures provided for in Articles 1 to 10 of the Framework Decision are criminal-law rules which are necessary to ensure the effectiveness of the common transport policy, as elaborated upon in Directive 2005/35, the Commission considers that the Framework Decision as a whole infringes Article 47 EU and must accordingly be annulled.

38. The Commission also observes that the terms essential' and needed', on the one hand, and the notion of necessary' within the meaning of Article 29 EU, on the other, in fact reflect the same concept and that, at that level, there is no difference between the EC Treaty and the EU Treaty.

39. Lastly, the Commission submits that its interpretation of the judgment in Case C176/03 Commission v Council does not deprive Title VI of the EU Treaty of any useful purpose, since a great many areas coming within the scope of that title are not affected by that interpretation.

40. The European Parliament observes that the Framework Decision is a perfect match of the framework decision which was the subject-matter of the judgment in Case C176/03 Commission v Council. Firstly, its aim and content are wholly analogous to that of Framework Decision 2003/80, which was annulled by the Court in that judgment. As is clear from the preamble thereto, the fight against pollution and protection of the environment are not ancillary or secondary objectives of Framework Decision 2005/667. Likewise, its content is similar to that of Framework Decision 2003/80, since in both cases the criminal offences envisaged relate to the discharge of polluting substances. Although the two framework decisions diverge as regards the specific definition of the type and level of criminal penalty to be applied, that divergence is not such as to justify, in the present case, an outcome which is any different from that in Case C176/03 Commission v Council . In fact,

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in that judgment the Court has already held that the Community legislature's competence in criminal-law matters extends to provisions such as Article 5(1) of Framework Decision 2003/80 concerning the type and level of criminal penalties.

41. Next, the criterion requiring that there be a need is also fulfilled in the present case. Lastly, since Articles 1 to 6 of the Framework Decision come within Community competence, that decision, being indivisible, should be regarded in its entirety as infringing Article 47 EU.

42. The Council, by contrast, puts forward as its principal argument that, in adopting Directive 2005/35 together with the European Parliament under the co-decision procedure, it decided - in accordance with Article 80(2) EC - the question whether' and, if so, to what extent' the Community legislature must exercise its competence to adopt provisions on ship-source pollution, in particular provisions introducing penalties for infringement of the relevant rules. Through the adoption of that directive, the Community legislature wished to demarcate the limits of its own power to take action in matters involving maritime transport policy. This approach is entirely in keeping with Article 80(2) EC and the case-law of the Court.

43. The Community legislature could have decided to go further on the basis of Article 80(2) EC. However, in keeping with the powers conferred on it by the EC Treaty, it chose not to do so. It is also noteworthy that the European Parliament and the Council followed the Commission's proposal concerning the legal basis to be used for Directive 2005/35. Although that directive also pursues objectives relating to protection of the environment, the Community legislature took the view that it essentially falls under the common transport policy and that the addition of a legal basis concerning environmental protection, in particular Article 175(1) EC, was not necessary. As it is, the legal basis chosen was not questioned by either the Parliament or the Commission.

44. Given the conditional nature of the competence in matters of transport policy conferred by Article 80 EC on the Community and the fact that transport policy, unlike environmental policy which was the policy area at issue in Case C176/03 Commission v Council , does not pursue an objective that is essential, transversal and fundamental, the Council considers that the inferences to be drawn from that judgment need not necessarily be the same in respect of both policies.

45. In those circumstances, it cannot validly be claimed that the provisions laid down in Framework Decision 2005/667 ought to have been adopted by the Community legislature.

46. In the alternative, the Council contends that the Community is not competent to lay down binding rules on the type and level of criminal penalty which the Member States must provide for in their national law and that, accordingly, the Council did not infringe the EC and EU Treaties by adopting Articles 1, 4(1), (4), (5), (6) and (7) and 6(1)(a), (2) and (3), or Articles 7 to 12 of the Framework Decision.

47. The Council states that, in terms of its aim and content - the key elements for determining the appropriate legal basis for adopting a measure - the Framework Decision is designed to approximate the laws of the Member States relating to the fight against ship-source pollution by harmonising the type and level of the applicable criminal penalties. However, it is clear from Case C176/03 Commission v Council that such harmonisation, which goes far beyond that provided for in Framework Decision 2003/80, does not currently fall within the Community's sphere of competence.

48. Since the approach adopted by the Court in that judgment must be regarded as marking an exception to the principle that criminal law falls outside the Community's sphere of competence - as do, by the same token, the rules of criminal procedure - the Council considers that the criteria applied by the Court in support of that approach must be interpreted narrowly. That approach should therefore apply only where there is a need', a concept which is not identical to that of necessary' as referred to in the second paragraph of Article 29 EU.

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49. The Council adds, with regard to the interpretation of the judgment in Case C176/03 Commission v Council advocated by the Commission, that not only would it deprive Title VI of the EU Treaty of much of its useful purpose, it also manifestly disregards the fact that the Court opted for that approach in that judgment because the Community objective of environmental protection is essential, transversal and fundamental.

50. Lastly, the Council observes that, in Case C176/03 Commission v Council , the Court held that, in the light of their aim and content, the Community was competent to adopt Articles 1 to 7 of Framework Decision 2003/80 and that it would therefore have excluded Article 8 on jurisdiction and Article 9 on extraditions and prosecutions from that sphere of competence. Likewise, in the present case, Articles 7, 8 and 9 of Framework Decision 2005/667 cover areas in respect of which the EC Treaty has not conferred any competence on the Community.

51. The arguments put forward by the Member States which have intervened in the present proceedings are largely similar to those relied on by the Council.

Findings of the Court

52. Under Article 47 EU, none of the provisions of the EC Treaty is to be affected by a provision of the EU Treaty. The same rule is laid down in the first paragraph of Article 29 EU, which introduces Title VI of the EU Treaty, entitled Provisions on police and judicial cooperation in criminal matters'.

53. It is the task of the Court to ensure that acts which, according to the Council, fall within the scope of Title VI do not encroach upon the powers conferred by the EC Treaty on the Community (see Case C170/96 Commission v Council [1998] ECR I2763, paragraph 16, and Case C176/03 Commission v Council , paragraph 39).

54. It is therefore necessary to determine whether or not the provisions of Framework Decision 2005/667 affect the Community's competence under Article 80(2) EC, in that they could have been adopted on the basis of that provision, as submitted by the Commission.

55. It should be borne in mind, firstly, that the common transport policy is one of the foundations of the Community, since Article 70 EC, read together with Article 80(1) EC, provides that the objectives of the Treaty are, in matters of transport by rail, road or inland waterway, to be pursued by the Member States within the framework of that policy (see Case 97/78 Schumalla [1998] ECR 2311, paragraph 4).

56. Next, it should be noted that, under Article 80(2) EC, the Council may decide whether, to what extent and by what procedure appropriate provisions may be laid down for sea transport (see, inter alia, Case C18/93 Corsica Ferries [1994] ECR I1783, paragraph 25), and the procedural provisions of Article 71 EC are to apply.

57. As evidenced by the Court's case-law, far from excluding the application of the EC Treaty to sea transport, Article 80(2) EC merely provides that the specific rules of the Treaty relating to the common transport policy, which are set out in Title V thereof, will not automatically apply to that sphere of activity (see, inter alia, Case C178/05 Commission v Greece [2007] ECR I0000, paragraph 52).

58. Since Article 80(2) EC does not lay down any explicit limitations as to the nature of the specific common rules which the Council may adopt on that basis in accordance with the procedural provisions laid down in Article 71 EC, the Community legislature has broad legislative powers under Article 80(2) EC and is competent - by virtue of that provision and in keeping with the other provisions of the EC Treaty relating to the common transport policy, in particular Article 71(1) EC - to lay down, inter alia, measures to improve transport safety' and any other appropriate

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provisions' in the field of maritime transport (see, to that effect, in respect of road transport, Joined Cases C184/02 and C223/02 Spain and Finland v Parliament and Council [2004] ECR I7789, paragraph 28).

59. That finding, to the effect that, within the scope of the competence conferred on it by Article 80(2) EC, the Community legislature may adopt measures aimed at improving maritime transport safety, is not called into question by the fact that, in the present case, the Council has not considered it appropriate to adopt the provisions of Framework Decision 2005/667 on the basis of Article 80(2) EC. In fact, the existence of the legislative competence conferred by Article 80(2) EC is not dependent on a decision by the legislature actually to exercise that competence.

60. Moreover, since requirements relating to environmental protection, which is one of the essential objectives of the Community (see, inter alia, Case C176/03 Commission v Council , paragraph 41), must, according to Article 6 EC, be integrated into the definition and implementation of... Community policies and activities', such protection must be regarded as an objective which also forms part of the common transport policy. The Community legislature may therefore, on the basis of Article 80(2) EC and in the exercise of the powers conferred on it by that provision, decide to promote environmental protection (see, by analogy, Case C336/00 Huber [2002] ECR I7699, paragraph 36).

61. Lastly, it must be borne in mind that, according to the Court's settled case-law, the choice of legal basis for a Community measure must rest on objective factors which are amenable to judicial review, including in particular the aim and the content of the measure (see Case C300/89 Commission v Council (Titanium dioxide) [1991] ECR I2867, paragraph 10; Huber , paragraph 30; and Case C176/30 Commission v Council , paragraph 45).

62. More specifically, in respect of Framework Decision 2005/667, the preamble thereto states that its purpose is to enhance maritime safety and improve protection of the marine environment against ship-source pollution. As evidenced by the second and third recitals in the preamble, that decision is intended to approximate certain legislation of the Member States in order to avoid a recurrence of damage like that brought about by the sinking of the oil tanker, the Prestige .

63. As is clear from the fourth recital in the preamble to Framework Decision 2005/667 and the sixth recital in the preamble to Directive 2005/35, the Framework Decision is intended to supplement the directive with detailed rules on criminal matters. As evidenced by the first and fifteenth recitals in the preamble to Directive 2005/35 and also in Article 1 thereof, it also aims to ensure a high level of safety and environmental protection in maritime transport. Its purpose, according to the fifteenth recital in the preamble and Article 1, is to incorporate international ship-source pollution standards into Community law and to establish penalties - criminal and administrative - for infringement of those rules, in order to ensure that they are effective.

64. As to the content of Framework Decision 2005/667, by virtue of Articles 2, 3 and 5 thereof, it introduces the obligation for Member States to provide for criminal penalties for persons, natural or legal, who have committed, aided, abetted or incited one of the offences referred to in Articles 4 and 5 of Directive 2005/35.

65. Moreover, the Framework Decision, according to which the criminal penalties must be effective, proportionate and dissuasive, lays down, in Articles 4 and 6, the type and level of criminal penalty to be applied according to the damage caused by the offences to water quality, to animal or vegetable species or to persons.

66. Although it is true that, as a general rule, neither criminal law nor the rules of criminal procedure fall within the Community's competence (see, to that effect, Case 203/80 Casati [1981] ECR 2595, paragraph 27; Case C226/97 Lemmens [1998] ECR I3711, paragraph 19; and Case C176/03

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Commission v Council , paragraph 47), the fact remains that when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, the Community legislature may require the Member States to introduce such penalties in order to ensure that the rules which it lays down in that field are fully effective (see, to that effect, Case C176/03 Commission v Council , paragraph 48).

67. In the present case, the Court finds, firstly, that the provisions laid down in Framework Decision 2005/667 - like those of Framework Decision 2003/80, at issue in the proceedings which gave rise to the judgment in Case C176/03 Commission v Council - relate to conduct which is likely to cause particularly serious environmental damage as a result, in this case, of the infringement of the Community rules on maritime safety.

68. Secondly, it is clear from the third, fourth, fifth, seventh and eighth recitals in the preamble to Directive 2005/35, read in conjunction with the first five recitals in the preamble to Framework Decision 2005/667, that the Council took the view that criminal penalties were necessary to ensure compliance with the Community rules laid down in the field of maritime safety.

69. Accordingly, since Articles 2, 3 and 5 of Framework Decision 2005/667 are designed to ensure the efficacy of the rules adopted in the field of maritime safety, non-compliance with which may have serious environmental consequences, by requiring Member States to apply criminal penalties to certain forms of conduct, those articles must be regarded as being essentially aimed at improving maritime safety, as well as environmental protection, and could have been validly adopted on the basis of Article 80(2) EC.

70. By contrast, and contrary to the submission of the Commission, the determination of the type and level of the criminal penalties to be applied does not fall within the Community's sphere of competence.

71. It follows that the Community legislature may not adopt provisions such as Articles 4 and 6 of Framework Decision 2005/667, since those articles relate to the type and level of the applicable criminal penalties. Consequently, those provisions were not adopted in infringement of Article 47 EU.

72. It should also be pointed out that the references made in Articles 4 and 6 of the Framework Decision to Articles 2, 3 and 5 thereof highlight the fact that, in the present case, those provisions are inextricably linked to the provisions concerning the criminal offences to which they relate.

73. As regards Articles 7 to 12 of Framework Decision 2005/667 - which respectively concern jurisdiction, notification of information between Member States, designation of contact points, territorial scope of application of the Framework Decision, the implementation obligation on Member States and the date of entry into force of the Framework Decision - it is sufficient to note, in the present case, that those articles are also inextricably linked to the provisions of the Framework Decision that are referred to in paragraphs 69 and 71 of this judgment, which means that it is not necessary to rule on the question whether they fall within the sphere of competence of the Community legislature.

74. In the light of the foregoing, it must be concluded that Framework Decision 2005/667, in encroaching on the competence which Article 80(2) EC attributes to the Community, infringes Article 47 EU and, being indivisible, must be annulled in its entirety.

Costs

75. 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. Since the Commission has applied for costs and the Council has been unsuccessful, the Council must be ordered to pay

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the costs. Pursuant to the first subparagraph of Article 69(4), the interveners in these proceedings must bear their own costs.

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61993J0018 : N 56
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NOTES Broussy, Emmanuelle ; Donnat, Francis ; Lambert, Christian: Chronique de jurisprudence communautaire. Compétence communautaire et sanctions pénales, L'actualité juridique ; droit administratif 2007 p.2251-2253 ; Simon, Denys: Compétence communautaire en matière pénale, Europe 2007 Décembre Comm. no 326 p.16-17 ; Gautier, Marie: Etendue de la compétence de la Communauté pour exiger des Etats membres qu'ils instituent des sanctions pénales, La Semaine Juridique - édition générale 2007 II 10207 p.36-39 ; Mok, M.R.: Nederlandse jurisprudentie ; Uitspraken in burgerlijke en strafzaken 2008 no 48 ; Pagh, Peter: EF-dom om strafferammer for miljølovsovertrædelser: - hverken en overnational eller mellemstatslig kompetence, Ugeskrift for Retsvæsen B 2008 p.10-13 ; Bianchi, Roberta: Ambiente: mensile di diritto e pratica per l'impresa 2008 no 01 p.56-57 ; Monpion, Anne: Arrêt CJCE, Commission contre Conseil du 23 octobre 2007: les limites de la compétence pénale de la Communauté, Revue du marché commun et de l'Union européenne 2008 p.130-135 ; De Moor-Van Vugt, A.J.C.: Administratiefrechtelijke beslissingen ; Rechtspraak bestuursrecht 2008 no 47 ; Eisele, Jörg: Juristenzeitung 2008 p.251-254 ; Cudennec, Annie: La Communauté européenne est compétente pour agir au plan pénal, Le droit maritime français 2008 p.228-232 ; Essens, O.F.: Commissie versus Raad: ronde 2, Nederlands tijdschrift voor Europees recht 2008 p.91-96 ; Emmans, Anna-Maria ; Rübenstahl, Markus: Die strafrechtliche Annexkompetenz der EG umfasst nicht Art und Mass der einzuführenden Kriminalstrafen - sie besteht aber auch jenseits des Umweltrechts, European Law Reporter 2008 p.103-107 ; Sanfrutos Cano, E.: La jurisprudence de la Cour de justice et du Tribunal de première instance. Chronique des arrêts. "Sanctions pénales réprimant la pollution causée par les navires", Revue du droit de l'Union européenne 2008 no 1 p.173-181

PROCEDU Action for annulment

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ORDONNANCE DU PRÉSIDENT DE LA COUR

25 avril 2006(*)

«Interventions»

Dans l'affaire C-440/05,

ayant pour objet un recours en annulation au titre de l'article 35, paragraphe 6, UE, introduit le 8 décembre 2005,

Commission des Communautés européennes, représentée par MM. W. Bogensberger et R. Troosters, en qualité d'agents, ayant élu domicile à Luxembourg,

partie requérante,

contre

Conseil de l'Union européenne, représenté par MM. J.-C. Piris, J. Schutte et Mme K. Michoel, en qualité d'agents,

partie défenderesse,

LE PRÉSIDENT DE LA COUR,

l'avocat général, Mme C. Stix-Hackl, entendu,

rend la présente

Ordonnance

1 Par requête déposée au greffe de la Cour le 13 février 2006, la République portugaise, représentée par M. L. Inez Fernandes, en qualité d'agent, a demandé à intervenir dans l'affaire C-440/05 à l'appui des conclusions de la partie défenderesse.

2 Par requête déposée au greffe de la Cour le 22 février 2006, le Royaume de Belgique, représenté par M. M. Wimmer, en qualité d'agent, a demandé à intervenir dans l'affaire C-440/05 à l'appui des conclusions de la partie défenderesse.

3 Par requête déposée au greffe de la Cour le 23 février 2006, la République de Finlande, représentée par Mme E. Bygglin, en qualité d'agent, ayant élu domicile à Luxembourg, a demandé à intervenir dans l'affaire C-440/05 à l'appui des conclusions de la partie défenderesse.

4 Par requête déposée au greffe de la Cour le 27 février 2006, la République française, représentée par M. G. de Bergues, en qualité d'agent, a demandé à intervenir dans l'affaire C-440/05 à l'appui des conclusions de la partie défenderesse.

5 Par requête déposée au greffe de la Cour le 6 mars 2006, la République slovaque, représentée par M. R. Procházka, en qualité d'agent, a demandé à intervenir dans l'affaire C-440/05 à l'appui des conclusions de la partie défenderesse.

6 Par requête déposée au greffe de la Cour le 6 mars 2006, la République de Malte, représentée par M. S. Camilleri, en qualité d'agent, a demandé à intervenir dans l'affaire C-440/05 à l'appui des conclusions de la partie défenderesse.

7 Par requête déposée au greffe de la Cour le 9 mars 2006, la République de Hongrie, représentée par M. G. Péter, en qualité d'agent, a demandé à intervenir dans l'affaire C-440/05 à l'appui des conclusions de la partie défenderesse.

8 Par requête déposée au greffe de la Cour le 13 mars 2006, le Royaume de Danemark, représenté par M. J. Molde, en qualité d'agent, ayant élu domicile à Luxembourg, a demandé à intervenir dans l'affaire C-440/05 à l'appui des conclusions de la partie défenderesse.

9 Par requête déposée au greffe de la Cour le 13 mars 2006, le Royaume de Suède, représenté par M. A. Kruse et M^mes^ A. Falk et K. Wistrand, en qualité d'agents, a demandé à intervenir dans l'affaire C-440/05 à l'appui des conclusions de la partie défenderesse.

10 Par requête déposée au greffe de la Cour le 13 mars 2006, l'Irlande, représentée par M. D. J. O'Hagan, en qualité d'agent, ayant élu domicile à Luxembourg, a demandé à intervenir dans l'affaire C-440/05 à l'appui des conclusions de la partie défenderesse.

11 Par requête déposée au greffe de la Cour le 13 mars 2006, la République tchèque, représentée par M. T. Boček, en qualité d'agent, ayant élu domicile à Luxembourg, a demandé à intervenir dans l'affaire C-440/05 à l'appui des conclusions de la partie défenderesse.

12 Par requête déposée au greffe de la Cour le 13 mars 2006, la République hellénique, représentée par M^mes^ E. Mamouna et S. Chalo, en qualité d'agents, ayant élu domicile à Luxembourg, a demandé à intervenir dans l'affaire C-440/05 à l'appui des conclusions de la partie défenderesse.

13 Par requête déposée au greffe de la Cour le 14 mars 2006, la République d'Estonie, représentée par M. L. Uibo, en qualité d'agent, a demandé à intervenir dans l'affaire C-440/05 à l'appui des conclusions de la partie défenderesse.

14 Par requête déposée au greffe de la Cour le 14 mars 2006, le Royaume-Uni de Grande-Bretagne et d'Irlande du Nord, représenté par Mme R. Caudwell, en qualité d'agent, a demandé à intervenir dans l'affaire C-440/05 à l'appui des conclusions de la partie défenderesse.

15 Par requête déposée au greffe de la Cour le 15 mars 2006, la République de Lettonie, représentée par Mme E. Balode-Buraka, en qualité d'agent, a demandé à intervenir dans l'affaire C-440/05 à l'appui des conclusions de la partie défenderesse.

16 Par requête déposée au greffe de la Cour le 15 mars 2006, le Parlement européen, représenté par Mme M. Gómez-Leal, MM. J. Rodrigues et A. Auersperger Matić, en qualité d'agents, ayant élu domicile à Luxembourg, a demandé à intervenir dans l'affaire C-440/05 à l'appui des conclusions de la partie requérante.

17 Par requête déposée au greffe de la Cour le 16 mars 2006, la République de Lituanie, représentée par M. D. Kriaučiūnas, en qualité d'agent, a demandé à intervenir dans l'affaire C-440/05 à l'appui des conclusions de la partie défenderesse.

18 Par requête déposée au greffe de la Cour le 16 mars 2006, le Royaume des Pays-Bas, représenté par Mme H. Sevenster, en qualité d'agent, a demandé à intervenir dans l'affaire C-440/05 à l'appui des conclusions de la partie défenderesse.

19 Par requête déposée au greffe de la Cour le 20 mars 2006, la République d'Autriche, représentée par Mme C. Pesendorfer, en qualité d'agent, ayant élu domicile à Luxembourg, a demandé à intervenir dans l'affaire C-440/05 à l'appui des conclusions de la partie défenderesse.

20 Par requête déposée au greffe de la Cour le 21 mars 2006, la République de Pologne, représentée par M. J. Pietras, en qualité d'agent, a demandé à intervenir dans l'affaire C-440/05 à l'appui des conclusions de la partie défenderesse.

21 Les requêtes en intervention ont été introduites conformément à l'article 93, paragraphe 1, du règlement de procédure, et sont présentées en application de l'article 40, premier alinéa, du statut de la Cour.

Par ces motifs, le président de la Cour ordonne:

1) **La République portugaise, le Royaume de Belgique, la République de Finlande, la République française, la République slovaque, la République de Malte, la République de Hongrie, le Royaume de Danemark, le Royaume de Suède, l'Irlande, la République tchèque, la République hellénique, la République d'Estonie, le Royaume-Uni de Grande-Bretagne et d'Irlande du Nord, la République de Lettonie, la République de Lituanie, le Royaume des Pays-Bas, la République d'Autriche et la République de Pologne sont admis à intervenir dans l'affaire C-440/05 à l'appui des conclusions de la partie défenderesse.**

2) **Le Parlement européen est admis à intervenir dans l'affaire C-440/05 à l'appui des conclusions de la partie requérante.**

3) **Un délai sera fixé aux parties intervenantes pour exposer, par écrit, les moyens à l'appui de leurs conclusions.**

4) **Une copie de toutes les pièces de procédure sera signifiée aux parties intervenantes par les soins du greffier.**

5) **Les dépens sont réservés.**

Signatures

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* Langue de procédure: le français.

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Ordonnance du Président de la Cour

28 septembre 2006(*)

«Intervention»

Dans l'affaire C-440/05,

ayant pour objet un recours en annulation au titre de l'article 35, paragraphe 6, UE, introduit le 8 décembre 2005,

Commission des Communautés européennes, représentée par MM. W. Bogensberger et R. Troosters, en qualité d'agents, ayant élu domicile à Luxembourg,

partie requérante,

soutenue par :

Parlement européen, représenté par Mme M. Gómez-Leal, MM. J. Rodrigues et A. Auersperger Matić, en qualité d'agents,

partie intervenante,

contre

Conseil de l'Union européenne, représenté par MM. J.-C. Piris, J. Schutte et Mme K. Michoel, en qualité d'agents,

partie défenderesse,

soutenu par :

République portugaise, représentée par M. L. Inez Fernandes et Mme M. L. Duarte, en qualité d'agents,

Royaume de Belgique, représenté par M. M. Wimmer, en qualité d'agent,

République de Finlande, représentée par Mme E. Bygglin, en qualité d'agent, ayant élu domicile à Luxembourg,

République française, représentée par Mme E. Belliard, M. G. de Bergues et Mme S. Gasri, en qualité d'agents,

République slovaque, représentée par M. R. Procházka, en qualité d'agent,

République de Malte, représentée par M. S. Camilleri, en qualité d'agent, assisté de M. P. Grech, Deputy Attorney General,

République de Hongrie, représentée par M. P. Gottfried, en qualité d'agent,

Royaume de Danemark, représenté par MM. J. Molde et M. C. Thorning, en qualité d'agents,

Royaume de Suède, représenté par M. A. Kruse et M^mes A. Falk et K. Wistrand, en qualité d'agents,

Irlande, représentée par M. D. J. O'Hagan, en qualité d'agent, assisté de M. E. Fitzsimons, SC, Mmes N. Hyland, BL, et C. O'Hara, advisory counsel, ayant élu domicile à Luxembourg,

République tchèque, représentée par M. T. Boček, en qualité d'agent, ayant élu domicile à Luxembourg,

République hellénique, représentée initialement par Mmes S. Chala et E. Mamouna, puis par Mmes S. Chala et A. Samoni-Rantou, en qualité d'agents, ayant élu domicile à Luxembourg,

République d'Estonie, représentée par M. L. Uibo, en qualité d'agent,

Royaume-Uni de Grande-Bretagne et d'Irlande du Nord, représenté initialement par Mlle R. Caudwell, puis par Mme E. O'Neill, en qualité d'agent, assistée de M. D. Anderson, QC, et Mlle D. J. Rhee, barrister,

République de Lettonie, représentée par Mme E. Balode-Buraka et M. E. Broks, en qualité d'agents,

République de Lituanie, représentée par M. D. Kriaučiūnas, en qualité d'agent,

Royaume des Pays-Bas, représenté par Mme H. G. Sevenster et M. D. J. M. de Grave, en qualité d'agents,

République d'Autriche, représentée par Mme C. Pesendorfer, en qualité d'agent, ayant élu domicile à Luxembourg,

République de Pologne, représentée initialement par M. J. Pietras, puis par Mme E. Ośniecka-Tamecka, en qualité d'agent,

parties intervenantes,

Le Président de la Cour,

l'avocat général, Mme C. Stix-Hackl, entendu,

rend la présente

Ordonnance

1 Par requête déposée au greffe de la Cour le 30 août 2006, la République de Slovénie, représentée par Mme T. Mihelič, en qualité d'agent, a demandé à intervenir dans l'affaire C-440/05 au soutien des conclusions de la partie défenderesse.

2 La requête en intervention, qui a été présentée en application de l'article 40, premier alinéa, du statut de la Cour de justice, étant parvenue au greffe de cette dernière postérieurement au délai prévu à l'article 93, paragraphe 1, du règlement de procédure, il y a lieu de l'admettre sur le fondement du paragraphe 7 de cette dernière disposition.

Par ces motifs, le président de la Cour ordonne:

1) La République de Slovénie est admise à intervenir dans l'affaire C-440/05 au soutien des conclusions de la partie défenderesse.

2) La partie intervenante pourra présenter ses observations lors de la procédure orale, si celle-ci a lieu.

3) Une copie de tous les actes de procédure sera signifiée à la partie intervenante par les soins du greffier.

4) Les dépens sont réservés.

Signatures

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* Langue de procédure: le français.

Opinion of Mr Advocate General Mazak delivered on 28 June 2007. Commission of the European Communities v Council of the European Union. Action for annulment - Articles 31(1)(e) EU, 34 EU and 47 EU - Framework Decision 2005/667/JHA - Enforcement of the law against ship-source pollution - Criminal penalties - Community competence - Legal basis - Article 80(2) EC. Case C-440/05.

I - Introduction

1. By its application under Article 35(6) EU, the Commission is seeking annulment of Council Framework Decision 2005/667/JHA of 12 July 2005 to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution (the framework decision') (2) on the grounds that, in infringement of Article 47 EU, the measures contained therein providing for an approximation of Member States' legislation in criminal matters should have been adopted on the basis of the EC Treaty rather than on the basis of Title VI of the Treaty on European Union.

2. Thus the present case concerns the distribution of competences between the first and the third pillars of the European Union as well as between the Community and the Member States in the area of criminal law - an area widely perceived as the preserve of State authority and sovereignty - and is therefore of truly constitutional significance.

3. It constitutes a follow-up to the judgment of 13 September 2005 in Commission v Council (3) by which the Court annulled Council Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law (4) on the ground that the measures at issue in that case, requiring the Member States to prescribe criminal penalties for a number of environmental offences, fell properly to be adopted by the Community on the basis of Article 175 EC.

4. However, that ruling leaves delicate questions to be considered as to the circumstances in which the Community has competence to oblige the Member States to provide for criminal penalties, and the precise extent to which that competence may be exercised.

5. On those points, the Commission and the European Parliament, on the one hand, and the Council and the 20 intervening Member States, on the other, have formed completely opposing views as to the implications of Case C176/03.

6. The Commission and the European Parliament, which have also set out their views on the inferences to be drawn from that judgment in a communication (5) and a resolution, (6) respectively, interpret it broadly to mean that the Court's reasoning applies beyond the area of environmental protection and confirms that the Community legislature is in principle competent to adopt, under the first pillar, any provisions relating to the criminal law of the Member States that are necessary to ensure that rules of Community law are fully effective. It should be added that, in accordance with that interpretation, the Commission has already submitted proposals for the adoption of a number of Community directives obliging Member States to provide for criminal penalties in their national laws. (7)

7. By contrast, all the Member States which have submitted observations in the present proceedings take the view that the findings of the Court in Case C176/03 are to be construed restrictively as relating exclusively to environmental policy and that it is in any event outside the competence of the Community to define the type and level of criminal penalties to be provided for by the Member States.

8. Thus it is against the background of that controversy that the Court is called upon in the present case to shed light on the meaning of its judgment in Case C176/03 with regard to the correct delimitation of the competence of the Community in the area of criminal law.

II - Legal framework and background

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9. The framework decision was adopted on 12 July 2005 on the basis of Title VI of the Treaty on European Union, and in particular Articles 31(1)(e) EU and 34(2)(b) EU.

10. With a reference to the shipwreck of the tanker Prestige, it is stated in the preamble to the framework decision that the fight against intentional or seriously negligent ship-source pollution constitutes one of the Union's priorities and that the legislation of the Member States should be approximated to that end (second and third recitals).

11. As appears from the fourth recital, that approximation is to be carried out by means of a double-text' mechanism comprising, on the one hand, the framework decision and, on the other, Directive 2005/35/EC of the European Parliament and of the Council of 7 September 2005 on ship-source pollution and on the introduction of penalties for infringements (the directive'), (8) whereby the framework decision is designed to supplement the directive with detailed rules on criminal matters.

12. Accordingly, the framework decision requires the Member States to prescribe criminal penalties in respect of ship-source discharges of polluting substances into the sea, which are to be regarded - pursuant to the framework decision, read in conjunction with the directive - as criminal offences.

13. Article 1 of the framework decision refers, as regards the applicable definitions, to Article 2 of the directive.

14. Article 2 of the framework decision requires each Member State to take the measures necessary to ensure that an infringement within the meaning of Articles 4 and 5 of the directive (9) is regarded as a criminal offence.

15. Article 3 ensures that the aiding, abetting or inciting of such a criminal offence is itself punishable.

16. Article 4 of the framework decision requires each Member State to ensure that the conduct referred to in Articles 2 and 3 is punishable by effective, proportionate and dissuasive criminal penalties and prescribes, moreover, in some detail the type and level of penalties to be imposed. In that regard, it determines in respect of various offences appropriate maximum penalty bands applicable in the case of custodial sentences.

17. Article 5 obliges Member States to take measures to ensure that legal persons can be held liable for offences under the framework decision in the circumstances specified.

18. Article 6 provides for penalties against legal persons and contains specifications as to the nature and maximum level of those penalties.

19. Article 7 of the framework decision concerns jurisdiction.

20. Articles 8 and 9 deal, respectively, with the notification to the Commission and other Member States of information relating to an offence, and with the designation of contact points.

21. Finally, Articles 10 to 12 govern the territorial scope, the implementation and the entry into force of the framework decision.

22. The directive, for its part, which invokes in its preamble the Community's maritime safety policy and the protection of environment, was adopted on the basis of Article 80(2) EC, under Title V relating to transport. Article 80(2) EC reads as follows:

The Council may, acting by a qualified majority, decide whether, to what extent and by what procedure appropriate provisions may be laid down for sea and air transport.'

23. The Commission objected, on the occasion both of the adoption of the directive and adoption of the framework decision, to the legal basis relied on by the Council to require the Member States to penalise the discharge of polluting substances from ships, and submitted that also in that respect

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Article 80(2) EC was the correct legal basis.

24. Contrary to that position, it is stated in the fifth recital to the framework decision that the correct instrument for imposing an obligation to provide for criminal penalties is the framework decision, based on Article 34 EU.

III - The proceedings before the Court

25. By order of the President of the Court of 25 April 2006, the Portuguese Republic, the Kingdom of Belgium, the Republic of Finland, the French Republic, the Slovak Republic, the Republic of Malta, the Republic of Hungary, the Kingdom of Denmark, the Kingdom of Sweden, Ireland, the Czech Republic, the Hellenic Republic, the Republic of Estonia, the United Kingdom of Great Britain and Northern Ireland, the Republic of Latvia, the Republic of Lithuania, the Kingdom of the Netherlands, the Republic of Austria, and the Republic of Poland, on the one hand, and the Parliament, on the other, were granted leave to intervene in support of the forms of order sought by the Council and the Commission, respectively. In addition, by order of the President of the Court of 28 September 2006, the Republic of Slovenia was granted leave to intervene in support of the Council.

26. In contrast with several of the intervening Member States, neither the Commission nor the Council - the sole parties to the present proceedings - submitted an application for an oral hearing. Accordingly, the Court, considering itself sufficiently informed by the numerous written observations submitted, decided pursuant to Article 44a of its Rules of Procedure to proceed to judgment without an oral procedure.

IV - Main arguments of the parties

27. The Commission challenges the validity of the framework decision on the grounds that the criminal law measures provided for in Articles 1 to 10 could have been adopted on the basis of Article 80(2) EC relating to the common transport policy of the Community and that, consequently, the entire framework decision - being indivisible - infringes Article 47 EU.

28. According to the Commission, this follows from the principles laid down by the Court in Case C176/03 which go beyond the area of environmental protection at issue in that case and apply in their entirety to other Community policies such as the common transport policy at issue in the present case. The importance of environmental protection in the Community and its particular characteristics, such as its transversal' nature, had in fact no decisive bearing on the decision of principle in Case C176/03. Such criteria would in fact lead to a paradoxical situation, in that other important areas of Community law would be excluded a priori from the possibility of being enforced effectively by means of criminal penalties on the basis of the EC Treaty.

29. The Commission maintains that - although criminal law does not as such and in general fall within the Community's competence and action in that regard may be based only on implied powers associated with a specific legal basis - the Community legislature may provide for criminal measures in so far as is necessary to ensure the full effectiveness of Community rules and regulations. Those implied powers on the part of the Community are thus determined by the need to guarantee compliance with a Community rule or policy, but are not confined to criminal law measures in a certain area of law or of a certain nature. The Community is therefore also competent to define the type and level of penalties if and in so far as it is established that this is necessary to ensure the full effectiveness of a Community policy. The framework decision does not in any event harmonise the type and level of the applicable criminal penalties but leaves a certain margin of discretion in that regard to the Member States.

30. The Commission considers all the measures provided for in Articles 1 to 10 of the framework

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decision as necessary to ensure the effectiveness of the common transport policy. The necessity test formulated by the Court in Case C176/03 is therefore satisfied.

31. Finally, the Commission specifies that it is not relevant for the purposes of Article 47 EU if or how the Community has already exercised its competence under Article 80(2) EC, but only whether competence to adopt measures such as those provided for in the framework decision actually exists.

32. The European Parliament aligns itself essentially with the arguments of the Commission. In its view, Articles 1 to 6 of the framework decision fall entirely under the competence of the Community. The decision is therefore, on account of its indivisibility, unlawful as a whole.

33. The European Parliament argues that the framework decision contested in the present case is comparable in all respects with the framework decision at issue in Case C176/03 in terms both of its objective and its content. The reasoning of the Court in that case thus applies mutatis mutandis in the present case. The Parliament observes in particular that it is clear from the preamble to the framework decision that, like the annulled framework decision, it is concerned with the protection of the environment and that in both cases the criminal offences envisaged relate in comparable fashion to discharges of polluting substances.

34. Although the European Parliament recognises that there is a difference between the two framework decisions as regards the precise definition of the level and type of the applicable penalties, it sees no reason why the outcome in the present case should be any different from that in Case C176/03. In the view of the Parliament, when considering Article 5(1) of Framework Decision 2003/80, the Court already confirmed in that judgment that the competence of the Community in criminal matters extends to provisions concerning the type and level of penal sanctions.

35. Finally, the European Parliament submits that, regard being had to the preamble to the framework decision and the circumstances surrounding its adoption, the necessity of the criminal measures is established in the present case.

36. The Council, on the other hand, supported without exception by the Member States which have intervened in these proceedings, denies that the criminal measures provided for in the framework decision should have been adopted on the basis of Article 80(2) EC. It emphasises, first of all, that it is undisputed that that Article constituted the correct legal basis for the adoption of the directiv e, which comes chiefly under the common transport policy even if it also pursues objectives relating to environmental protection.

37. The Council contends that the present case must be distinguished in several respects from the situation covered by the ruling of the Court in Case C176/03, which cannot necessarily be applied to other areas of Community action. In that regard, the Council points out that the Court framed its ruling in terms of the environmental objectives of the Community and emphasised the special importance of environmental protection. In particular, environmental protection is distinguished by the fundamental nature of that objective and its extension across the range of [the] policies and activities [of the Community]'. (10)

38. In contrast, not only does the common transport policy lack those characteristics, the scope of Community competence in that field depends also on a decision by the Community legislature. As the Court stated in Case C476/98, Article 80(2) EC merely provides for a power for the Community to take action, a power which, however, it makes dependent on there being a prior decision of the Council. (11) It is thus up to the Council to decide whether and to what extent provisions may be laid down for sea and air transport. By adopting the directive, the Community legislature defined the extent to which it wished to take action in the field concerned. The Council admits that the Community legislature could in part have adopted more far-reaching measures on the basis of Article

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80 EC, but emphasises that it clearly decided not to do so. The Council thus contests the premise of the Commission that the provisions contained in the framework decision should have been adopted by the Community legislature.

39. In the alternative, the Council contends that the provisions of the framework decision at issue differ from those of the framework decision annulled in Case C176/03 in that they are more detailed, in particular with regard to the level and type of the penalties to be provided for by the Member States. It can clearly be inferred from Case C176/03 that the Court attached importance to the fact that the provisions under scrutiny left to the Member States the choice as to which criminal penalties to apply, so long as they were effective, proportionate and dissuasive. (12) The Community legislature has thus no competence to define the level and type of criminal penalties to be applied. The Council concludes therefore that the majority of the disputed provisions in the framework decision could not have been adopted by the Community and accordingly do not infringe Article 47 EU. If Case C176/03 were to be interpreted along the lines advocated by the Commission, Title VI EU would largely be deprived of practical effect: thus such an interpretation manifestly goes beyond what the Court intended in its judgment, which must be construed restrictively and in the light of the particular circumstances underlying it.

40. Finally, the Council argues that it cannot be concluded from the adoption of the framework decision that the criminal measures provided for must be regarded as necessary' within the meaning of Case C176/03.

41. The Member States which have intervened in these proceedings essentially follow the same line of reasoning as the Council. They maintain that the Community's implied competence to provide for criminal measures - as formulated by the Court in Case C176/03 - is exceptional and falls to be narrowly construed. The implied competence to legislate on criminal law matters is confined to measures which are necessary' or (absolutely) essential' for combating serious environmental offences. It does not extend beyond the field of environmental protection to another common policy such as the transport policy at issue and in any event excludes, according to the Member States, harmonisation of the type and level of penalties as laid down in the framework decision.

42. The numerous, slightly varying arguments put forward by the Member States in support of their view turn in particular on the principles of subsidiarity, attributed powers and proportionality; the particular nature and necessary coherence of criminal law; the margin of appreciation to be left for the Member States; and the system set up by the Treaty on European Union which would be undermined if the arguments of the Commission were upheld.

43. It is also argued that Article 47 EU is intended to lay down a clear delimitation of competences between the first and the third pillars but not to establish that the former has primacy over the latter. A number of Member States challenge the view of the Commission that although the Member States remain free, on the one hand, to act individually so long as the Community has not decided to use its powers under Article 80(2) EC, they are precluded, on the other hand, from acting collectively on the basis of the third pillar. Also, as the Community had not yet legislated on ship-source pollution when the framework decision was adopted, it cannot be argued that that decision encroached on an existing Community competence.

44. The Member States conclude therefore that the framework decision was the correct legal instrument for the adoption of the criminal law measures contained therein.

V - Analysis

A - The broader framework of the delimitation of competences: Article 47 EU

45. A proper adjudication of the present case hinges, first of all, on Article 47 EU, which marks

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a watershed between the first, or Community, pillar on the one hand and the second and third pillars, covering foreign and security policy (Title V EU) and police and judicial cooperation in criminal matters (Title VI EU), on the other.

46. That distinction is important, since it demarcates the line between what is essentially the Community method, characterising the hard core' of European integration under the European Communities, and the more intergovernmental' policies and forms of cooperation established by the EU Treaty. (13)

47. In the light of the submissions of the parties, it appears appropriate to clarify the meaning of Article 47 EU and its impact on the issues of competence which are raised in the present case.

48. Article 47 EU provides that nothing in the Treaty on European Union is to affect the EC Treaty.

49. The Court has already held in that regard that it is the task of the Court to ensure that acts which, according to the Council, fall within the scope of Title VI of the Treaty on European Union do not encroach upon the powers conferred by the EC Treaty on the Community'. (14)

50. As is already clear from that finding, Article 47 EU is not designed merely to ensure that nothing under the EU Treaty affects or runs counter to existing substantive provisions of Community law. Rather, it is intended, in a more comprehensive sense, to preserve also the powers conferred on the Community as such.

51. That is confirmed by the first paragraph of Article 29 EU, which expressly provides that Union provisions on police and judicial cooperation in criminal matters are without prejudice to the powers of the European Community'.

52. In order to determine whether Article 47 EU has been infringed, the question to be asked is therefore whether the provisions in question could have been adopted - potentially - on the basis of the EC Treaty. (15)

53. Contrary to the view expressed by certain Governments, Article 47 EU thus establishes the primacy' of Community law or, more particularly, the primacy of Community action under the EC Treaty over activities undertaken on the basis of Title V or Title VI of the EU Treaty, in that the Council and, as the case may be, the other institutions of the Union must act on the basis of the EC Treaty if and in so far as it provides an appropriate legal basis for the purposes of the action envisaged.

54. In that way, Article 47 EU reflects the architecture of the Union which, according to Article 1 EU, is founded on the European Communities, supplemented by the policies and forms of cooperation established by [the] Treaty [on European Union]' (emphasis added). As is also stated in that Article, the Treaty on European Union marks a new stage in the process of creating an ever closer union among the peoples of Europe'.

55. It is quite clear from that wording that, in providing for certain new forms of cooperation, the Treaty on European Union meant only to add to the fields of activities of the Communities, it did not mean to detract from them by providing for alternative' competences to be exercised by the institutions of the Union in cases where Community and Union policies may overlap, that is to say, by empowering the institutions to avail themselves in such situations of less integrated forms of cooperation under Titles V or VI EU.

56. It follows from the foregoing, first, that although, as a rule, the Council is not obliged to legislate at all, should it decide to do so in the context of the Union, it is obliged, in so far as the EC Treaty confers the necessary powers on the Community, to act exclusively on the basis of that Treaty.

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57. Secondly, contrary to what some Governments are suggesting, no sound inferences can be drawn for present purposes from the fact that, at the time of the adoption of the framework decision, the Community had not yet adopted legislation with regard to the matters covered (since the directive was adopted subsequently).

58. The vertical distribution of powers between the Community and the Member States must in that regard be distinguished from the horizontal, inter-pillar distribution of powers governed by Article 47 EU. In the former relationship, Member States remain - except in the case of an exclusive competence of the Community - in principle free to act unless the Community has actually exercised its own competences in such a way as to pre-empt' the Member States within the meaning of the AETR case-law. (16)

59. In the latter relationship, by contrast, action under Titles V or VI EU is precluded from the outset by the existence of appropriate powers under the EC Treaty, regardless of whether and to what extent they may actually already have been exercised by the Community.

60. Accordingly, it is not contradictory to maintain that, in so far as the Community has not yet adopted legislation in the field of criminal law, the Member States remain in principle free to act in that area at national level whilst at the same time maintaining that, by virtue of Article 47 EU, the Council is precluded from acting under Title VI EU.

61. As regards, more particularly, the arguments put forward by several Governments to the effect that if the Member States are free to act individually' they should a fortiori be free to act collectively', that is to say, by means of a framework decision under Title VI, (17) it must be noted that, although each Member State is represented in the Council, the legal nature of Council action cannot be assimilated to mere collective' action on the part of the Member States. As an institution of the Union, the Council exercises, pursuant to Article 5 EU, its powers under the conditions and for the purposes provided for by the Treaties establishing the Communities and the Treaty on European Union.

62. Thirdly, it is in my view not decisive with regard to Article 47 EU - as the Commission has rightly observed - that pursuant to Article 80(2) EC the Council may decide whether or to what extent provisions may be laid down for sea and air transport. Even if it is true that the EC Treaty makes that power dependent on there being a prior decision of the Council, (18) the fact remains that the Council has a power under the EC Treaty to take action in relation to sea transport.

63. Accordingly, the question that now falls to be examined is whether the disputed criminal law provisions of the framework decision could, in the light of the findings of the Court in Case C176/03, have been adopted on the basis of Article 80(2) EC.

64. It should not be overlooked, however, that even if the Court were to find that, for one reason or another, there is no such competence under the policy on transport that would not, strictly speaking, be the end of the story.

65. Article 80(2) EC was chosen as the legal basis for the directive in the case before us, but that does not necessarily mean that no other provision of the EC Treaty - the most likely alternative being Article 175 EC on the environment - could have served as the legal basis for the adoption of the disputed measures contained in the framework decision. In principle, if it were to be found that the provisions of the framework decision could have been adopted using a legal basis provided for elsewhere in the EC Treaty that would mean that the framework decision infringes Article 47 EU.

66. However, the parties to the present proceedings have either avoided that issue or agreed that only one of the provisions in the EC Treaty - if any - could constitute a correct legal basis

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for the adoption of measures such as those at issue, namely, Article 80(2) EC. Accordingly, I shall base my assessment on that view.

B - The implications of Case C176/03: scope of the competence of the Community to provide for criminal measures

67. In many respects, criminal law stands out from other areas of law. Availing itself of the most severe and most dissuasive tool of social control - punishments - it delineates the outer limits of acceptable behaviour and in that way protects the values held dearest by the community at large. (19) As an expression essentially of the common will, criminal penalties reflect particular social disapproval and are in that respect of a qualitatively different nature as compared with other punishments such as administrative sanctions.

68. Thus, more so than other fields of law, criminal law largely mirrors the particular cultural, moral, financial and other attitudes of a community and is especially sensitive to societal developments.

69. There is, however, no uniform concept of the notion of criminal law and the Member States may have very different ideas when it comes to identifying in closer detail the purposes which it should serve and the effects it may have. It is thus difficult to talk about criminal law in general terms and without specific national connotations.

70. Nevertheless, if we take the European Convention on Human Rights as a common point of departure, we can in any event note that it takes account of the particular nature of criminal law charges and penalties by providing, under Article 6(2) and (3) and Article 7, for additional and more extensive procedural and substantive guarantees with regard to criminal cases as compared with civil cases. The European Court of Human Rights has given the notion of criminal offence' as used in those Articles an autonomous meaning and seeks to relate that notion not primarily to the classification in domestic law, but rather to the nature of the offence itself and the nature and severity of the sentence which can be imposed. (20) The Court has held, as regards more particularly the purpose of criminal sanctions that the aims of prevention and reparation are consistent with a punitive purpose and may be seen as constituent elements of the very notion of punishment'. (21)

71. In my view, it can quite safely be said that criminal law is characterised by its dissuasive or deterrent nature. (22) It should be borne in mind, however, that deterrence is not the only identifiable purpose of criminal law and that the way in which this ultimum remedium of the law is used - some of the parties have also emphasised this point - indicates the social standards underpinning the community concerned and is therefore, in the last analysis, inherently related to the identity of that community.

72. The power to impose criminal sanctions has certainly traditionally been seen as intimately linked to sovereignty and properly to be entrusted to the individual States and intergovernmental forms of cooperation rather than to the Community. However, even though, as a general rule, neither criminal law nor the rules of criminal procedure fall within the Community's competence, (23) it must be emphasised that the criminal law is by no means a domaine reservé for the Member States under the EC Treaty.

73. In fact, it is clear already from case-law prior to Case C176/03 that Community law intersects in several respects with criminal law. However, rather than discussing in detail that case-law - which, together with the relevant secondary Community law, has already been analysed in extenso by Advocate General Ruiz-Jarabo Colomer (24) - I shall briefly recall the most important types of intersection between Community law and national criminal law.

74. First of all, and on a more general level, Community law can indirectly influence national criminal law in that it requires, as regards matters within its scope, the relevant national criminal

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legislation to be in conformity with Community law. This perspective of compatibility is illustrated by the Amsterdam Bulb case, in which the Court held that in the absence of any provision in the Community rules laying down specific penalties, the Member States are free to adopt such penalties as appear to them to be appropriate, including criminal penalties. (25) On the other side of the coin, criminal penalties for infringement of national laws implementing Community law may be precluded by Community law on the grounds, for example, that they are excessive and thereby become an obstacle to the free movement of persons. (26)

75. In such cases, Community law thus delimits - by requiring negative integration' - the scope of action of the Member States with respect to criminal law. (27)

76. In what can be seen as a move towards positive integration' and the acknowledgement of positive obligations in the field of criminal law, the Court held in the Greek Maize ' line of cases that where Community legislation does not specifically provide any penalty for an infringement or refers for that purpose to national laws, regulations and administrative provisions, Member States can be required, by virtue of the general duty of the Member States as laid down in Article 10 EC, to take all measures necessary to guarantee the full effectiveness and application of Community law, to ensure in particular that infringements of Community law are penalised under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive'. (28) The Court specified in Nunes and de Matos that the same reasoning applies where a Community regulation lays down particular penalties for infringement, but does not exhaustively list the penalties that the Member States may impose, as in the case of the regulation on the European Social Fund at issue in that case. (29)

77. Viewed against that background, the Court took in Case C176/03 a step that was certainly qualitatively significant but not, after all, incomprehensible by accepting that the Community legislature may have the power to adopt measures which expressly require Member States to provide for criminal penalties with regard to certain conduct and which do therefore indeed, as the Court acknowledged, entail partial harmonisation of the criminal laws of the Member States. (30)

78. How big that step really was - that is to say, how far the Community competence thus established to provide for criminal penalties extends both in breadth' and in depth' - is of course the question central to the present dispute.

79. The reasoning which led the Court to recognise that power in Case C176/03 can be summarised briefly as follows.

80. The question which the Court had to ascertain - and which it answered in the affirmative - was whether the criminal measures provided for in the framework decision at issue in that case could be adopted on the basis of Article 175 EC on the environment. (31)

81. In that regard, the Court first recalled that according to Article 2 EC and its case-law, the protection of the environment constitutes one of the essential objectives of the Community. It further made reference to Article 6 EC, which states that environmental protection requirements must be integrated into the definition and implementation of Community policies and activities, and to Articles 174 EC to 176 EC which lay down the framework within which Community environmental policy must be carried out. (32)

82. The Court went on to state that the measures referred to in the three indents of the first subparagraph of Article 175(2) EC all imply the involvement of Community institutions in matters for which, apart from Community policy on the environment, either the Community has no legislative powers or unanimity within the Council is required.

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83. The Court then recalled settled case-law according to which the choice of legal basis for a Community measure must rest on objective factors which are amenable to judicial review, including in particular the aim and the content of the measure. (33)

84. Accordingly, as regards the aim of the framework decision, the Court inferred both from its title and from its first three recitals that its objective was the protection of the environment. (34)

85. As to the content of the framework decision under scrutiny, the Court then recognised that Articles 2 to 7 thereof entailed partial harmonisation of the criminal law of the Member States, in particular as regards the constituent elements of various criminal offences committed to the detriment of the environment' and reaffirmed that, as a general rule, neither criminal law nor the rules of criminal procedure fall within the Community's competence. (35)

86. In the following key passage of the judgment, however, the Court held, quite succinctly, that that finding does not prevent the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, from taking measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective'. (36)

87. It is thus clear that the Court recognised a power on the part of the Community to require Member States to adopt criminal measures as envisaged by the framework decision, and held that power to be an implied facet of the powers conferred on the Community under Article 175 EC.

88. However, the Court described that power very closely, in direct relation to the particular facts of the case, rather than in the form of a principle, which accounts for the difficulty of distinguishing the underlying rationale from its concrete application.

89. It should be noted, first of all, that the ruling in Case C176/03 is - and in that regard it resembles the earlier Greek Maize case-law (37) - fundamentally motivated by and born out of the concern to ensure the full effectiveness of Community law. That is not only clear from the key passage cited above, but - besides the Opinion of Advocate General Ruiz-Jarabo Colomer (38) - also from paragraph 52 of the judgment in which the Court states that it is not possible to infer from Articles 135 EC and 280(4) EC that any harmonisation of criminal law must be ruled out even where it is necessary to ensure the effectiveness of Community law'. (39)

90. Furthermore, seen from another angle, in finding that Article 175 EC confers on the Community competence to require Member States to criminalise certain conduct which is particularly detrimental to the environment, the Court employed essentially a line of reasoning predicated on implied powers , according to which the Community enjoys the powers or means necessary to achieve a given objective or task attributed to it. (40) Put simply, the Community objective of environmental protection and its effet utile would, according to the ratio of the judgment, be compromised if the Community legislature did not have the power to adopt the criminal law measures necessary to ensure that the rules which it lays down on environmental protection are fully effective.

91. To what extent can it now be taken out of the equation that Case C176/03 was about environmental protection and about combating serious environmental offences'? Is the power to require criminal enforcement, as the Council and the intervening Member States contend, limited in breadth' to environmental law or, as the Commission and the Parliament claim, in principle applicable to other common policy areas such as the transport policy at issue?

92. Although the numerous references in the judgment to protection of the environment and its place in the Treaty could be read as suggesting - as the Council and the Member States essentially argue

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- that the Court intended to restrict its reasoning to the specific field of the environment, I share the view of the Commission that there is indeed no sound basis for regarding the power to provide for criminal measures as being limited in that way.

93. It is true that protection of the environment is - as the Special Reports recently submitted by the Intergovernmental Panel on Climate Change made clearer than ever - of vital importance not only from a European policy perspective but also for the future of mankind as a whole (41) and that it constitutes, as the Court recalled in Case C176/03, an essential objective of the Community. (42)

94. Patently, however, environmental protection is not the only essential objective or policy area of the Community and it is difficult to distinguish it on that account from the other Community objectives and activities referred to in Articles 2 EC and 3 EC, such as the establishment of an internal market characterised by the fundamental freedoms, the common agricultural policy or the common rules on competition.

95. In keeping with what has been said above concerning the role or, rather, the effect of criminal law as a barometer of the importance attached by a community to a legal good or value, (43) to single out environmental protection in such a way would in my view not do justice at all to the nature - or, it might even be said, to the identity - of the Community.

96. What is more, the environment is not the only horizontal' matter (Article 6 EC) under the EC Treaty - we need think only of gender equality (Article 3(2) EC), non-discrimination (Article 12(1) EC) or public health (Article 152(1) EC) - and, in any event, I cannot see why that particular attribute should, as the Council and several Member States have argued, be regarded as decisive in relation to the power to require criminal enforcement.

97. Furthermore, it is not really feasible to argue that that power should be limited to the area of environment when we take into account that it is a corollary to the principle of effectiveness of Community law.

98. Viewed from that perspective, the presumption that the power to require criminal penalties is limited to the area of the environment carries with it the implication either that, because of its particular nature, environmental protection is the only area which needs criminal enforcement in order to be fully effective or, in the alternative - if we accept that other policies may also need such enforcement to be effective - that the Community legislature must regard a potential lack of effectiveness as acceptable in other areas because of, for instance, their minor importance' or the less essential' objectives that they pursue. In my view, both of those positions are unacceptable and neither can be upheld.

99. In the light of the foregoing I therefore believe that it is not reasonably possible - in any event, not without a dash of arbitrariness - to reserve exclusively for the specific area of the environment the power of the Community to require the Member States to use the tool of criminal enforcement. Since the raison d'être for that power lies with the general principle of effectiveness underlying Community law, it must in principle also exist in relation to any other Community policy area (such as transport), subject, of course, to the limits set by the Treaty provisions providing the substantive legal basis in question.

100. The concrete contours of the power to take measures relating to the criminal law of the Member States remain, however, still to be addressed. In that regard, too, the reasoning in Case C176/03 is rather ambiguous. It makes reference both to essential measure[s] for combating serious... offences' and to measures relating to criminal law which the Community legislature considers necessary in order to ensure that the rules which it lays down... are fully effective'. (44)

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101. Some light is shed on the meaning of those criteria later on in the judgment in so far as, in assessing whether in the case before it the conditions for adoption of the measures at issue on the basis of Article 175 EC were fulfilled, the Court considered it decisive that the framework decision referred to infringements of a considerable number of Community measures and that the Council took the view that criminal penalties were essential for combating serious offences against the environment'. (45)

102. Accordingly, it appears from the judgment in Case C176/03 that the Community legislature has the power to adopt measures providing for the imposition of criminal penalties where it considers such penalties necessary in order to ensure that the rules which it lays down are fully effective and on condition that criminal measures are essential for combating serious offences in the area concerned.

103. Turning to the question whether, within that framework, the Community can prescribe the type and level of the penalties to be applied (depth' of the power), I agree with Advocate General Ruiz-Jarabo Colomer (46) that the Community legislature is entitled to constrain the Member States to impose criminal penalties and to prescribe that they be effective, proportionate and dissuasive, but, beyond that, it is not empowered to specify the penalties to be imposed.

104. It must be borne in mind that the issue here is not a possible power on the part of the Community to impose criminal penalties itself, but rather the power to require the Member States to provide, within their respective penal systems , for certain forms of conduct to be classed as criminal offences as a means of upholding the Community legal order. Clearly, therefore, that raises not only concerns as to the internal consistency of the criminal law of the Union, which the Commission has rightly addressed in its Communication on Case C176/03, (47) but also as to the coherence of each national penal system.

105. As is clear from the submissions of the intervening Governments in that regard, the Member States have already on a general level quite different ideas as to the role and purpose of criminal law as an instrument of enforcement. On a more concrete level, those diverging ideas are reflected by differences in the national penal systems as regards the overall level of penalties, the balance struck between the various forms of sentences and, obviously, the type and level of penalties provided for in respect of particular offences. Each criminal code reflects a particular ranking of the legal interests which it seeks to protect (property, the person, the environment, and so on) and varies the penalties accordingly.

106. Thus the determination by the Community legislature of the type and level of penalties to be imposed - on the basis of a power which is ancillary to the specific competences provided for by the Treaty and which allows, at sectoral level, for (only) partial harmonisation of national criminal laws - could lead to fragmentation and compromise the coherence of national penal systems.

107. Moreover, the seriousness of a criminal penalty, its effectiveness and dissuasiveness, cannot be viewed in isolation from the other criminal penalties provided for under national law and the way in which penalties are made use of in a given Member State as an instrument of enforcement. As the United Kingdom Government observed in that regard, a given level of fine can send out very different messages in different Member States regarding the seriousness of the offence in question.

108. In my view, therefore, and in accordance with the principle of subsidiarity, the Member States are as a rule better placed than the Community to translate' the concept of effective, proportionate and dissuasive criminal penalties' into their respective legal systems and societal context.

109. Case C176/03 does not contradict that view. Rather, the Court's observation that the provisions of the annulled framework decision leave to the Member States the choice of the criminal penalties to apply, although, in accordance with Article 5(1) of the decision, the penalties must be effective,

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proportionate and dissuasive' (48) mirrors the position of Advocate General Ruiz-Jarabo Colomer in so far as he maintains that the Community cannot go further than requiring the Member States to provide for certain offences and to make them punishable by effective, proportionate and dissuasive' criminal penalties. (49) Moreover, such a delimitation of the respective powers of the Community and the Member States is in line with the case-law prior to Case C176/03. (50)

110. It is true that, unlike the Advocate General, (51) the Court did not specifically address the requirement laid down in Article 5(1) of the annulled framework decision that the most serious conduct should be punished by deprivation of liberty, entailing extradition, and did not expressly indicate that such a provision (relating to the type of penalty) could not be adopted under the first pillar. It would be erroneous to infer, however, that a provision relating to the type of penalty could indeed be adopted on that basis. The Court's finding that the framework decision, which it considered indivisible, fell properly to be adopted under Article 175 EC - in that it provided that certain conduct which is particularly detrimental to the environment is to be criminal - already meant that the framework decision had to be annulled, and it was not examined in further detail because there was no need to do so. (52)

111. The delimitation of powers as outlined, according to which the Community can require the imposition of effective, proportionate and dissuasive criminal penalties but must leave the determination of their type and level to the Member States, has also the advantage of being clear-cut. I doubt that it would be at all practicable to differentiate further with regard to the degree of detail in which the Community may determine penalties. (53)

112. To sum up, it may be said that according to Case C176/03, as I read it, the Community legislature can, whenever criminal measures are necessary to ensure the full effectiveness of Community law and essential to combat serious offences in a particular area, require Member States to penalise certain conduct and to adopt in that regard effective, proportionate and dissuasive criminal sanctions.

113. That competence enables the Community to avail itself, within the powers and policy areas conferred upon it, of the full range of legal enforcement measures in order to uphold its own legal order. It is thus a significant factor in the movement of Community law, so to speak, towards a lex perfecta. At the same time, the existence of such competence does not call into question the general rule that criminal law and the rules of criminal law fall within the purview of the Member States; nor - since it leaves the Member States the choice of the criminal penalties to apply - does it in my view interfere with national penal systems to such an extent that it could unacceptably affect their coherence. (54)

114. It ought not be concealed, however, that the competence of the Community in relation to criminal law as established by the Court in Case C176/03 reveals on closer inspection certain conceptual flaws, which make it difficult, as the present case shows, to ascertain whether in a concrete case the conditions for the exercise of that competence are fulfilled.

115. In the first place, effectiveness is in several respects an imprecise criterion on the basis of which to establish competence for the adoption of measures relating to criminal law.

116. Firstly, and on a more general level, effectiveness is not an all or nothing issue but a question of degree. The difficulty lies in identifying the required standard: When are rules in a specific field not sufficiently effective or not fully effective', thus necessitating the instrument of criminal law?

117. Secondly, what is the contribution of criminal penalties to the effectiveness of a law? Criminological debate continues as to which way and in which matters criminal penalties represent the best means of ensuring the effective enforcement of the law. It may be too simple to assume that criminal law is always the appropriate remedy for a lack of effectiveness.

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118. Thirdly, although its deterrent effect means that there is certainly a correlation between criminal law and effectiveness, effectiveness does not entirely encapsulate the essence of criminal law. As I have already suggested above, the policy considerations behind the use of criminal penalties in a given community go well beyond the mere question of effective enforcement.

119. It is thus clear that the questions whether criminal measures are in a particular case essential' for combating serious offences or necessary' in order to ensure that rules are fully effective' call, not only for objective' consideration of the substantive legal basis or policy area in question, but also for a degree of judgment. From that perspective, it was no accident that the Court referred to criminal law measures which the Community legislature considers necessary' and established that the Council took the view that criminal penalties were essential'. (55)

120. In the second place, it is not ideal that the Community's criminal competence as outlined attaches by way of accessorium sequitur principale to the specific competences conferred on the Community - in such a way that it could virtually be regarded as merely a single aspect of the Community policy concerned - whilst at the same time its implications have to be accommodated by the criminal law of the Member States, which is normally perceived as forming a distinct body of law.

121. It appears to me problematic, in particular, that the conditions for the adoption of measures relating to criminal law under the Community pillar, notably the legislative procedure, depend on the area of Community action concerned, and vary accordingly.

122. For the same reason, it hardly constitutes a satisfactory basis for a broader move towards the criminal enforcement of Community law. If such a policy is to be pursued within the Community, a specific legal basis providing for a uniform legislative procedure would certainly be desirable.

C - Validity of the framework decision at issue

123. Although the principal issues raised in the present case have already been addressed in the preceding points, it remains to be assessed in concreto whether or to what extent the contested terms of the framework decision - regard being had, in particular, to its aim and content (56) - could properly have been adopted on the basis of the EC Treaty.

124. As regards the aim of the framework decision, it is clear from its title and recitals that it takes as its object the approximation of the legislation of Member States for the enforcement of the law against ship-source pollution and in that regard is designed to supplement the directive.

125. Thus, like the directive (57) - in furtherance, specifically, of the Community's maritime safety policy - the framework decision seeks to protect the environment and, in particular, to combat environmental crime (first recital of the framework decision).

126. As I have already stated above, (58) the Commission bases its application in the present case on the view that the provisions contained in the framework decision should have been adopted, like the directive, on the basis of Article 80(2) EC, since it concerns maritime transport. Save for the criminal law aspect, the other parties or interveners have in principle neither questioned that position nor maintained that Article 175 EC on the environment would be eligible as a legal basis for the directive or for the measures provided for in the framework decision, were they to be adopted under the Community pillar.

127. In my view, too, the Commission is not wrong to hold that, despite the environmental aspect, the aims of the framework decision can be pursued on the basis of Article 80(2) EC concerning maritime transport. While the pollution of the sea is certainly as such an environmental concern, its reduction or prevention is at the same time an important field of Community action in maritime transport. (59)

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128. It should be noted in that regard that the fact that a Community measure pursues aims of environmental protection does not automatically mean that it has to be adopted on the basis of Article 175 EC. The Court has already held that although Articles 174 EC and 175 EC are intended to confer powers on the Community to undertake specific action on environmental matters, its powers under other provisions of the Treaty remain intact, even if measures adopted thereunder pursue at the same time one of the objectives of environmental protection; moreover, since environmental protection requirements are a necessary component of the Community's other policies, a Community measure is not to be classed as action on environmental matters merely because it takes account of those requirements. (60)

129. In my view, measures seeking environmental protection which, as in the present case, specifically concern ship-source pollution form part of the maritime transport policy for which Article 80(2) EC provides a particular legal basis. I agree therefore with the Commission that Article 80(2) EC enabling rules to be laid down for sea transport, not Article 175 EC on environment, would be the correct legal basis for the adoption of such measures.

130. Turning, however, to the content of the framework decision, the Commission, supported by the Parliament, claims, quite sweepingly, that the framework decision could have been adopted in its entirety on the basis of Article 80(2) EC.

131. As is evident from the foregoing considerations, that view is not correct as regards Articles 4 and 6 of the framework decision in so far as they prescribe in some detail - albeit partly in the form of penalty bands - the type and level of penalties to be applied. The adoption of such provisions falls, as I have indicated above, within the scope of Title VI of the Treaty on European Union. Furthermore, in so far as they concern the establishment and coordination of jurisdiction, a mechanism for the exchange of information on the commission of criminal offences and the establishment of contact points to that end, Articles 7, 8, and 9 of the framework decision reach to my mind beyond the competence of the Community as outlined above to require the Member States to criminalise certain conduct. Those provisions were therefore rightly adopted by means of a framework decision in the field of police and judicial cooperation in criminal matters. Finally, Articles 10 (Territorial scope), 11 (Implementation) and 12 (Entry into force) are of a merely technical nature.

132. However, the framework decision contains also a number of provisions concerning the constituent elements of the criminal offences to be provided for, as well as the requirement that they be punishable by effective, proportionate and dissuasive criminal penalties. I count amongst these provisions Article 2; Article 3; Article 4(1) on Penalties, in so far it obliges Member States to ensure that the offences referred to in the two previous Articles are punishable by effective, proportionate and dissuasive criminal penalties; Article 5, under which legal persons can be held liable for those offences; and Article 6(1), in so far as it provides that such legal persons may be punished by effective, proportionate and dissuasive penalties.

133. In that regard, it should be noted that - as is recalled in the first recital of the directive - the Community's maritime safety policy, which is an aspect of sea transport, is aimed at a high level of safety and environmental protection. As appears from the recitals to the framework decision, the Council considered it necessary, following the accident of the tanker Prestige, to impose on the Member States an obligation to provide for criminal penalties to combat environmental crime in order to improve safety at sea. Given the impetus of the serious pollution caused by the shipwreck of the Prestige, the framework decision should, as its title says, strengthen the criminal law framework for the enforcement of the law against ship-source pollution.

134. Moreover, as the second recital of the directive relates, the rules in the Member States, which are based upon the Marpol 73/78 Convention, were being ignored on a daily basis by a considerable number of ships sailing in Community waters, without corrective action being taken.

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135. Lastly, the Community legislature stated expressly in the directive (fourth and fifth recitals) that measures of a dissuasive nature form an integral part of the Community's maritime safety policy and that there is a need for effective, dissuasive and proportionate penalties in order to achieve effective protection of the environment in the field.

136. Against that background it can to my mind be assumed that the adoption of criminal measures is, in the view of the Community legislature, necessary for the effective protection of the environment as regards ship-source pollution and that such measures are essential to combat serious offences in the field.

137. It thus falls within the competence of the Community to oblige Member States to penalise such offences and to establish effective, proportionate and dissuasive penalties.

138. It follows that Articles 2, 3 and 5 of the framework decision, as well as parts of Articles 4(1) and 6(1) thereof, could properly have been adopted on the basis of Article 80(2) EC.

139. Consequently, since the framework decision is to be regarded as indivisible, the entire framework decision should, in my view, be regarded as adopted in infringement of Article 47 EU and, accordingly, should be annulled.

VI - Conclusion

140. In the light of the foregoing considerations, I propose that the Court should:

(1) annul Council Framework Decision 2005/667/JHA of 12 July 2005 to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution;

(2) order the Council of the European Union to pay the costs;

(3) order the interveners to bear their own costs.

(1) .

(2) - OJ 2005 L 255, p. 164.

(3) - Case C176/03 [2005] ECR I7879.

(4) - OJ 2003 L 29, p. 55.

(5) - Communication of 23 November 2005 from the Commission to the European Parliament and the Council on the implications of the Court's judgment of 13 September 2005 (Case C176/03 Commission v Council) (COM(2005) 583).

(6) - European Parliament resolution on the consequences of the judgment of the Court of 13 September 2005 (C176/03 Commission v Council) (2006/2007(INI)).

(7) - See Amended Proposal for a Directive of the European Parliament and of the Council on criminal measures aimed at ensuring the enforcement of intellectual property rights (COM(2006) 168 final) and Proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law (COM(2007) 51 final).

(8) - OJ 2005 L 255, p. 11.

(9) - Article 4 of the directive, entitled Infringements', states: Member States shall ensure that ship-source discharges of polluting substances into any of the areas referred to in Article 3(1) are regarded as infringements if committed with intent, recklessly or by serious negligence. These infringements are regarded as criminal offences by, and in the circumstances provided for in, Framework Decision 2005/667/JHA supplementing this Directive.' Article 5 of the directive provides for certain exceptions to Article 4.

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(10) - Cited in footnote 3, paragraph 42.

(11) - Commission v Germany [2002] ECR I9855, paragraph 80.

(12) - Cited in footnote 3, paragraph 49.

(13) - The latter are quite distinct from the former, in particular, in terms of the nature and effect of the measures adopted to promote them and the legal instruments used (which are more of an international law nature, and lack direct effect); in terms of the decision-making procedure and the role played by the various institutions (there being no exclusive power of initiative on the part of the Commission, and the tendency as a rule for legislation to be adopted by unanimity vote of the Council, with only limited involvement on the part of the European Parliament); and, not least, in terms of judicial control (there being no action for infringement as provided for in Article 226 EC in the case of failure to transpose framework decisions into national law, and restrictions with regard to the Court's jurisdiction to give preliminary rulings). However, some principles elaborated in the context of Community law may also extend to the second and third pillars: see in particular, as to the duty of consistent interpretation, Case C105/03 Maria Pupino [2005] ECR I5285.

(14) - See Case C170/96 Commission v Council [1998] ECR I2763, paragraph 16, and Case C176/03, cited in footnote 3, paragraph 39.

(15) - See, to that effect, Case C176/03, cited in footnote 3, paragraph 40.

(16) - See as to that, inter alia, Case 22/70 Commission v Council AETR ' [1971] ECR 263, paragraph 31, and Case C476/98, cited in footnote 11, in particular paragraphs 108 to 110.

(17) - In that regard, reference was also made to the maxim he who can do more can do less'.

(18) - See Case C476/98, cited in footnote 11, paragraph 80.

(19) - See in a similar sense already Opinion of Advocate General Ruiz-Jarabo Colomer in Case C176/03, judgment cited in footnote 3, point 72.

(20) - The so-called Engel criteria': Eur. Court H. R., Engel and others v. the Netherlands , judgment of 8 June 1976, Series A no. 22.

(21) - Eur. Court H. R., Welch v. the United Kingdom , judgment of 9 February 1993, Series A no. 307.

(22) - See in that regard also Opinion of Advocate General Jacobs in Case C240/90 Germany v Commission [1992] ECR I5383, point 11, and Opinion of Advocate General Saggio in Case C356/97 Molkereigenossenschaft Wiedergeltingen [2000] ECR I5461, point 50.

(23) - Case C176/03, cited in footnote 3, paragraph 47, with reference to Case 203/80 Casati [1981] ECR 2595, paragraph 27; and Case C226/97 Lemmens [1998] ECR I3711, paragraph 19.

(24) - See his Opinion in Case C176/03, judgment cited in footnote 3, point 30 et seq.

(25) - Case 50/76 [1977] ECR 137, paragraphs 32 and 33 (emphasis added).

(26) - See, as to that, Case C193/94 Skanavi [1996] ECR I929, paragraph 36 (emphasis added).

(27) - Case C457/02 Antonio Niselli [2004] ECR I10853 should also be mentioned as an example of the indirect impact of Community law - in that case the Community rules on waste - on national criminal law. See, as to the limits in that context, Joined Cases C387/02, C391/02 and C403/02 Berlusconi and Others [2005] ECR I3565.

(28) - Case 68/88 Commission v Greece [1989] ECR 2965, paragraphs 23 and 24.

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(29) - Case C186/98 [1999] ECR I4883, paragraph 12.

(30) - See Case C176/03, cited in footnote 3, paragraph 47.

(31) - Paragraph 40.

(32) - Paragraphs 41 to 43.

(33) - Paragraph 45, with reference to Case C300/89 Commission v Council Titanium dioxide ' [1991] ECR I2867, paragraph 10, and Case C336/00 Huber [2002] ECR I7699, paragraph 30.

(34) - Paragraph 46.

(35) - Paragraph 47.

(36) - Paragraph 48.

(37) - See point 76 above.

(38) - See, in particular, points 84 to 87 of the Opinion, judgment cited in footnote 3.

(39) - Case C176/03, cited in footnote 3, paragraph 52.

(40) - See as to that reasoning Joined Cases 281/85, 283/85 to 285/85 and 287/85 Germany v Commission [1987] ECR 3203, paragraph 28.

(41) - See also the emphasis put on environmental concerns by Advocate General Ruiz-Jarabo Colomer in his Opinion, judgment cited in footnote 3, points 52 to 70.

(42) - Paragraph 41 of the judgment.

(43) - See point 67 et seq. above.

(44) - Paragraph 48.

(45) - Paragraph 50.

(46) - See points 83 to 87 of his Opinion, judgment cited in footnote 3.

(47) - Cited in footnote 5, at point 13.

(48) - Cited in footnote 3, paragraph 49.

(49) - See points 83 to 85 of his Opinion, judgment cited in footnote 3.

(50) - See point 76 above.

(51) - See point 94 of his Opinion, judgment cited in footnote 3.

(52) - Conversely, the Court held that there was no need to examine the Commission's argument that the framework decision should in any event be annulled in part on account of the choices it leaves to the Member States. See paragraph 54 of Case C176/03, cited in footnote 3.

(53) - By, for example, indicating the type of penalty, but not the level of the penalty or by defining the level of penalties in terms of a certain range.

(54) - It may be noted, moreover, that, as the Austrian Government pointed out, a comparable ancillary competence is known to certain federal systems, by which the states are competent to adopt, inter alia, measures in the field of criminal law which are necessary for the regulation of matters within their purview despite the fact that, as a rule, criminal law falls under the competence of the national legislature.

(55) - See Case C176/03, cited in footnote 3, paragraphs 48 and 50 (emphasis added).

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(56) - See Case C176/03, cited in footnote 3, paragraph 45 and the case-law cited therein.

(57) - See, in particular, the first and the fourth recitals.

(58) - See points 65 and 66.

(59) - See the second recital of Directive 2000/59/EC of the European Parliament and of the Council of 27 November 2000 on port reception facilities for ship-generated waste and cargo residues (OJ 2000 L 332, p. 81), which was also adopted on the basis of Article 80(2) EC.

(60) - See, to that effect, Case C336/00, cited in footnote 33, paragraph 33.

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32005F0667-A06 : N 131
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32005F0667-A10 : N 131
32005F0667-A11 : N 131
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61980J0203 : N 72
61985J0281 : N 90
61988J0068 : N 76
61989J0300 : N 83 - 86 89
61990C0240 : N 71
61994J0193 : N 74
61996J0170 : N 49
61997J0226 : N 72
61997C0356 : N 71
61998J0186 : N 76
61998J0476 : N 58 62
62000J0336 : N 83 - 86 89 128
62002J0387 : N 75
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Action brought on 21 November 2005 by the Commission of the European Communities against the Hellenic Republic

(Case C-410/05)

(Language of the case: Greek)

An action against the Hellenic Republic was brought before the Court of Justice of the European Communities on 21 November 2005 by the Commission of the European Communities, represented by G. Zavvos and G. Braun, of its Legal Service, with an address for service in Luxembourg.

The Commission claims that the Court should:

- declare that, by not adopting, and in any event by not notifying to the Commission, the laws, regulations and administrative provisions necessary to comply with Directive 2001/97/EC [1] of the European Parliament and of the Council of 4 December 2001 amending Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering, the Hellenic Republic has failed to fulfil its obligations under that directive;

- order the Hellenic Republic to pay the costs.

Pleas in law and main arguments

The time-limit for transposition of the directive into domestic law expired on 15 June 2003.

____

[1] - OJ No L 344, 28.12.2001, p. 76.

Judgment of the Court (Second Chamber)
of 18 July 2007
Criminal proceedings against Norma Kraaijenbrink. Reference for a preliminary ruling: Hof van Cassatie - Belgium. Convention implementing the Schengen Agreement - Article 54 - Ne bis in idem principle - Notion of same acts' - Different acts - Prosecution in two Contracting States - Acts linked together by the same criminal intention. Case C-367/05.

In Case C367/05,

REFERENCE for a preliminary ruling under Article 35 EU from the Hof van Cassatie (Belgium), made by decision of 6 September 2005, received at the Court on 29 September 2005, in the criminal proceedings against

Norma Kraaijenbrink,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, J. Kluka, R. Silva de Lapuerta, J. Makarczyk and L. Bay Larsen (Rapporteur), Judges,

Advocate General: E. Sharpston,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 4 July 2006,

after considering the observations submitted on behalf of:

- Ms Kraaijenbrink, by M. De Boel, advocaat,

- the Kingdom of the Netherlands, by H.G. Sevenster, acting as Agent,

- the Czech Republic, by T. Boek, acting as Agent,

- the Hellenic Republic, by M. Apessos, S. Trekli and M. Tassopoulou, acting as Agents,

- the Kingdom of Spain, by M. Muñoz Pérez, acting as Agent,

- the Republic of Austria, by C. Pesendorfer, acting as Agent,

- the Republic of Poland, by J. Pietras, acting as Agent,

- the Commission of the European Communities, by W. Bogensberger and R. Troosters, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 5 December 2006,

gives the following

Judgment

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

Article 54 of the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, signed on 19 June 1990 in Schengen (Luxembourg), must be interpreted as meaning that:

- the relevant criterion for the purposes of the application of that article is identity of the material acts, understood as the existence of a set of facts which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected;

- different acts consisting, in particular, first, in holding in one Contracting State the proceeds

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of drug trafficking and, second, in the exchanging at exchange bureaux in another Contracting State of sums of money also originating from such trafficking should not be regarded as the same acts' within the meaning of Article 54 of the Convention implementing the Schengen Agreement merely because the competent national court finds that those acts are linked together by the same criminal intention;

- it is for that national court to assess whether the degree of identity and connection between all the facts to be compared is such that it is possible, in the light of the said relevant abovementioned criterion, to find that they are the same acts' within the meaning of Article 54 of the Convention implementing the Schengen Agreement.

1. This reference for a preliminary ruling concerns the interpretation of Article 54, read in conjunction with Article 71, of the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (OJ 2000 L 239, p. 19; the CISA'), signed on 19 June 1990 in Schengen (Luxembourg).

2. The reference was made in the course of criminal proceedings brought in Belgium against Ms Kraaijenbrink in which she was charged with laundering the proceeds of drug trafficking.

Legal context

Community law

3. Under Article 1 of the Protocol integrating the Schengen acquis into the framework of the European Union, annexed to the Treaty on European Union and to the Treaty establishing the European Community by the Treaty of Amsterdam (the Protocol'), 13 Member States of the European Union, amongst them the Kingdom of Belgium and the Kingdom of the Netherlands, are authorised, within the legal and institutional framework of the Union and of the EU and EC Treaties, to establish closer cooperation among themselves, within the scope of the Schengen acquis as set out in the annex to the Protocol.

4. The Schengen acquis thus defined includes, inter alia, the Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, signed in Schengen on 14 June 1985 (OJ 2000 L 239, p. 13), and the CISA.

5. By virtue of the first subparagraph of Article 2(1) of the Protocol, from the date of entry into force of the Treaty of Amsterdam, on 1 May 1999, the Schengen acquis was to apply immediately to the 13 Member States referred to in Article 1 of that protocol.

6. Pursuant to the second sentence of the second subparagraph of Article 2(1) of the Protocol, on 20 May 1999 the Council of the European Union adopted Decision 1999/436/EC determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions or decisions which constitute the Schengen acquis (OJ 1999 L 176, p. 17). It is apparent from Article 2 of that decision, in conjunction with Annex A thereto, that the Council selected, first, Articles 34 EU and 31 EU and, second, Articles 34 EU, 30 EU and 31 EU, which form part of Title VI of the Treaty on European Union entitled Provisions on police and judicial cooperation in criminal matters', as the legal basis for Articles 54 to 58 and 71 respectively of the CISA.

7. As provided in Article 54 of the CISA, which forms part of Chapter 3 (Application of the ne bis in idem principle') of Title III (Police and Security') of the CISA:

A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it

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has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party.'

8. Article 58 of the CISA, which is in that same chapter, states:

The above provisions shall not preclude the application of broader national provisions on the ne bis in idem principle with regard to judicial decisions taken abroad.'

9. Article 71 of the CISA, which forms part of Chapter 6 (Narcotic drugs') of Title III, states:

1. The Contracting Parties undertake as regards the direct or indirect sale of narcotic drugs and psychotropic substances of whatever type, including cannabis, and the possession of such products and substances for sale or export, to adopt in accordance with the existing United Nations Conventions... all necessary measures to prevent and punish the illicit trafficking in narcotic drugs and psychotropic substances.

2. The Contracting Parties undertake to prevent and punish by administrative and penal measures the illegal export of narcotic drugs and psychotropic substances, including cannabis, as well as the sale, supply and handing over of such products and substances....

...

5. The Contracting Parties shall do their utmost to prevent and combat the negative effects arising from the illicit demand for narcotic drugs and psychotropic substances of whatever type, including cannabis. ...'

10. According to the information published in the Official Journal of the European Communities of 1 May 1999 (OJ 1999 L 114, p. 56), concerning the date of entry into force of the Treaty of Amsterdam, the Kingdom of Belgium declared, pursuant to Article 35(2) EU, that it accepted the jurisdiction of the Court of Justice to give preliminary rulings in accordance with the arrangements laid down in Article 35(3)(b) EU.

International law

11. Article 36 of the Single Convention on Narcotic Drugs, concluded in New York on 30 March 1961 under the aegis of the United Nations (the Single Convention'), is worded as follows:

1. (a) Subject to its constitutional limitations, each Party shall adopt such measures as will ensure that cultivation, production, manufacture, extraction, preparation, possession, offering, offering for sale, distribution, purchase, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation and exportation of drugs contrary to the provisions of this Convention, and any other action which in the opinion of such Party may be contrary to the provisions of this Convention, shall be punishable offences when committed intentionally, and that serious offences shall be liable to adequate punishment particularly by imprisonment or other penalties of deprivation of liberty.

(b) ...

2. Subject to the constitutional limitations of a Party, its legal system and domestic law,

(a) (i) Each of the offences enumerated in paragraph 1, if committed in different countries, shall be considered as a distinct offence;

(ii) Intentional participation in, conspiracy to commit and attempts to commit, any of such offences, and preparatory acts and financial operations in connexion with the offences referred to in this article, shall be punishable offences as provided in paragraph 1;

...'

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National law

12. Article 65 of the Belgian Criminal Code provides:

Where several offences are founded on the same conduct, or where several offences simultaneously before the same court demonstrate successive and continuous criminal intention, sentence shall be passed only in respect of the most serious offence.

When a court finds that offences considered in an earlier final judgment and other conduct - assuming it is factually proven - which is currently before it both predates that judgment and, together with those offences, demonstrates successive and continuous criminal intention, the sentence already imposed shall be taken into account in determining the sentence to be imposed. If the sentence already imposed seems adequate as a penalty for the whole course of criminal conduct, the court shall make a finding of guilt and shall refer in its judgment to the sentence already imposed. The total sentence imposed under this article may not exceed the maximum sentence for the most serious offence.'

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

13. Ms Kraaijenbrink, a Dutch national, was sentenced by judgment of 11 December 1998 of the Arrondissementsrechtbank te Middelburg (Middelburg District Court, Netherlands) to a suspended six month term of imprisonment for several offences under Article 416 of the Wetboek van Strafrecht (Netherlands Penal Code) of receiving and handling the proceeds of drug trafficking between October 1994 and May 1995 in the Netherlands.

14. By judgment of 20 April 2001, the rechtbank van eerste aanleg te Gent (Court of First Instance, Ghent, Belgium) sentenced Ms Kraaijenbrink to two years' imprisonment for committing several offences under Article 505 of the Belgian Criminal Code by exchanging in Belgium between November 1994 and February 1996 the proceeds of drug trafficking operations in the Netherlands. That judgment was confirmed by a judgment of 15 March 2005 of the hof van beroep te Gent, correctionele Kamer (Appeal Court of Ghent, Criminal Chamber).

15. Referring to Article 71 of the CISA and Article 36(2)(a)(i) and (ii) of the Single Convention, both those courts considered that Ms Kraaijenbrink could not rely on Article 54 of the CISA. They considered that the offences of receiving and handling the proceeds of drug trafficking committed in the Netherlands and the money laundering offences in Belgium resulting from that trafficking must be regarded in that State as separate offences. That was so notwithstanding the common intention underlying the offences of receiving and handling in the Netherlands and those of money laundering in Belgium.

16. Ms Kraaijenbrink then appealed on a point of law and pleaded, in particular, infringement of the ne bis in idem principle in Article 54 of the CISA.

17. The Hof van Cassatie observes first of all that, contrary to Ms Kraaijenbrink's contention, the finding that there was a common intention' underlying the unlawful conduct in the Netherlands and the money laundering offence committed in Belgium does not necessarily entail a finding that the sums of money involved in the money laundering operations in Belgium were the proceeds of the trafficking of drugs in respect of the receipt and handling of which Ms Kraaijenbrink had already been sentenced in the Netherlands.

18. On the other hand, it follows from the judgment of the hof van beroep te Gent of 15 March 2005, against which the appeal on the point of law was lodged, that different acts are involved in the two Contracting States which none the less constitute the successive and continuous implementation of the same criminal intention with the result that, if they had all been carried out in Belgium, they would be regarded as a single legal act which would have been dealt with under Article 65

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of the Belgian Criminal Code.

19. Accordingly, the Hof van Cassatie considered that the question arose as to whether the notion of same acts' within the meaning of Article 54 of the CISA must be interpreted as covering different acts consisting, first, in holding in one Contracting State the proceeds of drug trafficking and, second, in the exchanging at exchange bureaux in another Contracting State of sums of money having the same origin.

20. It was in those circumstances that the Hof van Cassatie decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

(1) Must Article 54 of the [CISA], read with Article 71 of that agreement be construed as meaning that the criminal offences of acquiring or having available in the Netherlands or transferring from there sums of money in foreign currencies originating from the trade in narcotics (offences which were prosecuted and in respect of which a conviction was obtained in the Netherlands for receiving and handling in breach of Article 416 of the Criminal Code), which differ from the criminal offences consisting in the exchanging at exchange bureaux in Belgium of the relevant sums of money from the trade in narcotics received in the Netherlands (prosecuted in Belgium as the offence of receiving and handling and performing other acts in regard to goods resulting from crime, in breach of Article 505 of the Criminal Code), are to be regarded as the same acts for the purposes of Article 54 aforesaid where the courts establish that they share a common intention and thus legally constitute a single act?

(2) If Question 1 is answered affirmatively:

Must the expression may not be prosecuted... for the same acts in Article 54 of the [CISA] be interpreted as meaning that the same acts' may also be constituted by different acts sharing the same intention, and thus constituting a single act, which would mean that a defendant can no longer be prosecuted for the offence of moneylaundering in Belgium once he has been duly convicted in the Netherlands of other offences committed with the same intention, regardless of any other offences committed during the same period but which became known or in respect of which prosecutions were brought in Belgium only after the date of the definitive foreign judgment or, in such a case, must that expression be interpreted as meaning that the court determining the merits may enter a conviction in respect of these other acts on a subsidiary basis, taking into account the sentences already imposed, unless it considers that those other sentences in its view constitute sufficient punishment of all the offences, and ensuring that the totality of the penalties imposed may not exceed the maximum of the severest penalty?'

The jurisdiction of the Court

21. It is apparent from paragraph 10 of this judgment that, in the circumstances of this case, the Court has jurisdic tion to give a ruling on the interpretation of the CISA pursuant to Article 35 EU.

22. In that respect, it should be noted that Article 54 of the CISA applies ratione temporis to criminal proceedings such as those in the main proceedings. Although it is true that the CISA was not yet in force in the Netherlands at the time of Ms Kraaijenbrink's first conviction in that State, it was, however, in force in the two States concerned when the court before which the second proceedings were brought considered the conditions governing the applicability of the ne bis in idem principle, which prompted this reference for a preliminary ruling (see, to that effect, Case C436/04 Van Esbroeck [2006] ECR I2333, paragraph 24).

The questions referred for a preliminary ruling

The first question

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23. It must be pointed out at the outset that the fact, referred to in the first question referred for a preliminary ruling, that the legal classification of the acts in respect of which the sentence was passed in the first Contracting State differs from that of the acts in respect of which the proceedings were brought in the second State is irrelevant, since a divergent legal classification of the same acts in two different Contracting States is no obstacle to the application of Article 54 of the CISA (see Van Esbroeck , paragraph 31).

24. Moreover, Article 71 of the CISA, also referred to in the first question, does not contain any element which might restrict the scope of Article 54 of the CISA (see Van Esbroeck , paragraph 40). It follows that the reference to existing United Nations Conventions in Article 71 cannot be understood as hindering the application of the ne bis in idem principle laid down in Article 54 (see Van Esbroeck , paragraph 41).

25. Accordingly, by its first question, the referring court must be understood as seeking, in essence, to ascertain whether the notion of same acts' within the meaning of Article 54 of the CISA must be construed as covering different acts consisting, in particular, first, in holding in one Contracting State the proceeds of drug trafficking and, second, in the exchanging at exchange bureaux in another Contracting State of sums of money having the same origin, where the national court before which the second criminal proceedings are brought finds that those acts are linked together by the same criminal intention.

26. In order to answer that question, it should be noted that the Court has already held that the only relevant criterion for the application of Article 54 of the CISA is identity of the material acts, understood as the existence of a set of concrete circumstances which are inextricably linked together (see Van Esbroeck , paragraph 36; Case C467/04 Gasparini and Others [2006] ECR I9199, paragraph 54, and Case C150/05 Van Straaten [2006] ECR I9327, paragraph 48).

27. In order to assess whether such a set of concrete circumstances exists, the competent national courts must determine whether the material acts in the two proceedings constitute a set of facts which are inextricably linked together in time, in space and by their subject-matter (see, to that effect, Van Esbroeck , paragraph 38; Gasparini and Others , paragraph 56, and Van Straaten , paragraph 52).

28. It follows that the starting point for assessing the notion of same acts' within the meaning of Article 54 of the CISA is to consider the specific unlawful conduct which gave rise to the criminal proceedings before the courts of the two Contracting States as a whole. Thus, Article 54 of the CISA can become applicable only where the court dealing with the second criminal prosecution finds that the material acts, by being linked in time, in space and by their subjectmatter, make up an inseparable whole.

29. On the other hand, if the material acts do not make up such an inseparable whole, the mere fact that the court before which the second prosecution is brought finds that the alleged perpetrator of those acts acted with the same criminal intention does not suffice to indicate that there is a set of concrete circumstances which are inextricably linked together covered by the notion of same acts' within the meaning of Article 54 of the CISA.

30. As the Commission of the European Communities in particular pointed out, a subjective link between acts which gave rise to criminal proceedings in two different Contracting States does not necessarily mean that there is an objective link between the material acts in question which, consequently, could be distinguished in time and space and by their nature.

31. As regards more specifically a situation such as that at issue in the main proceedings, in which it has not been clearly established to what extent it is the same financial gains derived from the drug trafficking that underlie, in whole or in part, the unlawful conduct in the two Contracting

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States concerned, it must be stated that, in principle, such a situation can be covered by the notion of same acts' within the meaning of Article 54 of the CISA only if an objective link can be established between the sums of money in the two sets of proceedings.

32. In that respect, it is for the competent national courts to assess whether the degree of identity and connection between all the factual circumstances that gave rise to those criminal proceedings against the same person in the two Contracting States is such that it is possible to find that they are the same acts' within the meaning of Article 54 of the CISA.

33. Moreover, it must be pointed out in this case that it is apparent from Article 58 of the CISA that the Contracting States are entitled to apply broader national provisions on the ne bis in idem principle with regard to judicial decisions taken abroad.

34. However, Article 58 of the CISA certainly does not authorise a Contracting State to refrain from trying a drugs offence, in breach of its obligations under Article 71 of the CISA, read in conjunction with Article 36 of the Single Convention, on the sole ground that the person charged has already been convicted in another Contracting State in respect of other offences motivated by the same criminal intention.

35. On the other hand, those provisions do not mean that in national law the competent courts before which a second set of proceedings is brought are precluded from taking account, when fixing the sentence, of penalties which may have already been imposed in the first set of proceedings.

36. In the light of the foregoing, the answer to the first question must therefore be that Article 54 of the CISA is to be interpreted as meaning that:

- the relevant criterion for the purposes of the application of that article is identity of the material acts, understood as the existence of a set of facts which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected;

- different acts consisting, in particular, first, in holding in one Contracting State the proceeds of drug trafficking and, second, in the exchanging at exchange bureaux in another Contracting State of sums of money also originating from such trafficking should not be regarded as the same acts' within the meaning of Article 54 of the CISA merely because the competent national court finds that those acts are linked together by the same criminal intention;

- it is for that national court to assess whether the degree of identity and connection between all the facts to be compared is such that it is possible, in the light of the said relevant criterion, to find that they are the same acts' within the meaning of Article 54 of the CISA.

The second question

37. The second question was referred only if the response to the first question confirmed that a common criminal intention is a sufficient condition in itself, which if satisfied, enables different acts to be regarded as the same acts' within the meaning of Article 54 of the CISA.

38. Since that has not been confirmed by the Court in its reply to the first question, it follows that there is no need to answer the second question.

Costs

39. 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.

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PROCEDU	Reference for a preliminary ruling
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Opinion of Advocate General Sharpston delivered on 5 December 2006. Criminal proceedings against Norma Kraaijenbrink. Reference for a preliminary ruling: Hof van Cassatie - Belgium. Convention implementing the Schengen Agreement - Article 54 - Ne bis in idem principle - Notion of same acts' - Different acts - Prosecution in two Contracting States - Acts linked together by the same criminal intention. Case C-367/05.

1. To what extent is a common intention relevant in determining whether, in the context of laundering the proceeds of drug trafficking, the acts for which a defendant has been prosecuted in two different Member States are the same acts' for the purposes of Article 54 of the Convention Implementing the Schengen Agreement (CISA')? (2) Are acts that were unknown to the prosecuting authorities or the adjudicating courts of the first Member State covered by that concept? And if a further prosecution is brought in the second Member State, and a conviction is secured, must the sentencing court take into account the sentence passed in the first Member State? Those, essentially, are the questions referred to the Court by the Belgian Hof van Cassatie (Court of Cassation).

Relevant provisions

The CISA

2. Pursuant to Article 1 of the Protocol integrating the Schengen acquis into the framework of the European Union (3) (the Protocol'), 13 Member States are authorised to establish closer cooperation among themselves within the scope of the so-called Schengen acquis'.

3. The annex to the Protocol defines the Schengen acquis' as including the Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, signed at Schengen on 14 June 1985 (4) (the Schengen Agreement') and, in particular, the CISA.

4. The Protocol provides that, from the date of entry into force of the Treaty of Amsterdam, namely 1 May 1999, the Schengen acquis is to apply immediately to the 13 Member States referred to in Article 1 of the Protocol, including the Netherlands and Belgium. (5)

5. Articles 54 to 58 of the CISA together constitute Chapter 3, entitled Application of the ne bis in idem principle', of Title III, which deals with Police and Security'.

6. Article 54 provides that a person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party'.

7. Article 55(1) entitles a Contracting Party, when ratifying, accepting or approving this Convention, to declare that it is not bound by Article 54' where the acts to which the foreign judgment relates took place in whole or in part in its own territory, constitute an offence against national security or other equally essential interests of that Contracting Party and/or were committed by officials of that Contracting Party in violation of the duties of their office.

8. Article 56 provides that if a further prosecution is brought in a Contracting Party against a person whose trial, in respect of the same acts, has been finally disposed of in another Contracting Party, any period of deprivation of liberty served in the latter Contracting Party arising from those acts shall be deducted from any penalty imposed. To the extent permitted by national law, penalties not involving deprivation of liberty shall also be taken into account'.

9. Article 58 provides that the above provisions shall not preclude the application of broader national provisions on the ne bis in idem principle with regard to judicial decisions taken abroad'.

10. Pursuant to Article 71(1), which is in Chapter 6 of the CISA entitled Narcotic Drugs',

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Contracting Parties undertake to adopt in accordance with the existing United Nations Conventions, all necessary measures to prevent and punish the illicit trafficking in narcotic drugs and psychotropic substances'. Article 71(2) requires Contracting Parties to prevent and punish by administrative and penal measures' the illegal export, the sale, supply and handing over of narcotic drugs and psychotropic substances. Under Article 71(5) Contracting Parties are required to do their utmost to prevent and combat the negative effects arising from the illicit demand for narcotic drugs and psychotropic substances'.

The 1961 UN Single Convention on Narcotic Drugs

11. The 1961 UN Single Convention on Narcotic Drugs, as amended by the 1972 Protocol (the Single Convention') is part of the acquis of the European Union under Title VI of the TEU. Member States are either party to it or required, upon accession to the EU, to become party to it.

12. Article 36(1)(a) of the Single Convention, entitled Penal Provisions', provides that subject to its constitutional limitations, each Party shall adopt the measures to ensure that a range of drugs-related offences including offering for sale, distribution or any other action which in the opinion of such Party may be contrary to the provisions of the Single Convention, shall be punishable offences when committed intentionally, and that serious offences shall be liable to adequate punishment particularly by imprisonment or other penalties of deprivation of liberty.

13. Under Article 36(2)(a)(i) and (ii), subject to the constitutional limitations of a Party, its legal system and domestic law, each of those offences shall be considered as a distinct offence if committed in different countries and financial operations in connection with those offences shall also be punishable offences in accordance with Article 36(1).

National rules

14. The Netherlands Government explained at the hearing that at the material time there was no specific provision in the Netherlands Penal Code dealing with the offence of money laundering. However, until 2002 laundering the proceeds of drug trafficking fell within the scope of Article 416 of the Netherlands Penal Code, under which it is an offence to handle stolen property or proceeds arising therefrom. To be convicted of that offence the person handling the property or its proceeds must have been aware that it was obtained by committing a serious offence. Trafficking in illicit drugs is considered to be such an offence.

15. Article 505 of the Belgian Criminal Code prohibits the trafficking, acquisition, possession, handling or trading of goods defined under Article 42(3) of the Code as having been obtained by criminal conduct. On that basis, the handling and laundering of proceeds of illicit drug trafficking are prohibited in Belgium.

16. Article 65 of the Belgian Criminal Code provides as follows:

Where several offences are founded on the same conduct, or where several offences simultaneously before the same court demonstrate successive and continuous criminal intention, sentence shall be passed only in respect of the most serious offence.

When a court finds that offences considered in an earlier final judgment and other conduct - assuming it is factually proven - which is currently before it both predates that judgment and, together with those offences, demonstrates successive and continuous criminal intention, the sentence already imposed shall be taken into account in determining the sentence to be imposed. If the sentence already imposed seems adequate as a penalty for the whole course of criminal conduct, the court shall make a finding of guilt and shall refer in its judgment to the sentence already imposed. The total sentence imposed under this article may not exceed the maximum sentence for the most serious offence.' (6)

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National proceedings and questions referred

17. In December 1998, Ms Kraaijenbrink, a Dutch national, was sentenced by the Arrondissementsrechtbank Middelburg (Middelburg District Court'), Netherlands, to a suspended six month term of imprisonment for several offences under Article 416 of the Netherlands Penal Code of receiving and handling the proceeds of drug trafficking between October 1994 and May 1995 in the Netherlands. (7)

18. In April 2001, the Correctionele Rechtbank te Gent (the Ghent Criminal Court'), Belgium, sentenced Ms Kraaijenbrink to two years' imprisonment for committing several offences under Article 505 of the Belgian Criminal Code by exchanging in Belgium sums received from trading narcotics in the Netherlands between November 1994 and February 1996. That judgment was confirmed by the Criminal Chamber of the Hof van Beroep te Gent (Appeal Court of Ghent) in March 2005.

19. Referring to Article 71 of the CISA and Article 36(2)(a)(i) and (ii) of the Single Convention, both courts in Belgium held that the appellant could not rely on Article 54 of the CISA. They considered that the offences of receiving and handling proceeds of drug trafficking committed in the Netherlands and the offences committed in Belgium which related to exchanging sums received from trading narcotics in the Netherlands must be regarded as separate offences. That was so notwithstanding the common intention underlying the money laundering offences in the Netherlands and Belgium.

20. On a further appeal to the Hof van Cassatie, Ms Kraaijenbrink argued that the criminal proceedings in Belgium were barred according to the principle of ne bis in idem in Article 54 of the CISA.

21. The Hof van Cassatie decided to stay proceedings and ask the Court for a preliminary ruling on the following questions:

(1) Must Article 54 of the [CISA], read with Article 71 of that agreement, be construed as meaning that the criminal offences of acquiring or having available in the Netherlands or transferring from there sums of money in foreign currencies originating from the trade in narcotics (offences which were prosecuted and in respect of which a conviction was obtained in the Netherlands for receiving and handling in breach of Article 416 of the Criminal Code), which differ from the criminal offences consisting in the exchanging at exchange bureaux in Belgium of the relevant sums of money from the trade in narcotics received in the Netherlands (prosecuted in Belgium as the offence of receiving and handling and performing other acts in regard to goods resulting from crime, in breach of Article 505 of the Criminal Code), are to be regarded as the same acts for the purposes of Article 54 aforesaid where the courts establish that they share a common intention and thus legally constitute a single act?

(2) If Question 1 is answered affirmatively:

Must the expression may not be prosecuted... for the same acts in Article 54 of the Convention implementing the Schengen Agreement be interpreted as meaning that the same acts may also be constituted by different acts sharing the same intention, and thus constituting a single act, which would mean that a defendant can no longer be prosecuted for the offence of money-laundering in Belgium once he has been duly convicted in the Netherlands of other offences committed with the same intention, regardless of any other offences committed during the same period but which became known or in respect of which prosecutions were brought in Belgium only after the date of the definitive foreign judgment or, in such a case, must that expression be interpreted as meaning that the court determining the merits may enter a conviction in respect of these other acts on a subsidiary basis, taking into account the sentences already imposed, unless it considers that those other sentences in its view constitute sufficient punishment of all the offences, and ensuring that the totality of the penalties imposed may not exceed the maximum of the severest penalty?'

22. Ms Kraaijenbrink, Austria, the Czech Republic, Greece, Poland, Spain and the Commission

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have submitted written observations. Oral submissions were made by Ms Kraaijenbrink, Austria, Greece, Spain and the Commission at the hearing on 4 July 2006. The Netherlands made submissions at the hearing alone. As in Kretzinger , (8) the written observations were submitted before the judgment in Van Esbroeck. (9) However, the hearing took place after judgment in that case was delivered.

Assessment

Preliminary remarks

23. First, it appears from the file that the defendant has been convicted for handling and laundering the proceeds of illicit drug trafficking both in Belgium and in the Netherlands. It is however unclear from the order for reference, as several parties have noted, whether the sums of money handled and laundered in both countries derived from the same illicit drug trafficking operations or formed part of the same criminal proceeds.

24. Secondly, the referring court indicates that since the exchange in [Belgium] at exchange bureaux of sums of money originating from dealing in narcotics and the receipt in [the Netherlands] of sums of money from dealing in narcotics, [...] are connected by the same intention to deal in illicit goods', those acts would constitute a single act under Article 65 of the Belgian Criminal Code law. In other words, if the conduct on which the convictions in the Netherlands and Belgium were based were assessed solely under Belgian law, it would be characterised as a single act by virtue of the common intention which underlies it.

The first question

25. By its first question the referring court is essentially asking whether two distinct offences committed in two different Member States which are linked by a common criminal intention fall, by virtue of that fact, within the definition of same acts' in Article 54 of the CISA. It also wishes to know whether the answer to that question is affected by Article 71 of the CISA, and the Single Convention indirectly referred to therein, concerning the obligations on Member States as regards the fight against the illicit trafficking of narcotic drugs and psychotropic substances.

26. The order for reference refers to criminal offences' rather than acts. In Van Esbroeck the Court stated that the legal interest protected or legal classification of the acts is irrelevant for the purposes of Article 54 of the CISA. Therefore it is appropriate to rephrase the first question as asking to what extent a common criminal intention is relevant in determining whether the acts for which a defendant has been prosecuted in two different Member States are the same acts' for the purposes of Article 54 of the CISA.

Assessment

- The same acts'

27. As I pointed out in my Opinion in Kretzinger , (10) the matters raised in the first question have now been resolved by Van Esbroeck (11) as confirmed by subsequent case-law. (12) It follows from that case-law that only the identity of the material facts, understood as the existence of a set of concrete circumstances which are inextricably linked together', (13) is relevant when determining whether Article 54 of the CISA applies. That assessment, according to the Court, requires determining whether the material acts at issue constitute a set of facts which are inextricably linked together in time, in space and by their subject-matter'. (14)

28. On that basis, I agree with the majority of the parties who have submitted observations that a common criminal intention underlying the material acts is insufficient in itself to classify them as the same acts' within the meaning of Article 54 of the CISA. Common intention may indeed be a factor to be taken into account, as I pointed out in my Opinion in Kretzinger. (15) But the acts must also be linked in time and space.

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29. As the Court also made clear in Van Esbroeck , (16) it is for national courts to decide whether, on the facts of the particular case, the acts in question are inextricably linked together. However, it may prove useful in the main proceedings if the Court can give some guidance in that regard.

30. The succinct nature of the order for reference does not make that task particularly straightforward. The referring court indicates that it has not been established definitively in the main proceedings whether the sums of money laundered in Belgium derived from trading the narcotics in the Netherlands for receiving and handling the proceeds of which Ms Kraaijenbrink was convicted by the Netherlands court. However, referring to the findings of the lower Belgian courts, Ms Kraaijenbrink insists that the money laundering operations in the Netherlands and Belgium concerned the same sums of money arising from the same illicit trafficking.

31. Money laundering generally involves a chain of financial transactions intended to disguise the unlawful origin of the money and to recycle it into circulation as legal currency. A sum of money is usually laundered through several transactions, some of which may include exchanges of currency which are carried out in quick succession in different places. The resulting sum of money is frequently less than the original sum and may be in a different currency.

32. I agree with the Commission that if the laundering operations in Belgium concerned sums of money which are inextricably related to the sums of money which were handled in the Netherlands and for receiving or handling which Ms Kraaijenbrink was there convicted, they would amount to the same acts' under Article 54 of the CISA. That might be the case, for instance, where the money laundered in the second Member State formed part of the original proceeds of the illicit drug trafficking in the first Member State, but at a later stage in the laundering chain. In addition to the common criminal intention that those acts share, they would also be linked materially, in space and in time.

33. If, on the contrary, the dirty' money which Ms Kraaijenbrink laundered in Belgium is unrelated to the dirty' money handled in the Netherlands, those acts are not inextricably linked although they may both relate to illicit drug trafficking operations and share a common criminal intention, namely to benefit financially from criminal proceeds. That would be the case, for instance, where the proceeds stem from drugs-related offences committed in different places at different times and where those proceeds were received or were laundered at times sufficiently different to break the temporal link.

34. In Van Straaten (17) the referring court essentially asked whether two acts of heroin possession in two Member States constituted the same acts' under Article 54 of the CISA where the first act concerned a small part of the larger consignment of heroin which the offender was accused of possessing in the second Member State and where the accomplices alleged to have been party to the acts in the two Member States differed.

35. The Court held that in the case of offences relating to narcotic drugs, the quantities of the drug that are at issue in the two Contracting States concerned or the persons alleged to have been party to the acts in the two States are not required to be identical' for Article 54 of the CISA to apply. (18) It is therefore possible that a situation in which such identity is lacking nevertheless involves a set of facts which, by their very nature, are inextricably linked. (19)

36. I must start by noting that applying those statements literally to any drug trafficking offence could produce undesirable results. A conviction for possessing or handling a small quantity of drugs in one Member State should not in my view automatically foreclose further criminal proceedings for possessing or handling substantially larger quantities of the same drugs in another, irrespective of whether they form part of the same consignment. (20) It seems better to read the statements I have just cited from Van Straaten as an ad hoc application of the general rule that complete

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identity of the material facts - in this case represented by the quantity of drugs and the identity of the accomplices - is not a requirement for Article 54 of the CISA to apply. Rather, those statements afford the national court a discretion in assessing what constitutes the same acts in the circumstances of the case.

37. Bearing in mind those qualifications, Van Straaten supports the view that a difference in the sums handled in the Netherlands and Belgium does not per se prevent the acts from being regarded as the same for the purposes of Article 54 of the CISA. However, as I have already said, that inextricable link' is a matter for the referring court to decide on the evidence before it in the main proceedings.

38. For the sake of completeness, I add that under Article 58 of the CISA Member States are allowed to apply a more generous interpretation of the principle of ne bis in idem under national law. Consequently, it would not be contrary to Article 54 of the CISA for national law to be interpreted so that the acts in question are to be treated as the same acts for which Ms Kraaijenbrink was prosecuted in the Netherlands because they share the same intention, even if they are not based on the same material facts for the purposes of Article 54 of the CISA.

- Articles 71 of the CISA and 36(2) of the Single Convention

39. As regards Article 71 of the CISA and Article 36(2) of the Single Convention, the majority of the parties submit that neither is relevant to the interpretation of Article 54 of the CISA. I agree.

40. It is true that Article 36(2) of the Single Convention, to which Article 71 of the CISA refers, requires that the offences falling within its scope, if committed in different countries, are to be considered as distinct offences. However, assuming that laundering the proceeds of drug trafficking is an offence falling with the scope of Article 36(2), (21) the Court has expressly held in Van Esbroeck that Article 71 of the [CISA] does not contain any element which might restrict the scope of Article 54'. (22) In the Court's view, it follows that the reference made in Article 71 of the CISA to existing United Nations Conventions cannot be understood as hindering the application of the ne bis in idem principle laid down in Article 54 of the CISA, which prevents only the plurality of proceedings against a person for the same acts and does not lead to decriminalisation within the Schengen territory'. (23)

41. In my view those statements apply equally in the present case. Article 71 of the CISA, which is drafted in very general terms and imposes on Contracting Parties a general obligation to penalise all offences relating to drug trafficking, does not provide for any derogation from the principle of ne bis in idem in that area or allow a drugs-related offence to be penalised twice in the Schengen context.

42. As regards the Single Convention, it was adopted in 1961 by an intergovernmental convention and was intended to apply to independent sovereign States. The Commission argues, in my view persuasively, that it would be incongruous to apply the Single Convention to the Schengen area, which was created over 30 years later and intended to achieve further integration in the field of police and judicial cooperation amongst its Contracting Parties. (24)

43. In such an integrated area, which is based on the mutual trust principle (25) and in which measures to fight illicit drug trafficking are to be adopted progressively at a supranational rather than national level, (26) the obligation in Article 36 of the Single Convention to consider as distinct offences committed in different countries loses its purpose. In my view, the obligation under Article 71 of the CISA on Contracting Parties to adopt the necessary measures to combat illicit drug trafficking in accordance with the existing United Nations Conventions can apply only to the extent that those conventions are relevant for the purposes of the Schengen agreements.

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44. Accordingly, I consider that the phrase same acts' in Articles 54 and 56 of the CISA refers to identity of material facts, understood as a set of concrete circumstances which are inextricably linked together in time, in space and by their subject-matter. The existence of a common criminal intention may be relevant when assessing whether those three criteria are met but is not itself a criterion. That interpretation is unaffected by Article 71 of the CISA or by Article 36(2) of the 1961 UN Single Convention on Narcotic Drugs.

The second question

45. The second question arises only in the event that the first question receives the (affirmative) answer that a common intention is a sufficient condition in itself for offences to be classified as the same acts' within the meaning of Article 54 of the CISA. I have indicated that I do not consider that to be the case. I nevertheless propose to examine the second question briefly in case the Court decides to answer the first question in the affirmative.

46. The wording of the second question is imprecise and open to different interpretations. As I read it, it consists of two branches.

47. First, the referring court wishes to know whether, assuming that the concept of the same acts' in Article 54 of the CISA covers acts which are different but which are unified by the same criminal intention, that notion can be extended to cover other offences committed during the same period which are subsidiary or additional to the offence penalised in the first judgment, but which became known or in respect of which prosecutions were brought in the second Member State after the first judgment, or whether the court in the second Member State may enter a conviction in respect of these other acts on a subsidiary basis.

48. If the latter is the case the referring court asks, in the second branch of its question, whether the court in the second Member State is to take into account sentences already imposed in the first Member State in determining under national law the sentence to be imposed.

49. In my view the answer to the first branch must follow the same reasoning that I have set out in response to the first question. Applying Van Esbroeck , if the acts giving rise to the subsidiary offences are inextricably linked in time, space and by their subject-matter to the acts forming the basis of the conviction in the first Member State, Article 54 of the CISA will apply, provided all its other conditions are met. (27) If that is not the case, the national court may try the defendant for the subsidiary offences, since the alleged acts fall outside the notion of the same acts' under that provision.

50. The fact that the ancillary acts were not known at the time, or were not adjudicated upon in the course of proceedings in the first Member State, does not undermine that conclusion. Nothing in the case-law of the Court on the notion of the same acts' in Article 54 of the CISA indicates that its scope is limited to acts that were known at the material time to the prosecuting authorities or adjudicating courts of the first Member State. Accordingly, nothing prevents the courts of the second Member State from finding that such acts are inextricably linked' to the acts constituting the subject-matter of the earlier proceedings, and therefore from regarding them as the same acts'.

51. On the contrary, the Court in Van Straaten (28) stated that Article 54 of the CISA does not require all material facts considered in the two sets of proceedings to be identical. In that case, circumstances which had not been considered by the court in the first Member State but were considered by the court in the second (29) did not prevent the Court from finding that the acts in question were capable of amounting to the same acts under Article 54 of the CISA.

52. Similar reasoning can be applied in the present case. Acts which are ancillary or additional to the main acts forming the subject of the earlier proceedings, but which were not themselves considered

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in those proceedings, fall within the concept of same acts' for the purposes of Article 54 of the CISA if all the acts are inextricably linked together in time, in space and by their subject-matter. Whether that is the case on the facts is a matter for the national court to determine.

53. The second branch of the question essentially asks whether the court hearing the second set of proceedings is to take into account penalties imposed in the first set of proceedings for the same acts if it decides to impose a sentence on the defendant in respect of those ancillary or additional acts.

54. Clearly, if the ancillary or additional acts are considered to be the same acts within the meaning of Article 54 of the CISA, the court hearing the second set of proceedings is, if all other conditions are met, prevented from prosecuting and, a fortiori, sentencing the defendant. The issue of whether previous penalties are to be taken into account therefore does not arise.

55. The situation is different where, even though the ancillary or additional acts are considered to be the same acts, the other conditions for the application of Article 54 of the CISA are not satisfied. (30) In that case an answer to the second branch is to be reached in the light of both the general principle of set-off and Article 56 of the CISA. I recall that Article 56 of the CISA requires a Contracting Party that prosecutes a person whose trial, in respect of the same acts, has been finally disposed of in another Contracting Party, to deduct any period of deprivation of liberty served in the latter Contracting Party arising from those acts from any penalty imposed. That provision also requires Member States, to the extent permitted by national law, to take into account penalties not involving deprivation of liberty.

56. At the hearing, the Commission made it clear that in its view Article 56 of the CISA reflected a general principle of criminal law, namely the proportionality principle, which applies to any situation in which the principle of ne bis in idem in Article 54 of the CISA does not apply.

57. That argument was vehemently opposed by the Netherlands. It argued that the principle of set-off contained in Article 56 of the CISA is restricted to cases in which the derogations in Article 55(1) of the CISA apply. In any other case, whether that principle applies is a matter of national law. Accepting the Commission's argument would amount to veiled harmonisation of national criminal law, circumventing the provisions of the CISA.

58. I can find no textual or logical link between Articles 55 and 56 of the CISA to support such an interpretation. More fundamentally, I share the Commission's view that there is a general principle of set-off (31) in EU law whereby previous penalties must be taken into account if the offender is penalised under a second set of proceedings for the same acts. (32)

59. Not only does the criminal law of each Member State, so far as I have been able to ascertain, contain variations of that principle, (33) but the Court has also recognised its existence in the context of applying concurrent national and EC sanctions in competition law. In Wilhelm the Court stated that if the possibility of two procedures being conducted separately were to lead to the imposition of consecutive sanctions [for the same acts], a general requirement of natural justice... demands that any previous punitive decision must be taken into account in determining any sanction which is to be imposed'. (34) That case-law was later confirmed in Boehringer Mannheim , where the Court held that in fixing the amount of a fine, the Commission must take account of penalties which have already been borne by the same undertaking for the same action, where penalties have been imposed for infringements of the cartel law of a Member State and, consequently, have been committed on Community territory'. (35) The Court of First Instance has faithfully followed that case-law. (36)

60. Although the case-law on this point is not yet settled, (37) I am of the view that the principle of set-off can be construed as a general principle of criminal law in all Member States and by

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extension, as a general principle of Community law arising from the requirements of natural justice and the principle of proportionality in criminal justice. (38)

61. The principle of set-off is in my view conceptually distinct from the principle of ne bis in idem , even though both are manifestations of a general requirement of natural justice or fairness in criminal proceedings. (39) By definition, the principle of set-off is relevant only when the principle of ne bis in idem is, for whatever reason, not applicable even though the facts forming the basis of the prosecution are the same. (40) Otherwise, the court seized with the second set of criminal proceedings must dismiss those proceedings as contrary to the principle of ne bis in idem.

62. It follows from the foregoing that Article 56 of the CISA merely codifies the principle of set-off for the purposes of Schengen. If I am right, two consequences follow from that conclusion. First, Article 56 of the CISA aside, the principle of set-off would still apply as a general principle of Community law. Second, as a general principle of law it is superior to Article 56 of the CISA in the hierarchy of norms. As a result, the fact that the scope of that provision is limited to penalties concerning deprivation of liberty is superseded by the wider scope of the general principle: all penalties imposed and served for the same acts in the first Member State should be taken into account in the proceedings in the second Member State.

63. Therefore, as a matter solely of EU law, when the principle of ne bis in idem does not apply national criminal courts are bound at the sentencing stage to take into account penalties, whether or not they involve deprivation of liberty, which have already been imposed on and served (or otherwise satisfied) by the defendant in other Member States for the same acts. That will be the case where one of the derogations in Article 55 of the CISA applies, but also where the trial in the first Member State has been disposed of but the enforcement condition in Article 54 of the CISA is not fulfilled. (41)

64. However, should the Court not accept the proposition that there is such a general principle of set-off, in my view it is clear that Article 56 of the CISA would apply in any event. Member States that are parties to the Schengen agreement are required to offset any previous periods of deprivation of freedom suffered by the defendant in other Member States against any custodial sentence imposed in the Schengen context.

65. Here, I disagree with the Netherlands Government's restrictive interpretation of Article 56 of the CISA. Nothing in the broad terms of that provision indicates that its scope is limited to cases where Article 55(1) of the CISA applies. A literal interpretation clearly suggests on the contrary that it should apply to cases in which, for whatever reason, a prosecution against the same defendant is initiated in a Member State despite the fact that his trial for the same acts has been disposed of in another Member State. (42)

66. Obviously, the foregoing analysis applies where the defendant is being tried and sentenced for the same acts a second time in another Member State and he cannot avail himself of Article 54 of the CISA. Where the acts are found not to be the same, no obligation arises under Article 56 of the CISA, or, as I have argued, under the general principle of set-off.

67. For the sake of completeness, I add that EU law does not prevent national courts before which the second set of proceedings are brought from applying more generous national rules on sentencing in circumstances where Articles 54 or 56 of the CISA - or the principles which they contain - are not applicable because the acts before the national court are found not to be the same acts' as those considered by the court hearing the first set of proceedings.

68. That conclusion follows from general principles of subsidiarity and attribution of powers. In addition, as the Commission notes, Articles 56 in fine and 58 of the CISA explicitly allow

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Member States to apply national law containing a more generous interpretation of the principles of ne bis in idem and of set-off in the context of the Schengen acquis.

69. Accordingly, I consider that the concept of the same acts' in Articles 54 and 56 of the CISA covers acts which are ancillary or additional to the main acts forming the subject of the proceedings in the first Member State, but which were not themselves considered in those proceedings, if those acts are inextricably linked together in time, in space and by their subject-matter. Nothing in EU law prevents Member States from applying to an offender more favourable criminal rules than those required under Articles 54 to 57 of the CISA.

Conclusion

70. In view of the foregoing I consider that the Court should rule as follows in answer to the questions posed by the Hof van Cassatie:

- The phrase same acts' in Articles 54 and 56 of the CISA refers to identity of material facts, understood as a set of concrete circumstances which are inextricably linked together in time, in space and by their subject-matter. Article 71 of the CISA or Article 36(2) of the 1961 UN Single Convention on Narcotic Drugs does not affect that interpretation.

- The existence of a common criminal intention may be relevant when assessing whether those three criteria are met, but is not itself a criterion.

- Acts which are ancillary or additional to the main acts forming the subject of the proceedings in the first Member State, but which were not themselves considered in those proceedings, fall within the concept same acts' for the purposes of Article 54 of the CISA if those acts are inextricably linked together in time, in space and by their subject-matter.

- In any event, EU law does not prevent a Member State from applying rules more favourable to an offender than those required under Articles 54 and 56 of the CISA.

(1) .

(2) - OJ 2000 L 239, p. 19.

(3) - Annexed by the Treaty of Amsterdam to the Treaty on the European Union (TEU') and to the Treaty establishing the European Community.

(4) - OJ 2000 L 239, p. 13.

(5) - Article 2(1), first subparagraph. The Court has jurisdiction to interpret provisions of the CISA by virtue of Article 35 EU.

(6) - My translation. The original text states: Lorsque un même fait constitue plusieurs infractions ou lorsque différentes infractions soumises simultanément au même juge du fond constituent la manifestation successive et continue de la même intention délictueuse, la peine la plus forte sera seule prononcée.

Lorsque le juge de fond constate que des infractions ayant antérieurement fait l'objet d'une décision définitive et d'autres faits dont il est saisi et qui, à les supposer établis, sont antérieurs à ladite décision et constituent avec les premières la manifestation successive et continue de la même intention délictueuse, il tient compte, pour la fixation de la peine, des peines déjà prononcées. Si celles-ci lui paraissent suffire à une juste répression de l'ensemble des infractions, il se prononce sur la culpabilité et renvoie dans sa décision aux peines déjà prononcées. Le total des peines prononcées en application de cet article ne peut excéder le maximum de la peine la plus forte'.

(7) - In the same judgment, Ms Kraaijenbrink was also convicted of intentionally breaching the Netherlands' Opium Law between October 1994 and February 1997.

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(8) - Case C-288/05, currently pending before the Court, in which I have also delivered my Opinion today.

(9) - Case C-436/04 [2006] ECR I-2333.

(10) - Cited in footnote 8 above, points 35 to 37.

(11) - Cited in footnote 9 above. See also point 22 above.

(12) - See Cases C-150/05 Van Straaten [2006] ECR I-0000 and C-467/04 Gasparini [2006] ECR I-0000.

(13) - At paragraph 36.

(14) - At paragraph 38.

(15) - At point 39.

(16) - Paragraph 38.

(17) - Cited in footnote 12 above.

(18) - At paragraph 49.

(19) - At paragraph 50.

(20) - Thus, I doubt that handling 50 grams of heroin in one Member State and 5 kilos of the same drug in another should automatically be treated as the same act, even if the two lots are part of the same consignment.

(21) - The Commission takes the position that that is not the case. Given how widely Article 36(2) is framed (see point 11 above), it is difficult to see how that could be correct.

(22) - At paragraph 40.

(23) - At paragraph 41.

(24) - In the same vein, see Advocate General Ruiz-Jarabo Colomer's Opinion in Van Esbroeck, cited in footnote 9 above, points 53 to 58.

(25) - See Joined Cases C-187/01 and C-385/01 Gözütok and Brügge [2003] ECR I-1345, at paragraphs 32 and 33.

(26) - See Articles 70 and 71(3) of the CISA which require Contracting Parties to increase their efforts towards cooperation in the fight against illicit drug trafficking.

(27) - On the other conditions for Article 54 of the CISA to apply, namely, that the trial has been finally disposed of (the finality' condition) and, if a penalty has been imposed, that it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party (the enforcement' condition), see my Opinions in Kretzinger , cited in footnote 8, and Gasparini , cited in footnote 12 above.

(28) - Cited in footnote 12 above.

(29) - Namely, the possession of four extra kilos of heroin and the participation of a different accomplice.

(30) - See footnote 27 above.

(31) - That principle is also referred to as the principle of taking into account' (see, for instance, M. Fletcher, Some developments to the ne bis in idem principle in the EU: Criminal proceedings against Hüssein Gözütok and Klaus Brügge ' [2003] 66 Modern Law Review 769, at footnote 5)

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or the accounting principle' (see J. Vervaele, The transnational ne bis in idem principle in the EU: Mutual Recognition and equivalent protection of human rights', (2005) Utrecht Law Review Vol. I, Issue 2 (December) 100, at 106 and 107).

(32) - In so saying, I should make it clear that I both understand and share the Netherlands' underlying concern that criminal law should not be harmonised by the back door (see, in that vein, my Opinion in Gasparini , cited in footnote 12 above). As I explain below, it seems to me that the origins in EC law of a general principle of set-off derived from the requirements of natural justice can be traced back to 1969 and the judgment of the Court in Case 14/68 Wilhelm [1969] ECR 1.

(33) - See also points 64 to 70 of my Opinion in Kretzinger , cited in footnote 8.

(34) - Cited in footnote 32 above, at paragraph 11.

(35) - Case 7/72 [1972] ECR 1281, at paragraph 3.

(36) - See, for instance, Case T-224/00 Archer Daniels Midlands v Commission [2003] ECR II-2597, at paragraph 87 and the case-law cited therein. See also Case T-322/01 Roquette Frères v Commission [2006] ECR II-0000, at paragraphs 279 to 292.

(37) - Despite the reference made in previous case-law to the requirements of natural justice', which would in my view necessarily imply that the principle of set-off is of universal application, the Court has been reluctant to accept explicitly that such a principle obliges the Commission to set off a penalty imposed by a third country when determining a penalty under EC competition rules. In two recent cases heard on appeal, the Court neither confirmed nor denied the universal nature of the principle of set-off, but resolved the cases on other grounds. See the judgment of the first chamber of the Court of 18 May 2006 in Case C-397/03 P Archer Daniels Midland v Commission [2006] ECR I-0000, at paragraph 52; a similar approach was applied by the second chamber of the Court in its judgment of 29 June 2006 in Case C-308/04 P SGL Carbon v Commission [2006] ECR I-0000, at paragraph 27. In paragraph 33 of the same judgment the Court seems, however, implicitly to reject the universal nature of the principle of set-off.

(38) - That principle is included as a fundamental right in Article II-109(3) of the Draft EU Constitution, that is, as part of the Charter of Fundamental Rights of the Union. That provision, which is entitled, Principles of Legality and proportionality of criminal offences and penalties' provides that the severity of penalties must not be disproportionate to the criminal offence'.

(39) - In the same vein see the Opinion of Advocate General Ruiz-Jarabo Colomer in Van Straaten , cited in footnote 12 above, at point 58. That is also the position that the Court seems implicitly to have followed in SGL Carbon and Archer Daniels Midland , both cited in footnote 37 above. The close affinity between those two principles may also explain why Article 56 of the CISA is included, together with Article 54, in Chapter 3 of Title III of the CISA, under the heading Application of the ne bis in idem principle'. However, as I have suggested in footnote 29 of my Opinion in Kretzinger , that should not alter the conclusion that they constitute two autonomous principles of EU law. See also, J-L. de la Cuesta Concurrent national and international criminal jurisdicition and the principle ne bis in idem' - general Report [of the XVII International Congress of Penal Law], International Review of Penal Law, Vol. 73, 2002/3 -4, 707, at 717 and 724.

(40) - See point 63 below.

(41) - See my Opinion in Kretzinger , cited in footnote 8 above, at point 72.

(42) - See point 63 above.

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Judgment of the Court (Grand Chamber)
of 26 June 2007
Ordre des barreaux francophones et germanophone and Others v Conseil des ministres. Reference for a preliminary ruling: Cour d'arbitrage, now the Cour constitutionnelle - Belgium. Directive 91/308/EEC - Prevention of the use of the financial system for the purpose of money laundering - Obligation on lawyers to inform the competent authorities of any fact which could be an indication of money laundering - Right to a fair trial - Professional secrecy and the independence of lawyers.
Case C-305/05.

1. Community law - Interpretation - Methods

2. Approximation of laws - Prevention of the use of the financial system for the purpose of money laundering - Directive 91/308

(Art. 6(2) EU; Council Directive 91/308, Arts 2a(5) and 6(1) and (3), second subpara.)

1. If the wording of secondary Community law is open to more than one interpretation, preference should be given to the interpretation which renders the provision consistent with the EC Treaty rather than to the interpretation which leads to its being incompatible with the Treaty. Member States must not only interpret their national law in a manner consistent with Community law but also make sure they do not rely on an interpretation of wording of secondary legislation which would be in conflict with the fundamental rights protected by the Community legal order or with the other general principles of Community law.

(see para. 28)

2. The obligations of information and cooperation with the authorities responsible for combating money laundering, laid down in Article 6(1) of Directive 91/308 on prevention of the use of the financial system for the purpose of money laundering and imposed on lawyers by Article 2a(5) of that directive, account being taken of the second subparagraph of Article 6(3) thereof, do not infringe the right to a fair trial as guaranteed by Article 6 of the European Convention on Human Rights and Article 6(2) EU.

It is clear from Article 2a(5) of Directive 91/308 that the obligations of information and cooperation apply to lawyers only in so far as they advise their client in the preparation or execution of certain transactions - essentially those of a financial nature or concerning real estate, as referred to in Article 2a(5)(a) of that directive - or when they act on behalf of and for their client in any financial or real estate transaction. As a rule, the nature of such activities is such that they take place in a context with no link to judicial proceedings and, consequently, those activities fall outside the scope of the right to a fair trial.

Moreover, as soon as the lawyer acting in connection with a transaction as referred to in Article 2a(5) of Directive 91/308 is called upon for assistance in defending the client or in representing him before the courts, or for advice as to the manner of instituting or avoiding judicial proceedings, that lawyer is exempt, by virtue of the second subparagraph of Article 6(3) of the directive, from the obligations laid down in Article 6(1), regardless of whether the information has been received or obtained before, during or after the proceedings. An exemption of that kind safeguards the right of the client to a fair trial.

Given that the requirements implied by the right to a fair trial presuppose, by definition, a link with judicial proceedings, and in view of the fact that the second subparagraph of Article 6(3) of Directive 91/308 exempts lawyers, where their activities are characterised by such a link, from the obligations of information and cooperation laid down in Article 6(1) of the directive, those requirements are respected.

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(see paras 33-35, 37, operative part)

In Case C-305/05,

REFERENCE for a preliminary ruling under Article 234 EC from the Cour d'arbitrage (now the Cour constitutionnelle) (Belgium), made by decision of 13 July 2005, received at the Court on 29 July 2005, in the proceedings

Ordre des barreaux francophones et germanophone,

Ordre français des avocats du barreau de Bruxelles,

Ordre des barreaux flamands,

Ordre néerlandais des avocats du barreau de Bruxelles,

v

Conseil des Ministres,

intervening parties:

Conseil des barreaux de l'Union européenne,

Ordre des avocats du barreau de Liège,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas, K. Lenaerts, E. Juhasz (Rapporteur) and J. Kluka, Presidents of Chambers, J.N. Cunha Rodrigues, R. Silva de Lapuerta, K. Schiemann, A. Borg Barthet, M. Ilei and J. Malenovsku, Judges,

Advocate General: M. Poiares Maduro,

Registrar: M.-A. Gaudissart, Head of Unit,

having regard to the written procedure and further to the hearing on 12 September 2006,

after considering the observations submitted on behalf of:

- the Ordre des barreaux francophones et germanophone and the Ordre français des avocats du barreau de Bruxelles, by F. Tulkens and V. Ost, avocats,

- the Ordre des barreaux flamands and the Ordre néerlandais des avocats du barreau de Bruxelles, by M. Storme, avocat,

- the Conseil des barreaux de l'Union européenne, by M. Mahieu, avocat,

- the Ordre des avocats du barreau de Liège, by E. Lemmens, avocat,

- the Belgian Government, by M. Wimmer, acting as Agent, and by L. Swartenbroux, avocat,

- the Italian Government, by I.M. Braguglia, acting as Agent, and by P. Gentili, avvocato dello Stato,

- the Cypriot Government, by E. RossidouPapakyriakou and F. Komodromos, acting as Agents,

- the Austrian Government, by C. Pesendorfer, acting as Agent,

- the Slovak Government, by R. Prochazka, acting as Agent,

- the European Parliament, by A. Caiola and C. Castillo del Carpio, then by A. Caiola and M. Dean, acting as Agents,

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- the Council of the European Union, by M. Sims and M.M. Josephides, acting as Agents,

- the Commission of the European Communities, by W. Bogensberger and R. Troosters, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 14 December 2006

gives the following

Judgment

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

The obligations of information and of cooperation with the authorities responsible for combating money laundering, laid down in Article 6(1) of Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering, as amended by Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001, and imposed on lawyers by Article 2a(5) of Directive 91/308, account being taken of the second subparagraph of Article 6(3) thereof, do not infringe the right to a fair trial as guaranteed by Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms and Article 6(2) EU.

1. The question referred for a preliminary ruling concerns the legality of Article 2a(5) of Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering (OJ 1991 L 166, p. 77), as amended by Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 (OJ 2001 L 344, p. 76) (Directive 91/308').

2. This reference has been made in the context of actions brought before the referring court respectively by the Ordre des barreaux francophones et germanophone (Association of the French-speaking and German-speaking Bars), the Ordre français des avocats du barreau de Bruxelles (French Bar Association of Brussels), the Ordre des barreaux flamands (Society of Flemish Bars) and by the Ordre néerlandais des avocats du barreau de Bruxelles (Dutch Bar Association of Brussels), seeking the annulment of certain Articles of the Law of 12 January 2004 amending the Law of 11 January 1993 relating to the prevention of the use of the financial system for the purpose of money laundering, the Law of 22 March 1993 relating to the status and control of credit institutions, and the Law of 6 April 1995 relating to the status and control of investment firms, financial intermediaries and investment advisors (Moniteur belge of 23 January 2004, p. 4352, the Law of 12 January 2004'), which transposes Directive 2001/97 into the national legal system.

Legal context

Convention for the Protection of Human Rights and Fundamental Freedoms

3. Article 6, entitled Right to a fair trial', of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR') provides:

1 In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law....

2 Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3 Everyone charged with a criminal offence has the following minimum rights:

a to be informed promptly, in a language which he understands and in detail, of the nature and cause

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of the accusation against him;

b to have adequate time and facilities for the preparation of his defence;

c to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

d to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

e to have the free assistance of an interpreter if he cannot understand or speak the language used in court.'

Community legislation

4. Recital 3 in the preamble to Directive 91/308 states:

Whereas money laundering has an evident influence on the rise of organised crime in general and drug trafficking in particular; whereas there is more and more awareness that combating money laundering is one of the most effective means of opposing this form of criminal activity, which constitutes a particular threat to Member States' societies.'

5. Recitals 1, 14 to 17, and 20 of Directive 2001/97 state:

(1) It is appropriate that Directive 91/308..., as one of the main international instruments in the fight against money laundering, should be updated in line with the conclusions of the Commission and the wishes expressed by the European Parliament and the Member States. In this way the Directive [91/308] should not only reflect best international practice in this area but should also continue to set a high standard in protecting the financial sector and other vulnerable activities from the harmful effects of the proceeds of crime.

...

(14) There is a trend towards the increased use by money launderers of non-financial businesses. This is confirmed by the work of the FATF [Financial Action Task Force] on money laundering techniques and typologies.

(15) The obligations of the Directive [91/308] concerning customer identification, record keeping and the reporting of suspicious transactions should be extended to a limited number of activities and professions which have been shown to be vulnerable to money laundering.

(16) Notaries and independent legal professionals, as defined by the Member States, should be made subject to the provisions of the Directive [91/308] when participating in financial or corporate transactions, including providing tax advice, where there is the greatest risk of the services of those legal professionals being misused for the purpose of laundering the proceeds of criminal activity.

(17) However, where independent members of professions providing legal advice which are legally recognised and controlled, such as lawyers, are ascertaining the legal position of a client or representing a client in legal proceedings, it would not be appropriate under the Directive [91/308] to put these legal professionals in respect of these activities under an obligation to report suspicions of money laundering. There must be exemptions from any obligation to report information obtained either before, during or after judicial proceedings, or in the course of ascertaining the legal position for a client. Thus, legal advice remains subject to the obligation of professional secrecy unless the legal counsellor is taking part in money laundering activities, the legal advice is provided for money laundering purposes, or the lawyer knows that the client is seeking legal advice for money laundering purposes.

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...

(20) In the case of notaries and independent legal professionals, Member States should be allowed, in order to take proper account of these professionals' duty of discretion owed to their clients, to nominate the bar association or other self-regulatory bodies for independent professionals as the body to which reports on possible money laundering cases may be addressed by these professionals. The rules governing the treatment of such reports and their possible onward transmission to the authorities responsible for combating money laundering and in general the appropriate forms of cooperation between the bar associations or professional bodies and these authorities should be determined by the Member States.'

6. Under Article 2a(5) of Directive 91/308, the following persons are subject to the obligations laid down in that directive:

(5) notaries and other independent legal professionals, when they participate, whether:

(a) by assisting in the planning or execution of transactions for their client concerning the

(i) buying and selling of real property or business entities;

(ii) managing of client money, securities or other assets;

(iii) opening or management of bank, savings or securities accounts;

(iv) organisation of contributions necessary for the creation, operation or management of companies;

(v) creation, operation or management of trusts, companies or similar structures;

(b) or by acting on behalf of and for their client in any financial or real estate transaction'.

7. Article 6 of Directive 91/308 provides:

1. Member States shall ensure that the institutions and persons subject to this Directive and their directors and employees cooperate fully with the authorities responsible for combating money laundering:

(a) by informing those authorities, on their own initiative, of any fact which might be an indication of money laundering;

(b) by furnishing those authorities, at their request, with all necessary information, in accordance with the procedures established by the applicable legislation.

2. The information referred to in paragraph 1 shall be forwarded to the authorities responsible for combating money laundering of the Member State in whose territory the institution or person forwarding the information is situated. The person or persons designated by the institutions and persons in accordance with the procedures provided for in Article 11(1)(a) shall normally forward the information.

3. In the case of the notaries and independent legal professionals referred to in Article 2a(5), Member States may designate an appropriate self-regulatory body of the profession concerned as the authority to be informed of the facts referred to in paragraph 1(a) and in such case shall lay down the appropriate forms of cooperation between that body and the authorities responsible for combating money laundering.

Member States shall not be obliged to apply the obligations laid down in paragraph 1 to notaries, independent legal professionals, auditors, external accountants and tax advisors with regard to information they receive from or obtain on one of their clients, in the course of ascertaining the legal position for their client or performing their task of defending or representing that client in, or concerning, judicial proceedings, including advice on instituting or avoiding proceedings,

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whether such information is received or obtained before, during or after such proceedings.'

National legislation

8. By Article 4 of the Law of 12 January 2004, the following Article 2b was inserted in the law of 11 January 1993 relating to the prevention of the use of the financial system for the purpose of money laundering and the financing of terrorism (Moniteur belge of 9 February 1993, p. 2828, the Law of 11 January 1993'):

In so far as expressly provided for, the provisions of this law shall also apply to lawyers [avocats]:

1° where they assist their client in the planning or execution of transactions relating to:

(a) the buying or selling of real property or business entities;

(b) the managing of client money, securities or other assets;

(c) the opening or management of bank, savings or securities accounts;

(d) the organisation of contributions necessary for the creation, operation or management of companies;

(e) creation, operation or management of trusts, companies or similar structures;

2° or when they act on behalf of and for their client in any financial or real estate transaction.'

9. By Article 25 of the Law of 12 January 2004, the following paragraph 3 was added to Article 14a of the Law of 11 January 1993:

The persons referred to in Article 2b who, in carrying out the activities listed in that Article, come across facts which they know or suspect to be linked to money laundering or to the financing of terrorism must immediately inform the President of the Bar of which they are members.

However, the persons referred to in Article 2b shall not pass on that information where they receive it from, or obtain it on, one of their clients in the course of ascertaining the client's legal position or in the course of performing their task of defending or representing that client in, or concerning, judicial proceedings, including advice on instituting or avoiding proceedings, whether such information is received or obtained before, during or after those proceedings.

The President of the Bar shall verify compliance with the conditions set out in Article 2b and in the preceding subparagraph. If those conditions are complied with, he shall immediately pass the information to the Financial Information Processing Unit.'

10. Article 27 of the Law of 12 January 2004 replaced Article 15(1) of the Law of 11 January 1993 with the following:

1. If the Financial Information Processing Unit receives an item of information, as referred to in Article 11(2), the Unit or one of its members or one of the members of its staff designated for that purpose by the judge in charge or by his deputy may require any additional information which they consider useful for the performance of the tasks of the Unit to be provided, within such time-limits as they prescribe, by:

(1) any of the bodies and persons referred to in Articles 2, 2a and 2b and by the President of the Bar referred to in Article 14a(3)

...

The persons referred to in Article 2b and the President of the Bar referred to in Article 14a(3) shall not pass on that information if the persons referred to in Article 2b have received it from one of their clients, or obtained it on one of their clients, in the course of ascertaining the

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client's legal position or in the course of performing their task of defending or representing that client in, or concerning, judicial proceedings, including giving advice on instituting or avoiding proceedings, whether the information has been received or obtained before, during or after those proceedings.

...'

The main proceedings and the question referred for a preliminary ruling

11. By two applications of 22 July 2004 made, respectively, by the Ordre des barreaux francophones et germanophone and the Ordre français des avocats du barreau de Bruxelles, on the one hand, and by the Ordre des barreaux flamands and the Ordre néerlandais des avocats du barreau de Bruxelles, on the other, the referring court was asked to annul Articles 4, 5, 7, 25, 27, 30 and 31 of the Law of 12 January 2004. The Conseil des barreaux de l'Union européenne (Council of the Bars and Law Societies of the European Union) and the Ordre des avocats du barreau de Liège (Society of lawyers of the Bar of Liege) have intervened in the main proceedings.

12. Before the referring court, the applicants maintain, in particular, that Articles 4, 25 and 27 of the Law of 12 January 2004, in so far as they extend to lawyers both the obligation to inform the competent authorities if they come across facts which they know or suspect to be linked to money laundering and the obligation to transmit to those authorities additional information which those authorities consider useful, unjustifiably impinge on professional secrecy and the independence of lawyers, that is to say, on principles which are a constituent element of the fundamental right of every individual to a fair trial and to the respect of his rights of defence. Those articles thus infringe Articles 10 and 11 of the Belgian Constitution, read in conjunction with Article 6 of the ECHR, the general principles of law relating to the rights of the defence, Article 6(2) EU, and also Articles 47 and 48 of the Charter of Fundamental Rights of the European Union proclaimed at Nice on 7 December 2000 (OJ 2000 C 364, p. 1).

13. The applicants further maintain, as does the Council of the Bars and Law Societies of the European Union, that that claim is not invalidated by the fact that the Belgian legislature transposed into national law the provisions of Directive 91/308 restricting the obligations of information and of cooperation as they relate to lawyers. In that regard, the Ordre des barreaux francophones et germanophone and the Ordre français des avocats du barreau de Bruxelles consider that the distinction drawn by those provisions between activities essential to the work of a lawyer and ancillary activities is legally untenable and gives rise to a serious lack of legal certainty. The Ordre des barreaux flamands and the Ordre néerlandais des avocats du barreau de Bruxelles emphasise that the obligations of reporting on and incriminating clients go beyond mere infringement of professional secrecy, to the extent that they wholly destroy the relationship of trust between lawyer and client.

14. The Council of the Bars and Law Societies of the European Union argues that the Law of 11 January 1993, as amended by the Law of 12 January 2004, makes it impossible to maintain intact the traditional role of the lawyer. The Council states in that connection that the specific features of the legal profession - namely independence and professional secrecy - contribute to the trust which the public has in that profession, and that such trust in a lawyer applies generally, not only to particular tasks performed by that lawyer.

15. The referring court observes that the actions for annulment have been brought against the Law of 12 January 2004, the function of which was the transposition into Belgian law of the provisions of Directive 2001/97. Given that the Community legislature is under a duty - as is the Belgian legislature - to respect the rights of the defence and the right to a fair trial, the referring court considers that, before ruling on the compatibility of that Law with the Belgian Constitution, it is first necessary to settle the question whether the directive on which that Law is based is

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itself lawful.

16. In those circumstances, the Cour d'arbitrage decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

Does Article 1(2) of Directive 2001/97... infringe the right to a fair trial which is guaranteed by Article 6 of the ECHR and, as a consequence, Article 6(2) EU in so far as the new Article 2a(5) which it inserted into Directive 91/308/EEC requires the inclusion of members of independent legal professions, not excluding the profession of lawyer [avocat], in the scope of that directive, which in essence has the aim of imposing on the persons and institutions targeted by it an obligation to inform the authorities responsible for combating money laundering of any fact which might be an indication of such money laundering (Article 6 of Directive 91/308/EEC, replaced by Article 1(5) of Directive 2001/97/EC)?'

The question referred for a preliminary ruling

17. It must be noted at the outset that, while in the main proceedings which have given rise to this reference the applicants and the interveners questioned the lawfulness, in the light of several higher-ranking rules of law, of the national legislation transposing Directive 91/308, the fact remains that, by its question, the referring court has considered it necessary to ask the Court to review the legality of that directive solely by reference to the right to a fair trial, as guaranteed by Article 6 of the ECHR and Article 6(2) EU.

18. According to settled case-law, the procedure established in Article 234 EC rests on a clear separation of functions between the national courts and the Court of Justice, with the result that it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court (see Case C448/01 EVN and Wienstrom [2003] ECR I14527, paragraph 74, and Case C145/03 Keller [2005] ECR I2529, paragraph 33).

19. That being so, the legality of Directive 91/308 should not additionally be appraised by reference to fundamental rights not specified by the referring court, such as the right to respect for privacy provided for in Article 8 of the ECHR.

20. Article 6(1) of Directive 91/308 provides that the persons covered by that directive must cooperate fully with the authorities responsible for combating money laundering by informing those authorities, on their own initiative, of any fact which might be indicative of money laundering and by furnishing those authorities, at the request of the latter, with all necessary information, in accordance with the procedures established by the applicable legislation.

21. As regards lawyers, Directive 91/308 delimits the application of those obligations of information and cooperation in two ways.

22. First, under Article 2a(5) of Directive 91/308, lawyers are subject to the obligations laid down in that directive - and, in particular, to the obligations of information and cooperation laid down in Article 6(1) thereof - only in so far as they participate, in the ways specified in Article 2a(5), in certain transactions listed exhaustively in that provision.

23. Secondly, it is clear from the second subparagraph of Article 6(3) of Directive 91/308 that the Member States are not obliged to impose the obligations of information and cooperation on lawyers as regards information which they have received from a client, or obtained on one of their clients, in the course of ascertaining the client's legal position or in the course of performing their task of defending or representing that client in, or concerning, judicial proceedings, including the

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giving of advice on instituting or avoiding such proceedings, whether such information is received or obtained before, during or after such proceedings.

24. The significance of that exemption is emphasised in recital 17 of Directive 2001/97, which states that it would not be appropriate for Directive 91/308 to impose the obligation of reporting suspicions of money laundering on independent members of professions providing legal advice which are legally recognised and controlled, such as lawyers, where they are ascertaining the legal position of a client or representing a client in legal proceedings. Recital 17 of the directive also states that an exemption from any obligation to report should be provided for in respect of information obtained before, during or after judicial proceedings, or in the course of ascertaining a client's legal position. The same recital underlines the fact that such an exemption implies that legal advice remains covered by professional secrecy unless the lawyer is himself taking part in money laundering activities, or is providing legal advice for the purposes of money laundering, or knows that his client is seeking legal advice for such purposes.

25. In the present case, it is clear from Articles 25 and 27 of the Law of 12 January 2004 that the Belgian legislature introduced into that Law exemptions for lawyers, covering information received or obtained in the circumstances referred to in the second subparagraph of Article 6(3) of Directive 91/308.

26. In those circumstances, it is necessary to determine whether the obligation incumbent on a lawyer acting in the exercise of his professional activities to cooperate with the authorities responsible for combating money laundering within the meaning of Article 6(1) of Directive 91/308 and to inform them on his own initiative of any fact which could be an indication of money laundering, account being taken of the limitations placed on that obligation by Articles 2a(5) and 6(3) of that directive, constitutes an infringement of the right to a fair trial as guaranteed by Article 6 of the ECHR and Article 6(2) EU.

27. It must first be observed that the second subparagraph of Article 6(3) of Directive 91/308 may lend itself to several interpretations, and consequently the precise extent of the obligations of information and cooperation incumbent on lawyers is not entirely unambiguous.

28. On that point, the Court has consistently held that, if the wording of secondary Community law is open to more than one interpretation, preference should be given to the interpretation which renders the provision consistent with the EC Treaty rather than to the interpretation which leads to its being incompatible with the Treaty (see Case 218/82 Commission v Council [1983] ECR 4063, paragraph 15, and Case C135/93 Spain v Commission [1995] ECR I1651, paragraph 37). Member States must not only interpret their national law in a manner consistent with Community law but also make sure they do not rely on an interpretation of wording of secondary legislation which would be in conflict with the fundamental rights protected by the Community legal order or with the other general principles of Community law (Case C101/01 Lindqvist [2003] ECR I12971, paragraph 87).

29. It must also be stated that fundamental rights form an integral part of the general principles of law whose observance the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories. In that regard, the ECHR has special significance (see, to that effect, Case 29/69 Stauder [1969] ECR 419, paragraph 7; Case C274/99 P Connolly v Commission [2001] ECR I1611, paragraph 37; Case C283/05 ASML [2005] ECR I0000, paragraph 26). Thus the right to a fair trial, which derives inter alia from Article 6 of the ECHR, constitutes a fundamental right which the European Union respects as a general principle under Article 6(2) EU.

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30. Article 6 of the ECHR provides that everyone is entitled to a fair hearing, whether in the determination of his civil rights and obligations or in the context of criminal proceedings.

31. According to the case-law of the European Court of Human Rights, the concept of a fair trial' referred to in Article 6 of the ECHR consists of various elements, which include, inter alia, the rights of the defence, the principle of equality of arms, the right of access to the courts, and the right of access to a lawyer both in civil and criminal proceedings (see Golder v United Kingdom , judgment of 21 February 1975, Series A No. 18, ºº 26 to 40; Campbell and Fell v United Kingdom , judgment of 28 June 1984, Series A No. 80, ºº 97 to 99, ºº 105 to 107 and ºº 111 to 113; and Borgers v Belgium , judgment of 30 October 1991, Series A No. 214-B, º 24).

32. Lawyers would be unable to carry out satisfactorily their task of advising, defending and representing their clients, who would in consequence be deprived of the rights conferred on them by Article 6 of the ECHR, if lawyers were obliged, in the context of judicial proceedings or the preparation for such proceedings, to cooperate with the authorities by passing them information obtained in the course of related legal consultations.

33. As was pointed out in paragraph 22 above, it is clear from Article 2a(5) of Directive 91/308 that the obligations of information and cooperation apply to lawyers only in so far as they advise their client in the preparation or execution of certain transactions - essentially those of a financial nature or concerning real estate, as referred to in Article 2a(5)(a) of that directive - or when they act on behalf of and for their client in any financial or real estate transaction. As a rule, the nature of such activities is such that they take place in a context with no link to judicial proceedings and, consequently, those activities fall outside the scope of the right to a fair trial.

34. Moreover, as soon as the lawyer acting in connection with a transaction as referred to in Article 2a(5) of Directive 91/308 is called upon for assistance in defending the client or in representing him before the courts, or for advice as to the manner of instituting or avoiding judicial proceedings, that lawyer is exempt, by virtue of the second subparagraph of Article 6(3) of the directive, from the obligations laid down in Article 6(1), regardless of whether the information has been received or obtained before, during or after the proceedings. An exemption of that kind safeguards the right of the client to a fair trial.

35. Given that the requirements implied by the right to a fair trial presuppose, by definition, a link with judicial proceedings, and in view of the fact that the second subparagraph of Article 6(3) of Directive 91/308 exempts lawyers, where their activities are characterised by such a link, from the obligations of information and cooperation laid down in Article 6(1) of the directive, those requirements are respected.

36. On the other hand, it must be recognised that the requirements relating to the right to a fair trial do not preclude the obligations of information and cooperation laid down in Article 6(1) of Directive 91/308 from being imposed on lawyers acting specifically in connection with the activities listed in Article 2a(5) of that directive, in cases where the second subparagraph of Article 6(3) of that directive does not apply, where those obligations are justified by the need - emphasised, in particular, in recital 3 of Directive 91/308 - to combat money laundering effectively, in view of its evident influence on the rise of organised crime, which itself is a particular threat to society in the Member States.

37. Having regard to the foregoing, it must be held that the obligations of information and of cooperation with the authorities responsible for combating money laundering, laid down in Article 6(1) of Directive 91/308 and imposed on lawyers by Article 2a(5) of that directive, account being taken of the second subparagraph of Article 6(3) thereof, do not infringe the right to a fair trial as guaranteed by Article 6 of the ECHR and Article 6(2) EU.

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Costs

38. 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.

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AUTLANG French

NATIONA Belgium

NATCOUR *A9* Cour d'arbitrage (Belgique), arrêt du 13/07/2005 (126/2005 ; Numéros du rôle: 3064 et 3065) ; - Cour d'arbitrage ; Arrêts 2005 p.1623-1646 ; - Journal des tribunaux 2005 p.787-788 ; - Revue de jurisprudence de Liège, Mons et Bruxelles 2005 p.1182-1191 ; - Administration publique 2006 p.149 (résumé) ; - European Current Law 2006 Part 6 no 51 (résumé) ; - Debry, Jean-Thierry: Quand la Cour d'abitrage pose des questions préjudicielles..., Revue de jurisprudence de Liège, Mons et Bruxelles 2005 p.1191-1199 ; - Pioletti, A. ; Porreca, P.: Il Foro italiano 2006 IV Col. 287-291

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PROCEDU Reference for a preliminary ruling

ADVGEN Poiares Maduro

JUDGRAP Juhasz

DATES of document: 26/06/2007
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Judgment of the Court (Grand Chamber)
of 3 May 2007
Advocaten voor de Wereld VZW v Leden van de Ministerraad. Reference for a preliminary ruling: Arbitragehof - Belgium. Police and judicial cooperation in criminal matters - Articles 6(2) EU and 34(2)(b) EU - Framework Decision 2002/584/JHA - European arrest warrant and surrender procedures between Member States - Approximation of national laws - Removal of verification of double criminality - Validity. Case C-303/05.

1. Preliminary rulings - Jurisdiction of the Court - Police and judicial cooperation in criminal matters

(Arts 34(2)(b) EU and 35(1) EU)

2. European Union - Police and judicial cooperation in criminal matters - Approximation of the laws and regulations of the Member States with regard to judicial cooperation in criminal matters

(Art. 34(2) EU; Council Framework Decision 2002/584, Art. 31(1))

3. European Union - Police and judicial cooperation in criminal matters - Framework Decision on the European arrest warrant and the surrender procedures between Member States

(Council Framework Decision 2002/584, Arts 1(3) and 2(2))

4. European Union - Police and judicial cooperation in criminal matters - Framework Decision on the European arrest warrant and the surrender procedures between Member States

(Council Framework Decision 2002/584, Art. 2(2))

1. Under Article 35(1) EU, the Court has jurisdiction, subject to the conditions laid down in that article, to give preliminary rulings on the interpretation and validity of, inter alia, framework decisions, which necessarily implies that it can, even if there is no express power to that effect, be called upon to interpret provisions of primary law, such as Article 34(2)(b) EU where the Court is being asked to examine whether a framework decision has been properly adopted on the basis of that latter provision.

(see para. 18)

2. Framework Decision 2002/584 on the European arrest warrant and the surrender procedures between Member States, which provides for the approximation of the laws and regulations of the Member States with regard to judicial cooperation in criminal matters and, more specifically, of the rules relating to the conditions, procedures and effects of surrender as between national authorities convicted persons or suspects for the purpose of enforcing judgments or of criminal proceedings, was not adopted in breach of Article 34(2)(b) EU.

In so far as it lists and defines, in general terms, the different types of legal instruments which may be used in the pursuit of the objectives of the Union set out in Title VI of the EU Treaty, Article 34(2) EU cannot be construed as meaning that the approximation of the laws and regulations of the Member States by the adoption of a framework decision under Article 34(2)(b) EU cannot relate to areas other than those mentioned in Article 31(1)(e) EU and, in particular, the matter of the European arrest warrant.

Furthermore, Article 34(2) EU also does not establish any order of priority between the different instruments listed in that provision. While it is true that the European arrest warrant could equally have been the subject of a convention, it is within the Council's discretion to give preference to the legal instrument of the framework decision in the case where the conditions governing the adoption of such a measure are satisfied.

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This latter conclusion is not invalidated by the fact that, in accordance with Article 31(1) of the Framework Decision, the latter was to replace from 1 January 2004, only in relations between Member States, the corresponding provisions of the earlier conventions on extradition set out in that provision. Any other interpretation unsupported by either Article 34(2) EU or by any other provision of the EU Treaty would risk depriving of its essential effectiveness the Council's recognised power to adopt framework decisions in fields previously governed by international conventions.

(see paras 28-29, 37-38, 41-43)

3. The principle of the legality of criminal offences and penalties (nullum crimen, nulla poena sine lege), which is one of the general legal principles underlying the constitutional traditions common to the Member States, has also been enshrined in various international treaties, in particular in Article 7(1) of the European Convention on Human Rights. This principle implies that legislation must define clearly offences and the penalties which they attract. That condition is met in the case where the individual concerned is in a position, on the basis of the wording of the relevant provision and with the help of the interpretative assistance given by the courts, to know which acts or omissions will make him criminally liable.

In so far as it dispenses with verification of the requirement of double criminality in respect of the offences listed in that provision, Article 2(2) of Framework Decision 2002/584 on the European arrest warrant and the surrender procedures between Member States is not invalid on the ground that it infringes the principle of the legality of criminal offences and penalties. The Framework Decision does not seek to harmonise the criminal offences in question in respect of their constituent elements or of the penalties which they attract. While Article 2(2) of the Framework Decision dispenses with verification of double criminality for the categories of offences mentioned therein, the definition of those offences and of the penalties applicable continue to be matters determined by the law of the issuing Member State, which, as is, moreover, stated in Article 1(3) of the Framework Decision, must respect fundamental rights and fundamental legal principles as enshrined in Article 6 EU, and, consequently, the principle of the legality of criminal offences and penalties.

(see paras 49-50, 52-54)

4. In so far as it dispenses with verification of double criminality in respect of the offences listed therein, Article 2(2) of Framework Decision 2002/584 on the European arrest warrant and the surrender procedures between Member States is not invalid inasmuch as it does not breach the principle of equality and non-discrimination.

With regard, first, to the choice of the 32 categories of offences listed in that provision, the Council was able to form the view, on the basis of the principle of mutual recognition and in the light of the high degree of trust and solidarity between the Member States, that, whether by reason of their inherent nature or by reason of the punishment incurred of a maximum of at least three years, the categories of offences in question feature among those the seriousness of which in terms of adversely affecting public order and public safety justifies dispensing with the verification of double criminality. Consequently, even if one were to assume that the situation of persons suspected of having committed offences featuring on the list set out in Article 2(2) of the Framework Decision or convicted of having committed such offences is comparable to the situation of persons suspected of having committed, or convicted of having committed, offences other than those listed in that provision, the distinction is, in any event, objectively justified.

With regard, second, to the fact that the lack of precision in the definition of the categories of offences in question risks giving rise to disparate implementation of the Framework Decision within the various national legal orders, suffice it to point out that it is not the objective of the Framework Decision to harmonise the substantive criminal law of the Member States and that

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nothing in Title VI of the EU Treaty makes the application of the European arrest warrant conditional on harmonisation of the criminal laws of the Member States within the area of the offences in question.

(see paras 57-60)

In Case C-303/05,

REFERENCE under Article 35 EU for a preliminary ruling by the Arbitragehof (Belgium), made by decision of 13 July 2005, received at the Court on 29 July 2005, in the proceedings

Advocaten voor de Wereld VZW

v

Leden van de Ministerraad ,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas, R. Schintgen, P. Kris, E. Juhasz and J. Kluka, Presidents of Chambers, J.N. Cunha Rodrigues (Rapporteur), J. Makarczyk, U. Lohmus, E. Levits and L. Bay Larsen, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 11 July 2006,

after considering the observations submitted on behalf of:

- Advocaten voor de Wereld VZW, by L. Deleu, P. Bekaert and F. van Vlaenderen, advocaten,

- the Belgian Government, by M. Wimmer, acting as Agent, assisted by E. Jacubowitz and P. de Maeyer, avocats,

- the Czech Government, by T. Boek, acting as Agent,

- the Spanish Government, by J.M. Rodríguez Carcamo, acting as Agent,

- the French Government, by G. de Bergues, J.C. Niollet and E. Belliard, acting as Agents,

- the Latvian Government, by E. Balode-Buraka, acting as Agent,

- the Lithuanian Government, by D. Kriauinas, acting as Agent,

- the Netherlands Government, by H.G. Sevenster, M. de Mol and C.M. Wissels, acting as Agents,

- the Polish Government, by J. Pietras, acting as Agent,

- the Finnish Government, by E. Bygglin, acting as Agent,

- the United Kingdom Government, by S. Nwaokolo and C. Gibbs, acting as Agents, and by A. Dashwood, Barrister,

- the Council of the European Union, by S. Kyriakopoulou, J. Schutte and O. Petersen, acting as Agents,

- the Commission of the European Communities, by W. Bogensberger and R. Troosters, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 12 September 2006,

gives the following

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Judgment

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

Examination of the questions submitted has revealed no factor capable of affecting the validity of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.

1. The reference for a preliminary ruling concerns the assessment as to the validity of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190, p. 1) (the Framework Decision').

2. This reference has been submitted in the course of an action brought by Advocaten voor de Wereld VZW (Advocaten voor de Wereld') before the Belgian Arbitragehof (Court of Arbitration) and seeking the annulment of the Belgian Law of 19 December 2003 on the European arrest warrant (Belgisch Staatsblad of 22 December 2003, p. 60075) (the Law of 19 December 2003'), in particular Articles 3, 5(1) and (2) and 7 thereof.

Legal context

3. Recital (5) in the preamble to the Framework Decision provides:

The objective set for the Union to become an area of freedom, security and justice leads to abolishing extradition between Member States and replacing it by a system of surrender between judicial authorities. Further, the introduction of a new simplified system of surrender of sentenced or suspected persons for the purposes of execution or prosecution of criminal sentences makes it possible to remove the complexity and potential for delay inherent in the present extradition procedures. Traditional cooperation relations which have prevailed up till now between Member States should be replaced by a system of free movement of judicial decisions in criminal matters, covering both pre-sentence and final decisions, within an area of freedom, security and justice.'

4. Recital (6) in the preamble to the Framework Decision is worded as follows:

The European arrest warrant provided for in this Framework Decision is the first concrete measure in the field of criminal law implementing the principle of mutual recognition which the European Council referred to as the cornerstone of judicial cooperation.'

5. Recital (7) in the preamble to the Framework Decision provides:

Since the aim of replacing the system of multilateral extradition built upon the European Convention on Extradition of 13 December 1957 cannot be sufficiently achieved by the Member States acting unilaterally and can therefore, by reason of its scale and effects, be better achieved at Union level, the Council may adopt measures in accordance with the principle of subsidiarity as referred to in Article 2 of the Treaty on European Union and Article 5 of the Treaty establishing the European Community. In accordance with the principle of proportionality, as set out in the latter Article, this Framework Decision does not go beyond what is necessary in order to achieve that objective.'

6. According to recital (11) in the preamble to the Framework Decision:

In relations between Member States, the European arrest warrant should replace all the previous instruments concerning extradition, including the provisions of Title III of the Convention implementing the Schengen Agreement which concern extradition.'

7. Article 1 of the Framework Decision, which was adopted on the basis of Article 31(1)(a) and (b) EU and Article 34(2)(b) EU, provides:

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1. The European arrest warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.

2. Member States shall execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of this Framework Decision.

3. This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union.'

8. Article 2 of the Framework Decision provides:

1. A European arrest warrant may be issued for acts punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 12 months or, where a sentence has been passed or a detention order has been made, for sentences of at least four months.

2. The following offences, if they are punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years and as they are defined by the law of the issuing Member State, shall, under the terms of this Framework Decision and without verification of the double criminality of the act, give rise to surrender pursuant to a European arrest warrant:

- participation in a criminal organisation,

- terrorism,

- trafficking in human beings,

- sexual exploitation of children and child pornography,

- illicit trafficking in narcotic drugs and psychotropic substances,

- illicit trafficking in weapons, munitions and explosives,

- corruption,

- fraud, including that affecting the financial interests of the European Communities within the meaning of the Convention of 26 July 1995 on the protection of the European Communities' financial interests,

- laundering of the proceeds of crime,

- counterfeiting currency, including of the euro,

- computer-related crime,

- environmental crime, including illicit trafficking in endangered animal species and in endangered plant species and varieties,

- facilitation of unauthorised entry and residence,

- murder, grievous bodily injury,

- illicit trade in human organs and tissue,

- kidnapping, illegal restraint and hostage-taking,

- racism and xenophobia,

- organised or armed robbery,

- illicit trafficking in cultural goods, including antiques and works of art,

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- swindling,
- racketeering and extortion,
- counterfeiting and piracy of products,
- forgery of administrative documents and trafficking therein,
- forgery of means of payment,
- illicit trafficking in hormonal substances and other growth promoters,
- illicit trafficking in nuclear or radioactive materials,
- trafficking in stolen vehicles,
- rape,
- arson,
- crimes within the jurisdiction of the International Criminal Court,
- unlawful seizure of aircraft/ships,
- sabotage.

3. The Council may decide at any time, acting unanimously after consultation of the European Parliament under the conditions laid down in Article 39(1) of the Treaty on European Union (TEU), to add other categories of offence to the list contained in paragraph 2. The Council shall examine, in the light of the report submitted by the Commission pursuant to Article 34(3), whether the list should be extended or amended.

4. For offences other than those covered by paragraph 2, surrender may be subject to the condition that the acts for which the European arrest warrant has been issued constitute an offence under the law of the executing Member State, whatever the constituent elements or however it is described.'

9. Article 31 of the Framework Decision provides:

1. Without prejudice to their application in relations between Member States and third States, this Framework Decision shall, from 1 January 2004, replace the corresponding provisions of the following conventions applicable in the field of extradition in relations between the Member States:

(a) the European Convention on Extradition of 13 December 1957, its additional protocol of 15 October 1975, its second additional protocol of 17 March 1978, and the European Convention on the suppression of terrorism of 27 January 1977 as far as extradition is concerned;

(b) the Agreement between the 12 Member States of the European Communities on the simplification and modernisation of methods of transmitting extradition requests of 26 May 1989;

(c) the Convention of 10 March 1995 on simplified extradition procedure between the Member States of the European Union;

(d) the Convention of 27 September 1996 relating to extradition between the Member States of the European Union;

(e) Title III, Chapter 4 of the Convention of 19 June 1990 implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at common borders.

2. Member States may continue to apply bilateral or multilateral agreements or arrangements in force when this Framework Decision is adopted in so far as such agreements or arrangements allow the objectives of this Framework Decision to be extended or enlarged and help to simplify or facilitate further the procedures for surrender of persons who are the subject of European arrest warrants.

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Member States may conclude bilateral or multilateral agreements or arrangements after this Framework Decision has come into force in so far as such agreements or arrangements allow the prescriptions of this Framework Decision to be extended or enlarged and help to simplify or facilitate further the procedures for surrender of persons who are the subject of European arrest warrants, in particular by fixing time-limits shorter than those fixed in Article 17, by extending the list of offences laid down in Article 2(2), by further limiting the grounds for refusal set out in Articles 3 and 4, or by lowering the threshold provided for in Article 2(1) or (2).

The agreements and arrangements referred to in the second subparagraph may in no case affect relations with Member States which are not parties to them.

Member States shall, within three months from the entry into force of this Framework Decision, notify the Council and the Commission of the existing agreements and arrangements referred to in the first subparagraph which they wish to continue applying.

Member States shall also notify the Council and the Commission of any new agreement or arrangement as referred to in the second subparagraph, within three months of signing it.

3. Where the conventions or agreements referred to in paragraph 1 apply to the territories of Member States or to territories for whose external relations a Member State is responsible to which this Framework Decision does not apply, these instruments shall continue to govern the relations existing between those territories and the other Member States.'

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

10. According to the decision making the reference, Advocaten voor de Wereld brought an action before the Arbitragehof on 21 June 2004 in which it sought the annulment, in whole or in part, of the Law of 19 December 2003 transposing the provisions of the Framework Decision into Belgian law.

11. In support of its action, Advocaten voor de Wereld submits inter alia that the Framework Decision is invalid on the ground that the subject-matter of the European arrest warrant ought to have been implemented by way of a convention and not by way of a framework decision since, under Article 34(2)(b) EU, framework decisions may be adopted only for the purpose of approximation of the laws and regulations of the Member States', which, it claims, is not the position in the present case.

12. Advocaten voor de Wereld also submits that Article 5(2) of the Law of 19 December 2003, which transposes Article 2(2) of the Framework Decision into Belgian domestic law, infringes the principle of equality and non-discrimination in that, for the offences mentioned in that latter provision, in the event of enforcement of a European arrest warrant, there is a derogation, without objective and reasonable justification, from the requirement of double criminality, whereas that requirement is maintained for other offences.

13. Advocaten voor de Wereld further argues that the Law of 19 December 2003 also fails to satisfy the conditions of the principle of legality in criminal matters in that it lists, not offences having a sufficiently clear and precise legal content, but only vague categories of undesirable behaviour. The judicial authority which must decide on the enforcement of a European arrest warrant will, it submits, have insufficient information to determine effectively whether the offences for which the person sought is being charged, or in respect of which a penalty has been imposed on him, come within one of the categories mentioned in Article 5(2) of that Law. The absence of a clear and precise definition of the offences referred to in that provision, it contends, leads to a disparate application of that Law by the various authorities responsible for the enforcement of a European arrest warrant and, by reason of that fact, also infringes the principle of equality and non-discrimination.

14. The Arbitragehof points out that the Law of 19 December 2003 is the direct result of the Council's

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decision to regulate the subject-matter of the European arrest warrant by means of a framework decision. The heads of complaint invoked by Advocaten voor de Wereld against that Law also hold good in equal measure with regard to the Framework Decision. In its view, differences of interpretation between courts with regard to the validity of Community measures and the validity of the legislation which constitutes the implementation of those measures in national law jeopardise the unity of the Community legal order and adversely affect the general principle of legal certainty.

15. The Arbitragehof adds that, under Article 35(1) EU, the Court alone has jurisdiction to give a preliminary ruling on the validity of framework decisions and that, under Article 35(2) EU, the Kingdom of Belgium has accepted the Court's jurisdiction in this field.

16. In those circumstances, the Arbitragehof decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

1. Is [the] Framework Decision... compatible with Article 34(2)(b) of the [EU] Treaty, under which framework decisions may be adopted only for the purpose of approximation of the laws and regulations of the Member States?

2. Is Article 2(2) of [the] Framework Decision..., in so far as it sets aside verification of the requirement of double criminality for the offences listed therein, compatible with Article 6(2) of the [EU] Treaty ... and, more specifically, with the principle of legality in criminal proceedings guaranteed by that provision and with the principle of equality and non-discrimination?'

The questions referred for preliminary ruling

The first question

Admissibility

17. The Czech Government submits that the first question referred is inadmissible on the ground that it requires the Court to examine Article 34(2)(b) EU, which is a provision of primary law not reviewable by the Court.

18. That argument is unfounded. Under Article 35(1) EU, the Court has jurisdiction, subject to the conditions laid down in that article, to give preliminary rulings on the interpretation and validity of, inter alia, framework decisions, which necessarily implies that it can, even if there is no express power to that effect, be called upon to interpret provisions of primary law, such as Article 34(2)(b) EU where, as in the case in the main proceedings, the Court is being asked to examine whether a framework decision has been properly adopted on the basis of that latter provision.

19. According to the Czech Government, the first question referred is also inadmissible inasmuch as the decision to refer fails to indicate clearly the relevant grounds which would justify a finding that the framework decision is invalid. It submits that it was for that reason impossible for it to submit any meaningful observations on that question. More specifically, in so far as Advocaten voor de Wereld contends that the Framework Decision did not bring about approximation of the laws of the Member States, it ought to have substantiated that assertion and the Arbitragehof ought to have made a note to that effect in its decision to refer.

20. It should be borne in mind that the information provided in orders for reference must not only be such as to enable the Court to reply usefully but must also enable the governments of the Member States and other interested parties to submit observations pursuant to Article 23 of the Statute of the Court of Justice (order in Case C422/98 Colonia Versicherung and Others [1999] ECR I1279, paragraph 5).

21. In the case in the main proceedings, the decision making the reference contains sufficient information to address those requirements. As indicated in paragraph 11 of this judgment, it appears

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from the decision making the reference that Advocaten voor de Wereld is submitting that the subject-matter of the European arrest warrant ought to have been implemented by way of a convention and not by way of a framework decision on the ground that, under Article 34(2)(b) EU, framework decisions may be adopted only for the purpose of approximation of the laws and regulations of the Member States', which is not the position in the present case.

22. Information of this kind is sufficient not only to enable the Court to provide a useful reply but also to safeguard the possibility open to the parties to the dispute, the Member States, the Council and Commission to submit observations pursuant to Article 23 of the Statute of the Court of Justice, as is, moreover, indicated by the observations lodged by all of the parties which have intervened in these proceedings, including those submitted by the Czech Government.

23. The first question referred is therefore admissible.

Substance

24. Advocaten voor de Wereld submits, in contrast to all of the other parties which have submitted observations in these proceedings, that the subject-matter of the European arrest warrant ought, in accordance with Article 34(2)(d) EU, to have been regulated by way of a convention.

25. In the first place, it argues, the framework decision could not have been validly adopted for the purpose of the approximation of laws and regulations as referred to in Article 34(2)(b) EU, inasmuch as the Council is empowered to adopt framework decisions only to approximate progressively the rules on criminal matters in the cases referred to in the third indent of the second paragraph of Article 29 EU and in Article 31(e) EU. For other common action on judicial cooperation in criminal matters, the Council must have recourse to conventions, pursuant to Article 34(2)(d) EU.

26. Second, pursuant to Article 31 of the Framework Agreement, the latter was to replace, as from 1 January 2004, the convention law in the field of extradition in relations between Member States. Only a measure of the same kind, that is to say, a convention within the meaning of Article 34(2)(d) EU, can validly derogate from the convention law in force.

27. That argument cannot be accepted.

28. As is clear in particular from Article 1(1) and (2) of the Framework Decision and recitals (5), (6), (7) and (11) in its preamble, the purpose of the Framework Decision is to replace the multilateral system of extradition between Member States with a system of surrender, as between judicial authorities, of convicted persons or suspects for the purpose of enforcing judgments or of criminal proceedings based on the principle of mutual recognition.

29. The mutual recognition of the arrest warrants issued in the different Member States in accordance with the law of the issuing State concerned requires the approximation of the laws and regulations of the Member States with regard to judicial cooperation in criminal matters and, more specifically, of the rules relating to the conditions, procedures and effects of surrender as between national authorities.

30. That is precisely the purpose of the Framework Decision in regard, inter alia, to the rules relating to the categories of listed offences in respect of which there is no verification of double criminality (Article 2(2)), to the grounds for mandatory or optional non-execution of the European arrest warrant (Articles 3 and 4), to the content and form of that warrant (Article 8), to the transmission of such a warrant and the detailed procedures governing such transmission (Articles 9 and 10), to the minimum guarantees which must be granted to a requested or arrested person (Articles 11 to 14), to the time-limits and procedures for the decision to execute that warrant (Article 17) and to the time-limits for surrender of the person sought (Article 23).

31. The Framework Decision is based on Article 31(1)(a) and (b) EU, which provides that common

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action on judicial cooperation in criminal matters is, respectively, to facilitate and accelerate judicial cooperation in relation to proceedings and the enforcement of decisions and to facilitate extradition between Member States.

32. Contrary to what Advocaten voor de Wereld contends, there is nothing to justify the conclusion that the approximation of the laws and regulations of the Member States by the adoption of framework decisions under Article 34(2)(b) EU is directed only at the Member States' rules of criminal law mentioned in Article 31(1)(e) EU, that is to say, those rules which relate to the constituent elements of criminal offences and the penalties applicable within the areas listed in the latter provision.

33. Under the fourth indent of the first paragraph of Article 2 EU, the development of an area of freedom, security and justice features as one of the objectives of the Union and the first paragraph of Article 29 EU states that, in order to provide citizens with a high level of safety within such an area, common action is to be developed among the Member States, inter alia in the field of judicial cooperation in criminal matters. According to the second indent of the second paragraph of Article 29 EU, closer cooperation between judicial and other competent authorities of the Member States... in accordance with the provisions of Articles 31 [EU] and 32 [EU]' is to contribute to the achievement of that objective.

34. Article 31(1)(a) and (b) EU does not, however, contain any indication as to the legal instruments which are to be used for this purpose.

35. Moreover, it is in general terms that Article 34(2) EU states that the Council shall take measures and promote cooperation,..., contributing to the pursuit of the objectives of the Union' and, [to] that end', empowers the Council to adopt a variety of different types of measures, set out in Article 34(2)(a) to (d) EU, which include framework decisions and conventions.

36. Furthermore, neither Article 34(2) EU nor any other provision of Title VI of the EU Treaty draws a distinction as to the type of measures which may be adopted on the basis of the subject-matter to which the joint action in the field of criminal cooperation relates.

37. Article 34(2) EU also does not establish any order of priority between the different instruments listed in that provision, with the result that it cannot be ruled out that the Council may have a choice between several instruments in order to regulate the same subject-matter, subject to the limits imposed by the nature of the instrument selected.

38. In those circumstances, in so far as it lists and defines, in general terms, the different types of legal instruments which may be used in the pursuit of the objectives of the Union' set out in Title VI of the EU Treaty, Article 34(2) EU cannot be construed as meaning that the approximation of the laws and regulations of the Member States by the adoption of a framework decision under Article 34(2)(b) EU cannot relate to areas other than those mentioned in Article 31(1)(e) EU and, in particular, the matter of the European arrest warrant.

39. The interpretation to the effect that the approximation of the laws and regulations of the Member States by means of the adoption of framework decisions is not only authorised in the areas referred to in Article 31(1)(e) EU is corroborated by Article 31(1)(c) EU, which states that common action must also be aimed at ensuring compatibility in rules applicable in the Member States, as may be necessary to improve such [judicial] cooperation [in criminal matters]', without drawing any distinction between the different types of measures which may be used for the purpose of approximating those rules.

40. In the present case, in so far as Article 34(2)(c) EU precludes the Council from using a decision to effect approximation of the laws and regulations of the Member States and in so far

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as the legal instrument of the common position within the meaning of Article 34(2)(a) EU must be limited to defining the Union's approach to a particular matter, the question thus arises as to whether, contrary to the argument put forward by Advocaten voor de Wereld, the Council was able validly to regulate the matter of the European arrest warrant by way of a framework decision rather than by means of a convention pursuant to Article 34(2)(d) EU.

41. While it is true that the European arrest warran t could equally have been the subject of a convention, it is within the Council's discretion to give preference to the legal instrument of the framework decision in the case where, as here, the conditions governing the adoption of such a measure are satisfied.

42. This conclusion is not invalidated by the fact that, in accordance with Article 31(1) of the Framework Decision, the latter was to replace from 1 January 2004, only in relations between Member States, the corresponding provisions of the earlier conventions on extradition set out in that provision. Any other interpretation unsupported by either Article 34(2) EU or by any other provision of the EU Treaty would risk depriving of its essential effectiveness the Council's recognised power to adopt framework decisions in fields previously governed by international conventions.

43. It follows that the Framework Decision was not adopted in a manner contrary to Article 34(2)(b) EU.

The second question

44. Advocaten voor de Wereld contends, in contrast to all of the other parties which have submitted observations in these proceedings, that, to the extent to which it dispenses with verification of the requirement of the double criminality of the offences mentioned in it, Article 2(2) of the Framework Decision is contrary to the principle of equality and non-discrimination and to the principle of legality in criminal matters.

45. It must be noted at the outset that, by virtue of Article 6 EU, the Union is founded on the principle of the rule of law and it respects fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and as they result from the constitutional provisions common to the Member States, as general principles of Community law. It follows that the institutions are subject to review of the conformity of their acts with the Treaties and the general principles of law, just like the Member States when they implement the law of the Union (see, inter alia, Case C-354/04 P Gestoras Pro Amnistía and Others v Council [2007] ECR I-0000, paragraph 51, and Case C355/04 P Segi and Others v Council [2007] ECR I-0000, paragraph 51).

46. It is common ground that those principles include the principle of the legality of criminal offences and penalties and the principle of equality and non-discrimination, which are also reaffirmed respectively in Articles 49, 20 and 21 of the Charter of Fundamental Rights of the European Union, proclaimed in Nice on 7 December 2000 (OJ 2000 C 364, p. 1).

47. It is accordingly a matter for the Court to examine the validity of the Framework Decision in the light of those principles.

The principle of the legality of criminal offences and penalties

48. According to Advocaten voor de Wereld, the list of more than 30 offences in respect of which the traditional condition of double criminality is henceforth abandoned if those offences are punishable in the issuing Member State by a custodial sentence or detention order for a maximum period of at last three years is so vague and imprecise that it breaches, or at the very least is capable of breaching, the principle of legality in criminal matters. The offences set out in that list are not accompanied by their legal definition but constitute very vaguely defined categories of

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undesirable conduct. A person deprived of his liberty on foot of a European arrest warrant without verification of double criminality does not benefit from the guarantee that criminal legislation must satisfy conditions as to precision, clarity and predictability allowing each person to know, at the time when an act is committed, whether that act does or does not constitute an offence, by contrast to those who are deprived of their liberty otherwise than pursuant to a European arrest warrant.

49. The principle of the legality of criminal offences and penalties (nullum crimen, nulla poena sine lege), which is one of the general legal principles underlying the constitutional traditions common to the Member States, has also been enshrined in various international treaties, in particular in Article 7(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (see in this regard, inter alia, Joined Cases C-74/95 and C-129/95 X [1996] ECR I6609, paragraph 25, and Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C213/02 P Dansk Rørindustri and Others v Commission [2005] ECR I5425, paragraphs 215 to 219).

50. This principle implies that legislation must define clearly offences and the penalties which they attract. That condition is met in the case where the individual concerned is in a position, on the basis of the wording of the relevant provision and with the help of the interpretative assistance given by the courts, to know which acts or omissions will make him criminally liable (see, inter alia, European Court of Human Rights judgment of 22 June 2000 in Coeme and Others v Belgium , Reports 2000-VII, ° 145).

51. In accordance with Article 2(2) of the Framework Decision, the offences listed in that provision give rise to surrender pursuant to a European arrest warrant, without verification of the double criminality of the act, if they are punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years and as they are defined by the law of the issuing Member State'.

52. Consequently, even if the Member States reproduce word-for-word the list of the categories of offences set out in Article 2(2) of the Framework Decision for the purposes of its implementation, the actual definition of those offences and the penalties applicable are those which follow from the law of the issuing Member State'. The Framework Decision does not seek to harmonise the criminal offences in question in respect of their constituent elements or of the penalties which they attract.

53. Accordingly, while Article 2(2) of the Framework Decision dispenses with verification of double criminality for the categories of offences mentioned therein, the definition of those offences and of the penalties applicable continue to be matters determined by the law of the issuing Member State, which, as is, moreover, stated in Article 1(3) of the Framework Decision, must respect fundamental rights and fundamental legal principles as enshrined in Article 6 EU, and, consequently, the principle of the legality of criminal offences and penalties.

54. It follows that, in so far as it dispenses with verification of the requirement of double criminality in respect of the offences listed in that provision, Article 2(2) of the Framework Decision is not invalid on the ground that it infringes the principle of the legality of criminal offences and penalties.

The principle of equality and non-discrimination

55. According to Advocaten voor de Wereld, the principle of equality and non-discrimination is infringed by the Framework Decision inasmuch as, for offences other than those covered by Article 2(2) thereof, surrender may be made subject to the condition that the facts in respect of which the European arrest warrant was issued constitute an offence under the law of the Member State of execution. That distinction, it argues, is not objectively justified. The removal of verification of double criminality is all the more open to question as no detailed definition of the facts in

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respect of which surrender is requested features in the Framework Decision. The system established by the latter gives rise to an unjustified difference in treatment as between individuals depending on whether the facts alleged to constitute the offence occurred in the Member State of execution or outside that State. Those individuals will thus be judged differently with regard to the deprivation of their liberty without any justification for that difference.

56. The principle of equality and non-discrimination 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, in particular, Case C-248/04 Koninklijke Coöperatie Cosun [2006] ECR I0000, paragraph 72 and the case-law there cited).

57. With regard, first, to the choice of the 32 categories of offences listed in Article 2(2) of the Framework Decision, the Council was able to form the view, on the basis of the principle of mutual recognition and in the light of the high degree of trust and solidarity between the Member States, that, whether by reason of their inherent nature or by reason of the punishment incurred of a maximum of at least three years, the categories of offences in question feature among those the seriousness of which in terms of adversely affecting public order and public safety justifies dispensing with the verification of double criminality.

58. Consequently, even if one were to assume that the situation of persons suspected of having committed offences featuring on the list set out in Article 2(2) of the Framework Decision or convicted of having committed such offences is comparable to the situation of persons suspected of having committed, or convicted of having committed, offences other than those listed in that provision, the distinction is, in any event, objectively justified.

59. With regard, second, to the fact that the lack of precision in the definition of the categories of offences in question risks giving rise to disparate implementation of the Framework Decision within the various national legal orders, suffice it to point out that it is not the objective of the Framework Decision to harmonise the substantive criminal law of the Member States and that nothing in Title VI of the EU Treaty, Articles 34 and 31 of which were indicated as forming the legal basis of the Framework Decision, makes the application of the European arrest warrant conditional on harmonisation of the criminal laws of the Member States within the area of the offences in question (see by way of analogy, inter alia, Joined Cases C-187/01 and C-385/01 Gözütok and Brügge [2003] ECR I-1345, paragraph 32, and Case C467/04 Gasparini and Others [2006] ECR I0000, paragraph 29).

60. It follows that, in so far as it dispenses with verification of double criminality in respect of the offences listed therein, Article 2(2) of the Framework Decision is not invalid inasmuch as it does not breach Article 6(2) EU or, more specifically, the principle of legality of criminal offences and penalties and the principle of equality and non-discrimination.

61. In the light of all of the foregoing, the answer must be that examination of the questions submitted has revealed no factor capable of affecting the validity of the Framework Decision.

Costs

62. 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.

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PROCEDU Reference for a preliminary ruling

ADVGEN Ruiz-Jarabo Colomer

JUDGRAP Cunha Rodrigues

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Opinion of Mr Advocate General Ruiz-Jarabo Colomer delivered on 12 September 2006. Advocaten voor de Wereld VZW v Leden van de Ministerraad. Reference for a preliminary ruling: Arbitragehof - Belgium. Police and judicial cooperation in criminal matters - Articles 6(2) EU and 34(2)(b) EU - Framework Decision 2002/584/JHA - European arrest warrant and surrender procedures between Member States - Approximation of national laws - Removal of verification of double criminality - Validity. Case C-303/05.

I - Introduction

1. The knowledge already acquired... concerning the surest rules to be observed in criminal judgments, is more interesting to mankind than any other thing in the world.' (2)

2. The Belgian Arbitragehof or Cour d'arbitrage (Constitutional Court) has asked the Court, pursuant to Article 35 EU, (3) to rule on the validity of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (the Framework Decision'). (4)

3. The Belgian court asks whether the Framework Decision is compatible with the Treaty on European Union in a procedural and a substantive context. With regard to the procedural context, which has its roots in Article 34(2)(b) EU, the Belgian court questions the legal basis relied on by the Council and asks whether the instrument chosen is suitable.

4. That question will require the Court to examine the system of sources of law in the third pillar of the Union, by analysing the nature of framework decisions, which are equivalent to the directives of the Community pillar. The judgment in Pupino (5) is a suitable starting point for that analysis.

5. As regards the second, substantive, context, the Belgian court casts doubt on what is perhaps the most important of the innovations entailed in this method of assistance between Member States for the arrest and surrender of individuals, that is, the fact that, in certain circumstances, it is prohibited to make execution of a European arrest warrant subject to the condition that the acts on which it is based must also constitute an offence in the State of execution. The Arbitragehof asks whether that innovation is compatible with the principle of equality and with the principle of legality in criminal proceedings and, accordingly, whether it complies with Article 6(2) EU.

6. In order to answer that question, it will be necessary to conduct a full examination of the role of fundamental rights in the sensitive sector of police and judicial cooperation in criminal matters, following the proclamation of the Charter of Fundamental Rights of the European Union. (6)

7. That is not a straightforward task because, in a number of Member States, transposition of the Framework Decision has been ruled out on the grounds that it infringes individual rights. In Poland, the Trybuna Konstytucyjny (Constitutional Court), which has jurisdiction to scrutinise laws in the light of the Constitution, held in a judgment of 27 April 2005 (7) that Article 607t(1) of the Code on criminal procedure was incompatible with Article 55(1) of the Constitution, (8) in that it authorised the surrender of a Polish national to the authorities of another Member State in response to a European arrest warrant. Barely three months later, on similar grounds, (9) the German Bundesverfassungsgericht (Federal Constitutional Court) delivered a similar judgment (10) with regard to the law implementing the Framework Decision. (11) The Supreme Court of Cyprus has adopted the same approach, (12) on the basis that Article 11 of the Cypriot Constitution does not provide for arrest with a view to the execution of a European arrest warrant. By contrast, the Czech Ustavní soud (Constitutional Court), in a judgment of 3 May 2006, (13) dismissed an action for unconstitutionality brought by a group of senators and members of parliament contesting the law transposing the Framework Decision, which, they claimed, infringed the Constitution on

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the ground that it authorised the surrender of Czech nationals and abolished the protection inherent in the double criminality rule.

8. There is, therefore, a far-reaching debate concerning the risk of incompatibility between the constitutions of the Member States and European Union law. The Court of Justice must participate in that debate by embracing the prominent role assigned to it, with a view to situating the interpretation of the values and principles which form the foundation of the Community legal system within parameters comparable to the ones which prevail in national systems. (14)

II - The legal framework

A - The Treaty on European Union

9. The Union, which embodies a new stage in the process of integration and seeks to create closer ties between the peoples of Europe, is founded on the European Communities, supplemented by the policies and forms of cooperation established by the Treaty on European Union (Article 1 EU). The Union is founded on values common to Europeans, such as liberty, democracy, the rule of law, and respect for human rights and fundamental freedoms (Article 6(1) EU).

10. In particular, in accordance with the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (the Rome Convention'), as they result from the constitutional traditions common to the Member States, those rights are enshrined as general principles of Community law, the protection of which, within the scope of the Treaties establishing the European Communities and the EU Treaty, is the responsibility of the Court of Justice (Article 6(2) EU in conjunction with Article 46(d) EU).

11. The objectives of the Union include the maintenance and development of the Union as an area of freedom, security and justice, in which the free movement of persons is assured by the adoption of measures for the prevention and combating of crime (Article 2(1) EU, fourth indent), as part of the so-called third pillar which concerns police and judicial cooperation in criminal matters (Title VI EU).

12. The third pillar is intended to provide citizens with a high degree of security by drawing up policies for the prevention and combating of crime, by means of increased cooperation between the judicial authorities, and for the approximation, where appropriate, of national criminal provisions (Articles 31 EU and 32 EU).

13. Action in the judicial sector includes, for example, (a) increasing mutual assistance in the processing of cases and in the enforcement of decisions, (b) facilitating extradition, (c) ensuring compatibility in rules applicable in the Member States, (d) preventing conflicts of jurisdiction, and (e) progressively establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organised crime, terrorism and illicit drug trafficking (Article 31(1) EU).

14. To that end, the Council may adopt by unanimous decision (Article 34(2) EU, subparagraphs (a) to (c)):

(1) common positions defining the approach of the Union to a particular matter;

(2) framework decisions for the purpose of approximation of the laws and regulations of the Member States. Like the directives of the first pillar, framework decisions are binding as to the result to be achieved but leave to the national authorities the choice of form and method, although, by contrast, they do not have direct effect;

(3) binding decisions for any other purpose consistent with the objectives of the third pillar, which are not aimed at harmonisation and which do not have direct effect.

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15. In addition, the Council may conclude conventions which it shall recommend to the Member States for adoption and which will enter into force when they have been ratified by half the Member States (Article 34(2)(d) EU).

B - Framework Decision 2002/584

16. Pursuant to Articles 31(1)(a) and (b) EU and 34(2)(b) EU, the Framework Decision addresses the desire to abolish the formal extradition procedure in the Union (15) and to replace it with a simplified system of judicial surrender of sentenced or suspected persons for the purposes of execution or prosecution of criminal sentences (recitals 1 and 5). In accordance with that plan, the Framework Decision replaces, in relations between the Member States, prior and subsequent international conventions (Article 31(1)), (16) which, however, continue to apply when they extend beyond the objectives of the Framework Decision or help to simplify or facilitate the execution of a European arrest warrant (Article 31(2)).

17. Accordingly, the system of cooperation between Member States has been abolished and a system of free movement of judicial decisions has been established, which is based on mutual confidence and recognition (recitals 5, 6 and 10, and Article 1(2)).

18. The Council of the European Union adopted the Framework Decision in accordance with the principles of subsidiarity and proportionality, and with a desire to respect fundamental rights and comply with Article 6 EU (recitals 7 and 12, and Article 1(3)). In that connection, the surrender of an individual must be refused (17) when there are reasons to believe, on the basis of objective elements, that the arrest warrant has been issued for the purpose of prosecuting, punishing or prejudicing the position of a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or where there is a serious risk that that person would be subjected to the death penalty, torture or other inhuman or degrading treatment. Furthermore, the Framework Decision encourages Member States to have regard to their constitutional rules relating to due process (18) and to freedom of association, freedom of the press and freedom of expression (recitals 12 and 13). There is also an undertaking to protect the personal data processed in the context of the implementation of the Framework Decision (recital 14).

19. The European arrest warrant is a decision from a court in a Member State, addressed to the authorities of another Member State, seeking the arrest and surrender of an individual for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order (Article 1(1)).

20. The warrant is strictly judicial in nature. It is a mechanism for judicial cooperation (Article 1 and Articles 3 to 6), without prejudice to any practical or administrative assistance which the central authority may be required to provide (recital 9 and Article 7).

21. The European arrest warrant is issued for the prosecution of offences punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 12 months, or for the execution of custodial sentences or detention orders for a period of at least four months (Article 2(1)). The Member State to which the arrest warrant is addressed may make surrender subject to the condition that the acts must also constitute an offence under its own legal system (Article 2(4)).

22. Under Article 2(2), that rule, which is known as the double criminality rule, does not apply in respect of 32 categories of offence, provided that the issuing Member State punishes those offences by a prison sentence of a maximum of at least three years. The list includes the following offences:

- participation in a criminal organisation,

- terrorism,

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- trafficking in human beings,
- sexual exploitation of children and child pornography,
- illicit trafficking in narcotic drugs and psychotropic substances,
- illicit trafficking in weapons, munitions and explosives,
- corruption,
- fraud, including that affecting the financial interests of the European Communities within the meaning of the Convention of 26 July 1995,
- laundering of the proceeds of crime,
- counterfeiting currency, including of the euro,
- computer-related crime,
- environmental crime, including illicit trafficking in endangered animal species and in endangered plant species and varieties,
- facilitation of unauthorised entry and residence,
- murder, grievous bodily injury,
- illicit trade in human organs and tissue,
- kidnapping, illegal restraint and hostage-taking,
- racism and xenophobia,
- organised or armed robbery,
- illicit trafficking in cultural goods, including antiques and works of art,
- swindling,
- racketeering and extortion,
- counterfeiting and piracy of products,
- forgery of administrative documents and trafficking therein,
- forgery of means of payment,
- illicit trafficking in hormonal substances and other growth promoters,
- illicit trafficking in nuclear or radioactive materials,
- trafficking in stolen vehicles,
- rape,
- arson,
- crimes within the jurisdiction of the International Criminal Court,
- unlawful seizure of aircraft/ships,
- sabotage.

23. Article 3 sets out three grounds for mandatory non-execution of the European arrest warrant, while Article 4 lays down seven grounds for optional non-execution. The latter category covers cases where the convicted person is a national or resident of the State to which the warrant is addressed and that State undertakes to ensure that the sentence or detention order is executed

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in accordance with its domestic law (Article 4(6)). Similarly, Article 5(3) provides that, in the same circumstances, for the purposes of prosecution, surrender may be subject to the condition that the person, after being heard, is returned to his own Member State in order to serve there the punishment imposed on him.

24. In the proceedings, which are dealt with as a matter of urgency and within preclusive time-limits (Articles 17 and 23), the requested person is entitled to a hearing (Articles 14 and 19), to be assisted by a lawyer and an interpreter (Article 11(2)), to the rights available to arrested persons and, where appropriate, to provisional release in accordance with the law of the executing Member State (Article 12).

25. The order must contain the information necessary for its execution, in particular the details of the identity of the person sought and the nature and classification of the offence (Article 8(1)). Any difficulties which may arise during the procedure must be dealt with by direct contact between the courts involved, and, where appropriate, with the involvement of the supporting administrative authorities (Article 10(5)).

26. The period for complying with the Framework Decision expired on 31 December 2003 (Article 34(1)).

III - The main proceedings and the questions referred for a preliminary ruling

27. Advocaten voor de Wereld, a non-profit-making association, brought an action in the Arbitragehof contesting the Wet betreffende het Europees aanhoudingsbevel (Law on the European arrest warrant) of 19 December 2003, (19) which transposes the Framework Decision into national law, on the ground that the said Law infringes Articles 10 and 11, in conjunction with Articles 36, 167(2), and 168, of the Grondwet (Belgian Constitution). The applicant claims that the European arrest warrant ought to have been established by an international convention and that Article 5(5) of the Law, which transposes Article 2(2) of the Framework Decision into national law, infringes the principle of equality and the requirement of legal certainty in the sphere of criminal proceedings.

28. In view of the nature of the dispute, prior to giving judgment, the Belgian Constitutional Court decided (20) to refer the following questions to the Court of Justice for a preliminary ruling:

(1) Is Framework Decision 2002/584... compatible with Article 34(2)(b) EU, under which framework decisions may be adopted only for the purpose of approximation of the laws and regulations of the Member States?

(2) Is Article 2(2) of Framework Decision 2002/584..., in so far as it sets aside verification of the requirement of double criminality for the offences listed therein, compatible with Article 6(2) EU and, more specifically, with the principle of legality in criminal proceedings guaranteed by that provision and with the principle of equality and nondiscrimination?'

IV - The procedure before the Court of Justice

29. The order for reference from the Arbitragehof was received at the Court Registry on 2 August 2005. Written observations were submitted by Advocaten voor de Wereld, the Commission, the Council of the European Union, and the Belgian, Czech, Spanish, Finnish, French, United Kingdom, Latvian, Lithuanian, Netherlands and Polish Governments. At the hearing held on 11 July 2006, oral argument was presented by the representatives of Advocaten voor de Wereld, the representatives of the Belgian, Czech, Spanish, French, Netherlands and United Kingdom Governments, and the representatives of the Council of the European Union and the Commission of the European Communities.

V - Analysis of the questions referred for a preliminary ruling

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A - The legal basis (first question)

30. It is common ground that the Framework Decision concerns matters which fall within the scope of the third pillar of the European Union and, accordingly, that the Council has jurisdiction to adopt provisions in that connection. (21) The dispute is focused on the type of instrument adopted, since, in the main proceedings, the suitability of a framework decision is contested on two grounds. The first is that the Framework Decision does not seek to approximate preexisting national laws, because the European arrest warrant is a newly created concept. The second ground is that prior international agreements on extradition cannot be repealed by a framework decision.

31. Having summarised the dispute in those terms, it is appropriate first of all to consider the essence of the European arrest warrant with a view to ascertaining its nature and concluding whether it is possible to apply to it the harmonising provisions of a framework decision. Should the reply to that question be in the affirmative, it will then be necessary to ascertain whether, in accordance with the principle of contrarius actus , the adoption of a framework decision was precluded because the field concerned had previously been governed by international agreements.

32. However, before considering those matters, I must propose a resolution of the claim put forward by the Czech Government that the first question is inadmissible.

1. Admissibility

33. The Czech Government contends that the examination of the question whether a framework decision is a suitable instrument to govern the European arrest warrant requires the Court to analyse a provision of primary law (Article 34(2)(b) EU) which is outside its control and, accordingly, the Court lacks jurisdiction to give a ruling. That approach is wholly erroneous specifically because one of the central responsibilities of this institution is to interpret the Treaties and to safeguard them vis-à-vis secondary law, tasks which are essentially constitutional in nature. (22)

34. All the powers of the Union are connected and are subject to the provisions enacted by the Community legislature, but the Court of Justice is also charged with preserving the integrity and ensuring the effectiveness of those powers by safeguarding them from any irregularities on the part of the other Community institutions. The Arbitragehof does not ask the Court for anything out of the ordinary, and instead merely requests that the Court exercise its powers in order to establish whether an act of the Union legislature is compatible with a provision of the Treaty, (23) an assessment which, at the outset, and by way of necessity, requires the Court to interpret and define the scope of the contested provision.

35. However, the Czech Republic is adamant that the first question is inadmissible and asserts that the order for reference does not state clearly the reasons why the Framework Decision is invalid. The Czech Government maintains that, with regard to its application for a declaration that the Belgian implementing law is unconstitutional on the grounds that the Framework Decision is not a suitable instrument for approximating national laws, the applicant association should have based its claim on relevant argum ents which the referring court should have set out in the order for reference.

36. The information provided by national courts must make it possible for interested parties in proceedings for a preliminary ruling to submit observations which supply the Court with facts which will enable it to give a useful reply. (24) That requirement is satisfied in this case because it is clear that the dispute centres on the question whether a framework decision is capable of establishing the European arrest warrant through the approximation of national laws. That is the view taken by the other 12 parties who have submitted observations in these proceedings and the Czech Government, while complaining about a lack of clarity on the part of the Arbitragehof, has still found itself able to take part in the discussion. (25)

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37. Now that I have cleared the way for a discussion of the substantive issue, I will analyse this new instrument governing cooperation between the Member States in criminal matters.

2. The European arrest warrant and extradition

38. It has been argued that the European arrest warrant procedure is a subspecies of extradition. Academic writers have described the Framework Decision as an attempt to facilitate extradition between the Member States, (26) and as a modern version of extradition (27) which is sui generis and has (28) a different name. (29) The Community legislature has contributed to the confusion by relying on Article 31(1)(b) EU. Certain high-ranking national courts have also contributed to the uncertainty; for example, the Trybuna Konstytucyjny described the surrender of an individual in compliance with a European arrest warrant as a form of extradition, (30) although it did so with a view to making the warrant subject to the same determining factors from the point of view of the protection of the fundamental rights enshrined in the Polish Constitution. The Bundesverfassungsgericht acted similarly by tacitly equating the two concepts with one another. (31)

39. However, attention has also been drawn to the differences by legislatures, (32) academic writers (33) and national courts. (34)

40. However, the views held are not so different in as much as they depend on the perspective chosen. If the focus is the result there are numerous similarities, but the differences appear more stark if regard is had to the reasons for the method of cooperation concerned and the manner in which it is carried out.

41. The move from extradition to the European arrest warrant constitutes a complete change of direction. It is clear that both concepts serve the same purpose of surrendering an individual who has been accused or convicted of an offence to the authorities of another State so that he may be prosecuted or serve his sentence there. However, that is where the similarities end.

42. In the case of extradition, contact is initiated between two sovereign States, the requester and the requested, each of which acts from an independent position. One State asks for the cooperation of the other State which decides whether to provide that cooperation on a case-by-case basis, having regard to grounds which exceed the purely legal sphere and enter into the scope of international relations, where the principle of opportuneness plays an important role. Accordingly, the intervention of politicians and criteria such as reciprocity and double criminality are justified because they have their origins in different spheres.

43. The nature of the situation changes when assistance is requested and provided in the context of a supranational, harmonised legal system where, by partially renouncing their sovereignty, States devolve power to independent authorities with law-making powers. That approximation, which falls within the scope of the first pillar of the Union, (35) also operates in the third, intergovernmental, pillar - albeit with a clear Community objective, as was demonstrated in Pupino - (36) by transferring to framework decisions certain aspects of the first pillar and a number of the parameters specific to directives. (37)

44. The relationship is not established between hermetically sealed spaces where a case-by-case assessment is required to determine that the assistance does not undermine the foundations of social organisation. On the contrary, the aim is to provide assistance to someone with whom one shares principles, values and objectives, (38) through the creation of an institutional framework with its own special sources of law which vary in force but which ultimately are all binding and which seek to prevent and combat crime in a single area of freedom, security and justice, by facilitating cooperation between States and harmonising their criminal laws.

45. In that context, inspired by mutual trust, cooperation is based not on the coming together

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of separate interests but rather on a common provision - the Framework Decision - which sets out the types of offence in respect of which assistance may be requested. Thus, arguments to the effect that there must be an individual assessment in the interests of reciprocity, (39) or that the double criminality rule is an absolute principle, are outmoded, since the participants in the procedure both regard the conduct which gives rise to the request as criminal and the request would also be dealt with if it was made from the executing State to the issuing State instead. In that situation, any assessment of opportuneness is irrelevant and the power of review is limited strictly to the courts. In other words, the political authorities must allow the judicial authorities to take the lead and an individual assessment of each case must give way to a more general type of assessment because the Framework Decision assumes that national courts have the jurisdiction to prosecute the offences it lists. In short, the situation is no longer one where sovereign States cooperate in individual cases; instead, it is one where Member States of the European Union are required to assist one another when offences which it is in the common interest to prosecute have been perpetrated. (40)

46. It is therefore my view that extradition and the European arrest warrant and surrender procedure take account of axiological models whose sole similarity is their objective. The Framework Decision takes that approach by abolishing extradition and replacing it with a system of surrender between judicial authorities, which is based on mutual recognition (41) and on the free movement of judicial decisions, and results from a high level of confidence between the Member States (recitals 1, 5, 6 and 10). For the reasons stated, reciprocity and double criminality are presumed for certain offences - that is, the most serious ones - and the grounds for refusing to provide assistance are restricted, while there is no scope at all for political discretion (Articles 3 and 4). (42)

47. That outcome appears to bolster the view of those who argue that, since the procedure concerned is new, there was nothing to harmonise, from which it follows that it was not appropriate to establish the European arrest warrant in a framework decision. However, that conclusion, by its simplicity, fails to take account of the nature of that source of law and of the essential character of the mechanism it creates.

3. The Framework Decision as a harmonising provision

48. That approach fails on its main premiss because the fact that the European arrest warrant and surrender procedure differs from the extradition system in all but its objective does not mean that the procedure was created in a vacuum, without any precedents in the national legal systems whose harmonisation is sought.

49. The European arrest warrant, a measure which is vital to the creation of an area of freedom, security and justice (Articles 2 EU and 29 EU), is an embodiment of judicial cooperation. It consists of a judicial decision requiring the arrest and surrender of an individual by a foreign judicial authority, for the purposes of conducting a criminal prosecution or executing a sentence (Article 1(1) of the Framework Decision). It is, therefore, a decision governed by the procedural law of the issuing Member State which, in accordance with the principle of mutual recognition, is treated in the other Member States in the same way as a decision of a national court, from which it follows that legislative harmonisation is essential. Arrest warrants are well established under the criminal procedure laws of the Member State and, in certain circumstances, subject to specified conditions, the Framework Decision affords them cross-border effect, an objective which requires approximation of the relevant national rules. The operative part of the Framework Decision addresses that objective, by harmonising the form and content of the decision, the methods of and time-limits for transmission and execution, the grounds for non-execution, and the rights which protect the arrested person during the procedure and for the purposes of surrender.

50. It is therefore not the case that a mechanism which did not previously exist has been created

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or that national extradition laws have been harmonised; rather, it is the concepts of arrest and surrender which have been harmonised so that the judicial authorities existing in each Member State may assist one another. (43)

51. This reference for a preliminary ruling does not concern the harmonising capacity of the Framework Decision but rather whether the decision is suitable for the purpose of creating a new concept. However, there is also an underlying ambiguity in that assertion because, as I have just pointed out, although the European arrest warrant differs from extradition, it is not a creation without parallels in the laws of the Member States. (44) In any event, even if such an argument were put forward, nothing would preclude the use of a framework decision if harmonisation were required because the EU Treaty does not prohibit its use in such circumstances.

4. The system of sources in the third pillar; in particular, the relationship between framework decisions and conventions

52. Article 34(2) EU lists four sources of law within the third pillar and, as the Council, the Commission, the Netherlands and Belgium point out, does not place them in a hierarchical orde r or categorise them by assigning each type of act to a particular field. In principle, each type may be used for all fields, without prejudice to the limits imposed by the nature of the act and the objective set, within whose boundaries the legislature has freedom of choice.

53. That margin of discretion is not subject to judicial review, from which it follows that a decision which does not exceed those boundaries is legally correct, irrespective of its content.

54. On this occasion, the Council opted for a framework decision and it is therefore appropriate to begin the analysis by establishing whether, in the light of the aim pursued and the procedure followed to achieve it, the Council could have used a different type of act. The common position must be rejected as a suitable measure, although it is useful in the sphere of the international relations of the Union and the Member States for the purpose of setting out their opinion on a particular subject (Article 37 EU), and, together with the joint action, its specific features may equally well be employed within the second pillar (Article 12 EU). (45)

55. The remaining acts - framework decisions, decisions and conventions - are suitable for measures which require transposition into national law. (46) However, the present proceedings do not call for an analysis of decisions, which are referred to in Article 34(2)(c) EU, because the article excludes their adoption for the purposes of harmonisation, which is vital to ensure the functioning of the European arrest warrant procedure.

56. Accordingly, the only alternative to a framework decision would have been a convention. The choice between the two types of measure entails the widest possible discretion. It is appropriate to dismiss the view, which is based on an assertion that the rank of provision has been frozen' pursuant to the contrarius actus principle, that, since extradition between Member States has traditionally been governed by international agreements, its successor', the European arrest warrant, must be established in the same manner.

a) The inapplicability of the contrarius actus principle

57. The rule which states that once a field has been governed by a particular type of provision, that field must always be governed by other provisions of the same rank, without any possibility of using a lower rank, is not absolute because it reflects an individual right in the context of relations between a sovereign power - the legislature - and another, essentially subordinate power - the executive - and their respective acts, namely laws and regulations. When parliament legislates in a field, the government must remain on the sidelines and intervene only to the extent that the representative chamber allows it to for the purpose of completing or incorporating its decisions,

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and no governmental act may regulate the same field, thereby usurping the will of the holder of power, unless, after the repeal of legislation, the latter authorises it and provided that there is no constitutional restriction to the effect that the field concerned must be governed by a law. (47)

58. Therefore, it makes no sense to discuss that point because framework decisions and international conventions have the same legal basis and must pass through the same procedure, in that both must be approved unanimously by the Council, following a proposal from a Member State or the Commission, and after consultation of the European Parliament (Article 34(2) EU in conjunction with Article 39(1) EU) (48)

59. An analysis of the practice leads to the same outcome as a theoretical analysis, since the Member States have on many occasions replaced measures enacted via a convention with other, harmonising measures. One paradigmatic example is the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, (49) known as the Brussels Convention, which was replaced by Council Regulation (EC) No 44/2001 of 22 December 2000 (Article 68). (50)

60. In those circumstances, it is appropriate to consider whether the format of an international convention facilitates respect for the principles of subsidiarity and proportionality, with the result that the Community legislature is obliged to use that format.

b) The principles of subsidiarity and proportionality

61. Those two principles, which are enshrined in Article 5 EC, apply in the third pillar. The principle of subsidiarity applies pursuant to Article 2 EU in fine , while the principle of proportionality applies as a mechanism to facilitate subsidiarity. (51)

62. Recital 7 in the preamble to the Framework Decision states that those principles have been respected, and rightly so, because, since the Framework Decision governs the execution, in the territory of a Member State, of arrest warrants issued by another Member State, in a common area based on mutual confidence and the reciprocal recognition of judicial decisions, that task may be dealt with more effectively by a joint approach, using the structures of the Union, rather than separately, albeit in a coordinated manner, by each Member State. Accordingly, there was a need for multilateral action, from which it follows that the principle of subsidiarity was observed.

63. The adoption of an international convention would also have been compatible with the principle of subsidiarity but the latitude accorded to the Union legislature allowed it to choose a framework decision. Moreover, the inalienable principle of proportionality did not impose the need for a different approach since, as I will explain below, experience recommended the choice of a framework decision in the light of the failure of the conventions concluded in the past. Since the requirement that the method must be appropriate to the purpose means that action taken by the Union must be restricted to fulfilling the objectives proposed, it is essential to use an instrument which imposes an obligation on the Member States to achieve the results in a specified period.

64. In other words, the freedom of action of the Community legislature was not restricted by an alleged freezing of the rank of provision which has traditionally governed the surrender of a citizen from one Member State to another, for the purposes of prosecution or the execution of a sentence, or by the principle of subsidiarity. However, even if a certain restriction of that freedom of action were accepted, a framework decision would still be a suitable measure in accordance with the principle of proportionality and the principle of the effectiveness of Community law, which, it is clear from the Pupino judgment, also applies to the third pillar.

c) The demand for greater effectiveness

65. The disputed Framework Decision is not the first attempt to improve judicial cooperation in criminal matters within the Union. The 1995 and 1996 conventions were its immediate, albeit failed,

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precursors. Both those conventions were adopted pursuant to Article K.3 of the Treaty on European Union, but at the moment they do not apply in all the Member States, since a number have still not ratified them. (52)

66. It was precisely the limitations inherent in international treaties that led to the inclusion of a new category in the list of sources of law, which would avoid the difficulties arising from States having freedom of choice with regard to ratification. (53) The Tampere European Council explicitly set out the objective of converting the Union into an area of freedom, security and justice, by making full use of the possibilities offered by the Treaty of Amsterdam'. (54) The proposal of the Commission is most revealing in that it states that a framework decision was chosen for reasons of effectiveness in view of the limited success of the previous conventions. (55)

67. The Member States and the institutions are required to achieve the objectives of Article 2 EU and, therefore, they must maintain and develop the area of freedom, security and justice and are obliged to use the most appropriate tools to meet that requirement. The Member States and the institutions are bound to ensure the effectiveness of Community law in general (56) and the effectiveness of Union law in particular, (57) from which it follows that the Council was not only entitled but, moreover, obliged to establish a mechanism for the European arrest warrant and surrender procedure in a framework decision. (58) Accordingly, it is not appropriate to call into question the method chosen by the Council. (59)

68. Accordingly, I propose that the Court reply to the first question by ruling that Framework Decision 2002/584 does not infringe Article 34(2)(b) EU.

B - Framework Decision 2002/584 and fundamental rights (second question)

69. Framework Decision 2002/584 concerns the rights of an individual who is the subject of an arrest warrant and specifically sets out the objective of protecting fundamental rights. In points 18 and 24 of this Opinion, I referred to that objective of the Framework Decision, an example of a move towards cooperation in criminal matters which transcends the merely bilateral relationship between States and takes account of a third dimension, namely the rights of the individual concerned. (60)

70. In that connection, Article 1(3) of the Framework Decision contains a solemn declaration which, had it not been included, would have been implicit since one of the founding principles of the European Union is respect for human rights and fundamental freedoms (Article 6(1) EU), enshrined as general principles of Community law, with the scope which they derive from the Rome Convention and the constitutional traditions common to the Member States (Article 6(2) EU). (61)

71. That consideration requires an examination of the protection of those rights in the Union and of the role assigned to the Court.

1. The protection of fundamental rights in the European Union

72. The absence of a list of fundamental rights in the founding treaties did not mean that those rights were not part of Community law. The Communities, the result of an agreement between States based on the democratic model, were created with the objective that they would be organisations governed by the rule of law. The seed was sowed in fertile ground and, over time, basic individual rights flowered as a result of the case-law of the Court of Justice.

73. That work in the field of protection has resulted in rights which are specifically recognised, such as the prohibition of discrimination with regard to pay on grounds of sex, enshrined in the current Article 141 EC, (62) but also in others which are not rooted directly in the Community legal system, such as the inviolability of private premises, (63) freedom of expression, (64) and, with closer links to this reference for a preliminary ruling, the nullum crimen, nulla poena sine

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lege principle. (65)

74. The Court applied a simple, logical line of reasoning to the effect that rules common to the legal systems of the Member States are general principles of Community law and, as such, they must be observed, from which it follows that fundamental rights, guarantees which are shared by all, form part of those principles and must be protected. (66) The harmonising objective in that field is beyond doubt and it is based on sources external to Community law, (67) namely, the aforementioned general principles which are shared by the Member States, (68) the common elements of their constitutional traditions, (69) and the international instruments for the protection of rights, (70) in particular the Rome Convention. (71)

75. The Community legislature gathered the evidence, inserted that case-law into Article 6 EU with effect from the Treaty of Amsterdam, and charged the Court of Justice with the protection of fundamental rights (Article 46(d) EU).

76. In 2000, an event which was difficult to ignore occurred, in the form of the proclamation of the Charter of Fundamental Rights of the European Union. That instrument does not have binding force because there is no enacting provision incorporating its subject-matter. (72) The proclamation is set out as a mere political declaration, devoid of legal force. (73)

77. However, that assertion does not lead me to the view that nothing has changed, as though the Charter were not worth the paper it is written on. First of all, the Charter did not emerge in a vacuum, without any link to its surroundings. On the contrary, the Charter belongs to a stage in the development process which I have described, in that, as it states in the preamble, (74) it codifies and reaffirms certain rights which are derived from the heritage common to the Member States, at national and international level, (75) from which it follows that the Union must respect those rights and the Court must protect them, in accordance with Articles 6 EU and 46(d) EU, whatever the legal nature and force of the instrument adopted in December 2000. (76)

78. Second, the Charter features in the case-law of the Court since the Advocates General have interpreted it, thereby transcending its merely programmatic and declarative nature. (77) Furthermore, the Court of First Instance has referred to the Charter in a number of its judgments. (78) However, the Charter is rarely cited in the judgments of the Court of Justice, (79) not even to refute the views put forward by the Advocates General, and it was only very recently - barely two months ago, in fact - in Parliament v Council (80) that the Court announced a change of direction, ruling that, while the Charter is not a legally binding document, its importance must be acknowledged (paragraph 38).

79. Accordingly, the Court must break its silence and recognise the authority of the Charter of Fundamental Rights as an interpretative tool at the forefront of the protection of the fundamental rights which are part of the heritage of the Member States. That undertaking must be approached with caution and vigour alike, in the full belief that, while the protection of fundamental rights is an essential part of the Community pillar, it is equally indispensable in the context of the third pillar, which, owing to the nature of its subject-matter, is capable of affecting the very heart of individual freedom, the foundation of the other freedoms.

80. In that way it might be possible to avoid repeating past misunderstandings with national courts which have been reticent about the capacity of the Community institutions to protect fundamental rights. (81)

81. The protective role is exercised in three different spheres (82) - national, Council of Europe and European Union - which are partly coextensive and, most importantly, are imbued with the same values. There are many points of intersection and overlapping is possible, but respect for other jurisdictions does not create any insurmountable problems where there is confidence that all parties

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exercise their jurisdiction while fully guaranteeing the system of coexistence. A dialogue between the constitutional courts of the European Union permits the foundations to be laid for a general discussion.

82. Thus, in the present reference for a preliminary ruling, the Court must have regard to the spirit of Articles 20 and 49 of the Charter of Fundamental Rights which respectively proclaim the principle of equality before the law and the principle of legality of criminal offences, principles which are widely accepted in the constitutional frameworks of the Member States, and the Court may refer, if necessary, to the case-law of the national courts and to the judgments of the European Court of Human Rights concerning Articles 14 and 7 of the Rome Convention.

2. Article 2(2) of Framework Decision 2002/584 and the principle of equality

a) Equality before the law

83. The Arbitragehof asks whether it is compatible with that fundamental right to provide that, where a European arrest warrant is executed for any of the offences listed in Article 2(2) of the Framework Decision, unlike in the case of other offences, it is not necessary to verify the criminality of those offences in the two Member States concerned.

84. For the purposes of analysing that question, it is important to consider the structure of Article 2 of the Framework Decision with a view to clarifying the misunderstanding which is clear in the question itself, as well as in a number of the observations submitted in these proceedings. A European arrest warrant is valid provided that the offence is punishable in the issuing Member State by a sentence of a specified duration (paragraph 1), although it is possible to make surrender conditional upon the act concerned constituting an offence in the State to which the warrant is addressed (paragraph 4). However, that option is not available for the 32 offences listed in paragraph 2. (83)

85. Accordingly, I believe it is incorrect to argue that, with the exception of the offences listed in Article 2(2), the European arrest warrant system is based on the principle of double criminality. On the contrary, prosecution in the requesting Member State is the only requirement that may be stipulated, even where the Member States are authorised, either when they transpose the Framework Decision (84) or when their courts execute an individual arrest warrant, (85) to make execution of the warrant conditional on the act concerned being categorised as an offence under their own legal systems, an option which is not available for the offences referred to in Article 2(2). (86)

86. In those circumstances, the question referred by the Arbitragehof is addressed to the wrong authority, since the discrimination complained of may not be attributed to the Union legislature but rather to national legislation or a national judicial decision, as applicable, matters on which the Court does not have jurisdiction to rule.

87. Even if the view were taken that the Framework Decision is the root cause of the infringement because it establishes different rules depending on the nature of the offence, the question would still lack logic.

88. Approached in those terms, the question must be restricted to the abstract concept of equality before the law, leaving aside, for the moment, consideration of the uncertainty surrounding its application and the prohibition of discrimination by reason of personal and social circumstances. (87)

89. The law must treat individuals equally and may not treat comparable situations differently or make different situations subject to identical rules. However, the law has a wide latitude to differentiate between similar situations provided that an objective and reasonable justification is given. In that connection, a justification will be objective and reasonable provided that the aim and the effects sought are legitimate and there is an adequate relationship of proportionality

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between them, which precludes particularly onerous and disproportionate outcomes. (88)

90. It is my view that in this case the situations concerned are not comparable. First, they are concerned with acts; regard is not had to individual circumstances but rather to the nature of the offence, from which it follows that there is no subjective discrimination. Second, from the point of view of their prosecution, there is no similarity between individuals who perpetrate different acts which do not have the same degree of seriousness and have different levels of culpability; the difference in the gravity of the offences precludes their comparability.

91. My opinion would not be altered if an assessment of the consequences of the execution of a European arrest warrant (arrest, surrender, prosecution, serving a sentence) led to the conclusion that the individuals concerned are in a similar situation, whatever the offence which gives rise to their arrest, since the distinction is objective, reasonable, fair and proportionate.

92. The distinction is objective because it takes account of factors which are external to the individual, are independent, and may be measured using abstract, general criteria, thereby avoiding any selective arbitrariness. Those factors are the nature of the offence and the punishment provided for it.

93. In addition, the distinction is reasonable and justified because it is aimed at one of the objectives of the European Union, namely, combating crime in an area of freedom, security and justice (Article 2 EU, fourth indent, in conjunction with Article 29 EU). The list in Article 2(2) of the Framework Decision contains offences which, as the Spanish Government observes in its notable statement in intervention (paragraph 121), have a serious effect on legal interests in need of special protection in Europe, and there is a requirement that the Member State issuing the arrest warrant must punish those offences by sentences with a particular degree of severity. (89) They are offences where the verification of double criminality is regarded as superfluous because the acts concerned are punished throughout the Member States. (90)

94. Finally, the proportionality of the measure is beyond doubt because the different rules are crucial for ensuring the surrender by a Member State of a person accused or convicted of a serious offence to the authorities of a judicial system which is comparable to that of the said Member State and which respects the principles of the rule of law and guarantees the fundamental rights of the individual concerned, including the rights which apply during the course of criminal proceedings.

95. I will conclude this section of the Opinion at the point where the applicant association in the main proceedings begins its observations, that is, by referring to those extremely unusual cases (91) where a Member State surrenders an individual under Article 2(2) of the Framework Decision for an act which is not punishable in its own territory. (92) That situation does not bring into play the principle of equality because there can be no discrimination vis-à-vis oneself, and it is important to reiterate that, for the purposes of that principle, any European arrest warrant issued with a view to detaining a person suspected or convicted in a Member State of one of the offences referred to in Article 2(2), and punished by a penalty of the severity specified in that provision, must be executed notwithstanding the personal and social circumstances of the individual concerned.

b) Equality in the application of the law

96. The order for reference puts forward another aspect of that complaint of discrimination by pointing out that there is a risk that Article 2(2) of the Framework Decision may be interpreted incorrectly owing to a lack of precision in the definitions it contains.

97. Since the question has arisen in those terms, it is clear that such a situation is not capable of placing in doubt the precision of the provision, which does not take account of future, hypothetical

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discrimination at the time of its application. There is an underlying confusion here between equality in the law itself and the equality which operates when the law is applied. The former, which is substantive in nature and aimed at ensuring that comparable situations are treated in the same way, is not respected when a provision makes similar situations subject to different rules without reasonable justification, whereas the latter, which is procedural in nature, is breached when an authority which is required to apply the provision in a particular instance construes that provision differently from on previous occasions with regard to similar situations. Accordingly, there is no inequality in the application of the law where conflicting judgments are handed down by courts which are acting in the legitimate exercise of their jurisdiction to determine a case, because the principle of equality does not require separate courts to reach identical conclusions. It would be ludicrous to class a law as discriminatory because it may be open to different interpretations which it may be possible to consolidate via the appropriate remedies.

98. In any event, it will be necessary to wait and see whether the disparities predicted actually arise despite the safeguards which the system establishes to prevent them. The Framework Decision provides useful mechanisms in that connection, by providing for an accurate exchange of information and direct contact between the courts involved. (93) In addition, should any uncertainty remain about the meaning of the terms used in Article 2(2) of the Framework Decision, the procedure for referring a preliminary ruling under Article 35 EU provides a suitable channel for a uniform interpretation within the territory of the Union.

99. The risk predicted, an obstacle arising from the absence of harmonisation of the criminal laws of the Member States, does not affect the principle of equality and is connected with the requirement of certainty in legal relationships, specifically ones which arise for the purposes of enforcement between the State and individuals. That assertion leads me to the other aspect of the second question referred for a preliminary ruling.

3. Article 2(2) of the Framework Decision and the principle of legality in criminal proceedings

100. That principle, (94) which is contained in the Latin aphorism nullum crimen, nulla poena sine lege and enshrined in Article 7(1) of the Rome Convention, and in Article 49(1) of the Charter of Fundamental Rights of the European Union, comprises, in the time-honoured words of the Spanish Constitutional Court, (95) two levels of protection. On the first level, which is substantive in nature and absolute in scope, the protection entails the fundamental requirement that there must be a pre-existing definition of offences and the penalties applicable to them. The second level is procedural and concerns the rank of the provisions which create those offences and govern the penalties, which, in the Spanish legal system, (96) and in the legal systems of most of the Member States, is the equivalent of a law adopted by the legislature, the custodian of popular sovereignty.

101. With regard to the argument put forward by the applicant association in the main proceedings, the Arbitragehof seeks to ascertain whether, in the light of its vagueness and lack of precision, the list of offences in Article 2(2) of the Framework Decision is compatible with the substantive protection.

102. That protection is a reflection of the principle of legal certainty in criminal law (97) and is all the more significant because it affects fundamental values, such as individual freedom. It seeks to ensure that people are aware in advance of the types of act from which they must refrain and the consequences of committing such acts (lex previa) . (98) The protection requires a strict, unambiguous definition of offences (lex certa) , so that, from the time those offences are created, and, where applicable, with the assistance of the courts, (99) individuals know with a reasonable degree of foreseeability the acts and omissions which will give rise to criminal liability, and it precludes the provisions concerned from being extensively construed by analogy, to the detriment of the accused, and from being applied retrospectively. (100)

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103. Accordingly, the principle of legality applies to substantive criminal law as a requirement which is addressed to the legislature when it defines offences and sentences, and which is addressed to the courts when they analyse and apply those definitions in criminal proceedings. (101) In other words, it comes into play during the exercise of the State's right to punish and during the application of acts which may be strictly construed as imposing a penalty, from which it follows that the Framework Decision cannot be said to contravene the principle because it does not provide for any punishments (102) or even seek to harmonise the criminal laws of the Member States. Instead, the Framework Decision is confined to creating a mechanism for assistance between the courts of different States during the course of proceedings to establish who is guilty of committing an offence or to execute a sentence. That system of cooperation is subject to a number of conditions, in that the sentences and detention orders which may be imposed must be of a certain severity, and it is also possible to require that the acts concerned must be classified as offences in the Member State of the court providing the assistance, except in the case of the offences referred to in Article 2(2) as they are defined by the law of the issuing Member State'.

104. Thus, the certainty required by that principle must be demanded from the substantive criminal law of the issuing Member State and, therefore, from the legislature and the courts of that State for the purposes of commencing criminal proceedings and resolving them, where appropriate, with a sentence. It is clear that a correctly drafted European arrest warrant must be based on acts which are defined in law as offences in that State. The criminal law of the Member State which executes the warrant simply has to provide the assistance requested and, if the measure transposing the Framework Decision so provides, make surrender conditional on the conduct concerned also being classified as a criminal offence by its own legislation, with the exception of the offences referred to in Article 2(2) to which the principle of legality also applies.

105. Notwithstanding the foregoing considerations, I must add that the arrest and surrender procedure entailed in the execution of a European arrest warrant is not punitive in nature. The court responsible for executing the warrant must establish that the conditions for handing over an individual who is in its jurisdiction to the issuing court have been satisfied, but the executing court is not required to hear the substance of the case, except for the purposes of the surrender proceedings, and must refrain from assessing the evidence and delivering a judgment as to guilt. That was the view of the European Court of Human Rights with regard to extradition, which it excluded from the concept of punishment in Article 7 of the Rome Convention. (103)

106. The question submitted by the Arbitragehof relates little to the principle of legality in criminal proceedings and a great deal to the fear that the concepts referred to in Article 2(2) of the Framework Decision may be interpreted differently in each Member State, with the risk of non-uniform application. I have already referred to that possibility, which is inherent in the nature of all legislative provisions, both abstract and general, in points 96 to 99 of this Opinion. Now it merely remains for me to add that, if, after relying on the methods provided for in the Framework Decision to resolve any difficulties and obtain a uniform interpretation by means of a reference for a preliminary ruling, the court executing the European arrest warrant still harbours uncertainty about the legal classification of the acts which form the basis of the warrant and about whether those acts are covered by any of the 32 offences listed in Article 2(2), then that court must rely on the provisions of Article 2(1) and (4).

107. In summary, it is my view that Article 2(2) of the Framework Decision does not infringe Article 6(2) EU because it is consistent with the principle of equality and the princip le of legality in criminal proceedings.

VI - Conclusion

108. In the light of the foregoing considerations, I propose that the Court reply to the questions

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referred for a preliminary ruling by the Arbitragehof by declaring:

(1) Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States does not infringe Article 34(2)(b) EU;

(2) by abolishing verification of the requirement of double criminality for the offences listed therein, Article 2(2) of the Framework Decision does not contravene the principle of legality in criminal proceedings or the principle of equality, and, accordingly, is compatible with Article 6(2) EU.

(1) .

(2) - Montesquieu, L'esprit des lois', Book 12, Chapter II, Gallimard, La Pléiade, uvres complètes, Paris, 1951, Volume II, p. 432.

(3) - Belgium has accepted the jurisdiction of the Court of Justice to give preliminary rulings pursuant to that provision and has conferred on all courts and tribunals the power to submit questions to the Court (OJ 1999 C 120, p. 24).

(4) - OJ 2002 L 190, p. 1.

(5) - Case C-105/03 [2005] ECR I-5285.

(6) - OJ 2000 C 364, p. 1.

(7) - P 1/05. On that judgment, see Komarek, J., Pluralismo constitucional europeo tras la ampliacion - Un analisis de la jurisprudencia comunitaria del Tribunal Constitucional polaco -', Revista Española de Derecho Europeo , No 16, 2005, pp. 627 to 657.

(8) - That provision states: Polish citizens shall not be extradited'.

(9) - Article 16(2) of the Grundgesetz für die Bundesrepublik (Bonn Fundamental Law) provided that a German national could not be surrendered to another State. That provision was amended on 29 December 2000 to restrict the right in certain cases stipulated by the law

(10) - Judgment of 18 July 2005 (2 BvR 2236/04), which held that there had been a breach of the essential subject-matter of the fundamental right laid down in Article 16(2) of the Bonn Fundamental Law.

(11) - Europäisches Haftbefehlgesetz - EuHbG. The Polish Constitutional Court, relying on Article 190 of the Constitution, deferred the effects of the declaration of unconstitutionality for 18 months because the European arrest warrant is crucially important to the operation of the administration of justice, especially - in so far as it is a method of cooperation between the Member States to promote the fight against crime - for the purpose of improving security'. However, the judgment of the German Federal Constitutional Court took immediate effect. Therefore, the Criminal Chamber of the Audiencia Nacional (National High Court), which is the Spanish judicial authority with jurisdiction in the field (Article 6(3) of the Framework Decision in conjunction with Ley Organica (Basic Law) 2/2003 of 14 March supplementing the Law on the European arrest warrant and surrender, Boletín Oficial del Estado (BOE') No 65, 17 March 2003, p. 10244), set aside surrender proceedings commenced in response to warrants issued by Germany and converted them into extradition proceedings (order of 20 September 2005). A similar reaction may be seen in the judgment of the Arios Pagos (Greek Supreme Court of Cassation) of 20 December 2005 (Case 2483/2005).

(12) - Judgment of 7 November 2005 (Case 294/2005).

(13) - Case 66/04.

(14) - Alonso García, R., Justicia constitucional y Union Europea , Thomson-Civitas, Madrid,

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2005, p. 41, echoes that need.

(15) - That recommendation was made by the European Council held in Tampere on 15 and 16 October 1999 (point 35 of the Presidency Conclusions).

(16) - Those conventions are as follows: (a) the European Convention on Extradition of 13 December 1957, its additional protocols of 15 October 1975 and 17 March 1978, and the European Convention on the Suppression of Terrorism of 27 January 1977; (b) Title III, Chapter 4, of the Convention of 19 June 1990 implementing the Schengen Agreement on the gradual abolition of checks at common borders (OJ 2000 L 239, p. 19); (c) the Agreement between the 12 Member States of the European Communities on the simplification and modernisation of methods of transmitting extradition requests of 26 May 1989; (d) the Convention of 10 March 1995 on simplified extradition procedure between the Member States of the European Union; and (e) the Convention of 27 September 1996 relating to extradition between the Member States of the European Union. The last two were concluded pursuant to Article K.3(2)(c) of the Treaty on European Union, the immediate precursor of Article 34(2)(d) EU.

(17) - The Spanish version states: Nada de lo dispuesto en la presente Decision marco podra interpretarse en el sentido de que impide la entrega de una persona contra la que se ha dictado una orden de detencion europea cuando existan razones objetivas...' [which translates as Nothing in this Framework Decision may be interpreted as prohibiting the surrender of a person for whom a European arrest warrant has been issued when there are reasons to believe, on the basis of objective elements...']. However, the desire of the Community legislature was exactly the opposite, as is clear, inter alia, from the French (Rien dans la présente décision-cadre ne peut être interprété comme une interdiction de refuser la remise d'une personne qui fait l'objet d'un mandat d'arrêt européen s'il y a des raisons de croire, sur la base d'éléments objectifs...'), English (Nothing in this Framework Decision may be interpreted as prohibiting refusal to surrender a person for whom a European arrest warrant has been issued when there are reasons to believe, on the basis of objective elements...'), German (Keine Bestimmung des vorliegenden Rahmenbeschlusses darf in dem Sinne ausgelegt werden, dass sie es untersagt, die Übergabe einer Person, gegen die ein Europäischer Haftbefehl besteht, abzulehnen, wenn objektive Anhaltspunkte dafür vorliegen ...') and Dutch (Niets in dit kaderbesluit staat eraan in de weg dat de overlevering kan worden geweigerd van een persoon tegen wie een Europees aanhoudingsbevel is uitgevaardigd, indien er objectieve redenen bestaan om aan te nemen...') versions.

(18) - Point 24 of this Opinion.

(19) - Moniteur belge , 22 December 2003, Second edition, p. 60075.

(20) - I hope that other constitutional courts, which are reluctant to accept their responsibilities as Community courts, will follow the example and enter into a dialogue with the Court of Justice which is essential for the purpose of building a united Europe. In Reflexiones sobre el Tribunal Constitucional español como juez comunitario', a contribution to the round table entitled Los tribunales constitucionales ante el derecho comunitario' during the conference entitled La articulacion entre el derecho comunitario y los derechos nacionales: algunas zonas de friccion', which was organised by the General Council of the Spanish Judiciary and held in Murcia in November 2005, I criticised the reservations of the Spanish Constitutional Court, which remains on the fringes of Community discussions.

(21) - The European arrest warrant addresses a concern which is reflected in Article 2(1) EU, fourth indent, Article 29 EU, second paragraph, second indent, and Article 31(1)(a) and (b) EU. The essential feature of the system is that the courts of a Member State confer validity on warrants issued by the courts of other Member States, thereby helping to consolidate and implement judicial cooperation (Article 31(1)(a) EU). If the arrest warrant is regarded as a form of extradition

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(an opinion which I do not share as I will explain below), it comes under the power referred to in Article 31(1)(b) EU. In any event, the list in Article 31 EU is not exhaustive (it uses the expression shall include') and, therefore, a procedure which facilitates the arrest and surrender of individuals so that they may be prosecuted or serve a sentence improves the level of safety of citizens of the Union, which is fully compatible with Article 29 EU.

(22) - Rodríguez-Iglesias, G.C., has drawn attention to the role of the Court of Justice as a constitutional court in El poder judicial en la Union Europea', La Union Europea tras la Reforma , Universidad de Cantabria, 1998, p. 22 et seq. I myself have reiterated that view (Ruiz-Jarabo, D., La vinculacion a la jurisprudencia del Tribunal de Justicia de las Comunidades Europeas (I)', Estudios de Derecho Judicial , No 34, Consejo General del Poder Judicial, 2001, pp. 287 to 291).

(23) - Referring a question on validity provides an indirect means of reviewing the constitutionality of secondary law at the time of its application.

(24) - Order of the Court in Case C-9/98 Agostini [1998] ECR I-4261, paragraph 5, and order of the Court in Case C-422/98 Colonia Versicherung and Others [1999] ECR I-1279, paragraph 5.

(25) - The Court does not have jurisdiction to resolve the question as to how the unsuitability of the Framework Decision leads to the unconstitutionality of the implementing law. However, I would venture to suggest that to uphold the suitability of an international treaty would infringe Article 36, in conjunction with Articles 167 and 168, of the Grondwet.

(26) - Tomuschat, C., Ungereimtes - Zum Urteil des Bundesverfassungsgerichts vom 18. Juli 2005 über den Europäischen Haftbefehl', Europäische Zeitschrift für Grundrechte , 2005, p. 456.

(27) - Flore, D., L'accueil de la décision-cadre relative au mandat d'arrêt européen en Belgique', Le mandat d'arrêt européen , Bruylant, Brussels, 2005, p. 137. Conway, G., Judicial interpretation and the third pillar', European Journal of Crime, Criminal Law and Criminal Justice , 2005, p. 255, regards them as equivalent concepts.

(28) - Keijzer, N., The double criminality requirement', Handbook on the European Arrest Warrant , Tob Blekxtoon, Wouter van Ballegooij (editors), The Hague, 2005, p. 139.

(29) - Plachta, M., European arrest warrant: Revolution in extradition', Journal of Crime, Criminal Law and Criminal Justice , 2003, p. 193.

(30) - Legal ground 3 of the judgment cited in point 7.

(31) - Judgment referred to in footnote 10.

(32) - The preamble to Spanish Law 3/2003 of 14 March 2003 on the European arrest warrant and surrender procedures (BOE No 65, 17 March 2003, p. 10244) states that the Law introduces amendments to the traditional extradition procedure which are so substantial that it may be stated without reservations that that procedure has disappeared from the scope of judicial cooperation relations between the Member States of the European Union' (final paragraph).

(33) - Plachta, M., at p. 191 of the work cited in footnote 29, draws attention to the differences. Lagodny, O., Extradition without a granting procedure: the concept of surrender', Handbook on the European Arrest Warrant , Tob Blekxtoon, Wouter van Ballegooij (editors), The Hague, 2005, pp. 41 and 42, notes the judicial nature of the European arrest warrant. Jégouzo, I., Le mandat d'arrêt européen ou la première concrétisation de l'espace judiciaire européen', Gazette du Palais - Recueil , July-August 2004, p. 2311, maintains that the Framework Decision is innovative in that it replaces political powers with a strictly procedural mechanism.

(34) - The Bundesverfassungsgericht, in the judgment referred to above, unwittingly points out

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the differences when it states that the Framework Decision has transformed a political decision, exempt from legal controls, into a judicial decision (ground 88, in fine).

(35) - Since the judgments in Case 26/62 Van Gend & Loos [1963] ECR 1 and Case 6/64 Costa v ENEL [1964] ECR 585, it is generally accepted that Community law constitutes a special legal system which, with regard to the specific fields which comprise its body of law, takes precedence over the legal systems of the Member States.

(36) - Paragraph 36 of the judgment in Pupino states that irrespective of the degree of integration envisaged by the Treaty of Amsterdam in the process of creating an ever closer union among the peoples of Europe within the meaning of the second paragraph of Article 1 EU, it is perfectly comprehensible that the authors of the Treaty on European Union should have considered it useful to make provision, in the context of Title VI of that treaty, for recourse to legal instruments with effects similar to those provided for by the EC Treaty, in order to contribute effectively to the pursuit of the Union's objectives. Sarmiento, D., Un paso mas en la constitucionalizacion del tercer pilar de la Union Europea. La sentencia María Pupino y el efecto directo de la decisiones marco', Revista Electronica de Estudios Internacionales , No 10, 2005 (http:www.reei.org), maintains that that judgment of the Court opens the way for a gradual communitarisation' of the intergovernmental fields of the EU Treaty. Alonso García, R., at pp. 36 to 38 of the work cited in footnote 14, maintains that the third pillar is a tertium genus , which is strongly intergovernmental in nature, although there are also supranational elements present in the instruments governing participation and in the mechanisms for judicial control'.

(37) - The principle of conforming interpretation (paragraphs 34, 43 and 47) and the principle of loyal cooperation (paragraph 42).

(38) - Weigend, Th., Grundsätze und Probleme des deutschen Auslieferungsrechts', Juristische Schulung , 2000, p. 110, asserts that the fight against international crime gives rise to uncertainty about whether it is appropriate to remain wedded to inherited views which are derived from an unconditional preference for State sovereignty and from a distrust of foreign criminal justice systems. He adds that many States would renounce that traditional view in the case of other States to which they know they are linked by a common legal culture and by respect for human rights.

(39) - As long ago as 1880, the Institute of International Law, Oxford, took the view that, although reciprocity in regard to extradition may be required for political reasons, it is not a requirement of justice (Article 5 of the Resolution of 9 September 1880 (Institute Yearbook new abbreviated edition, Volume I, 1875-83, p. 733). I have taken the quotation from Schultz, H., Rapport général provisoire sur la question IV pour le X e Congrès international de droit pénal du 29 septembre au 5 octobre 1969 à Rome', Revue Internationale de Droit Pénal , 1968, No 3-4, p. 795.

(40) - No one would accord the status of extradition to legal assistance for the surrender of an accused between a court in the Land of Bavaria and a court in the Land of Lower Saxony, or between a court in the autonomous community of Catalonia and a court in the autonomous community of Andalusia, from which it follows that assistance should not be regarded as extradition where it takes place in the context of the European Union. It might be countered that, just as the courts of one country (Germany or Spain) apply the same criminal law irrespective of where their seat is, so those of different Member States are bound by different criminal codes even though they share identical principles and values. However, that assertion is not entirely correct for the following reasons. On the one hand, there are harmonised fields within the Union while, on the other hand, there are basic criminal provisions (for example, those which create environmental offences, referred in Article 2(2) of the Framework Decision) which are implemented by technical measures whose adoption is the responsibility of the Länder or the autonomous communities, thereby leading

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to a number of differences in the categorisation of a particular offence in the same Member State.

(41) - The Tampere European Council made the principle of the mutual recognition of judicial decisions into the cornerstone of judicial cooperation within the Union (point 33 of the Presidency Conclusions). That principle is examined by Sanz Moran, A.J., La orden europea de detencion y entrega: algunas consideraciones de caracter jurídico-material', Cooperacion Judicial Penal en la Union Europea: la orden europea de detencion y entrega , Lex Nova, Valladolid, 2005, pp. 81 to 90, which sets out the arguments of opponents of the principle.

(42) - The Framework Decision is part of a process of development which began with the European Convention on Extradition of 1957 (Article 28(3)) and continued with the European Convention on Extradition of 1996 (Article 1(2)), paving the way for provisions more favourable to cooperation, contained in uniform or reciprocal laws which lay down a system for execution in the territory of a State of arrest warrants issued by other States. One example of that type of instrument is the treaty between the Kingdom of Spain and the Italian Republic for the prosecution of serious offences by means of the abolition of extradition in an area of common justice, done at Rome on 28 November 2000, which never entered into force because the procedure had begun which led to the adoption of the Framework Decision, described by the Council of the European Union as a uniform law within the meaning of Article 28(3) of the 1957 convention (Conclusions on the application of the European arrest warrant and its relationship with the Council of Europe legal instruments', Brussels, 11 September 2003, doc. 12413/03).

(43) - For example, in Spain, the Framework Decision has affected Articles 273 to 278 of Basic Law 6/1985 of 1 July 1985 on the judiciary and Articles 183 to 196 of the Law on criminal procedure of 14 September 1882.

(44) - As the United Kingdom and France have pointed out (paragraphs 28 to 32 and 10 to 13 of their statements in intervention, respectively), in accordance with Articles 94 EC, 95 EC and 308 EC, any new act must be adopted pursuant to Article 308 EC, while the harmonisation of existing provisions and the coordination of the basic provisions of future laws must take place pursuant to Articles 94 EC and 95 EC. Thus, in Opinion 1/94 ([1994] ECR I-5267), the Court explained that the Community is competent, in the field of intellectual property, to harmonise national laws pursuant to Articles 94 EC and 95 EC and may use Article 308 EC as the basis for creating new rights superimposed on national rights (point 59). That applied to the creation of a supplementary protection certificate for medicinal products (Council Regulation (EEC) No 1768/92 of 18 June 1992 (OJ 1992 L 182, p. 1), as the Court pointed out in the judgment in Case C-350/92 Spain v Council [1995] ECR I-1985, paragraph 23. In Case C377/98 Netherlands v Parliament and Council [2001] ECR I7079, the Court noted that Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions (OJ 1998 L 213, p. 13) comes under the first category because it does not create a Community-based right and instead is based on national concepts, such as patents, which are issued in accordance with internal procedures, notwithstanding the fact that the inventions covered were not previously patentable in certain Member States and that the directive makes certain clarifications and provides for derogations as regards the scope of the protection (paragraph 25).

(45) - Simon, D., Le système juridique communautaire , Presses Universitaires de France, Second edition, November 1998, p. 238, calls them atypical measures'. For example, the Council common position of 31 January 2000 on the proposed protocol against the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition, supplementing the United Nations Convention against transnational organised crime (OJ 2000 L 37, p. 1), and Joint Action 96/443/JHA of 15 July 1996, adopted by the Council on the basis of Article K.3 of the Treaty on European Union, concerning action to combat racism and xenophobia (OJ 1996 L 185, p. 5).

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(46) - Brechmann, W., Kommentar zu EU-Vertrag und EG-Vertrag , Calliess/Ruffert, Second edition, 2002, paragraph 34.6, p. 267.

(47) - Professors García de Enterría, E., and Fernandez, T.R. explain the principle in Curso de Derecho Administrativo , Volume I, Civitas, 10th edition, Madrid, 2000, pp. 247 and 248.

(48) - I feel obliged to mention the claim to the effect that the practice of adopting measures by means of framework decisions is undemocratic, which has been put forward by the applicant association in the main proceedings on the ground that, unlike international agreements, framework decisions do not require any additional action on the part of national legislatures. First of all, framework decisions, and the manner in which they are enacted, are governed by a treaty which has been freely adopted by the Member States under the decision-making leadership of their respective governments. Furthermore, as I have just stated, the European Parliament is consulted during the procedure for the adoption of framework decisions and its national counterparts have the right to draw up restrictions and have jurisdiction to adopt domestic measures applying and implementing framework decisions if their constitutional system requires that they must have the rank of a law.

(49) - OJ 1972 L 299, p. 32; consolidated version in OJ 1998 C 27, p. 1.

(50) - OJ 2001 L 12, p. 1. Other examples are Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (OJ 2001 L 174, p. 1) (Article 21); Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (OJ 2000 L 160, p. 1) (Article 44); and Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (OJ 2000 L 160, p. 37) (Article 20).

(51) - The close connection between the two principles is clear in Article 5 EC, which provides that the Community may take action only where the objectives of the proposed action cannot be achieved by the Member States unilaterally (subsidiarity) and restricts the action which the Community may take to that which is strictly necessary (proportionality).

(52) - The Commission notes (paragraph 22 of its observations) that the conventions concluded pursuant to the Treaty of Maastricht did not enter into force before the Treaty of Amsterdam, because they had not been ratified by a sufficient number of Member States. On the date of adoption of the Framework Decision, those conventions had been ratified by 12 of the 15 Member States existing at the time.

(53) - The Council only recommends its adoption (Article 34(2)(d) EU).

(54) - Introduction to the Presidency Conclusions of the Tampere European Council, 15 and 16 October 1999.

(55) - COM(2001) 522 final/2, p. 4, point 4.3.

(56) - The principle of effectiveness also applies to the jurisdiction of the Member States with regard to procedural matters, by requiring that their national legal systems do not render excessively difficult or impossible the exercise of rights conferred by Community law. Case 33/76 Rewe [1976] ECR 1989 heads a long line of cases in which the Court made a ruling to that effect. Among the most recent are Case C-255/00 Grundig Italiana [2002] ECR I8003 and Case C30/02 Recheio-Cash & Carry [2004] ECR I6051.

(57) - I have already argued in this Opinion that the principle of effectiveness is the basis for the judgment in Pupino , as stated in paragraphs 38 and 42 of that judgment.

(58) - The United Kingdom Government describes the Framework Decision as indispensable' (paragraph 37, in fine , of its statement in intervention).

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(59) - The principle of effectiveness is the inspiration for Article 31(2) of the Framework Decision which provides that the Member States may continue to apply bilateral or multilateral agreements the provisions of which extend beyond those of the Framework Decision and help to simplify or facilitate the procedures for surrender.

(60) - Vennemann, N., The European arrest warrant and its human rights implications', Zeitschrift für ausländisches öffentliches Recht und Völkerrecht , 2003, pp. 113 and 114.

(61) - In the judgment in Pupino , the Court noted that framework decisions must be interpreted in accordance with the Rome Convention (paragraph 59).

(62) - The case of Ms Defrenne is symbolic. The judgments in Case 80/70 Defrenne I [1971] ECR 445, Case 43/75 Defrenne II [1976] ECR 455, and Case 149/77 Defrenne III [1978] ECR 1365 mark the progress of the case through the Court.

(63) - Judgments in Case 31/59 Acciaieria e Tubificio di Brescia v High Authority [1960] ECR 71; Case 136/79 National Panasonic v Commission [1980] ECR 2033; Joined Cases 46/87 and 227/87 Hoechst [1989] ECR 2859; and Case C-94/00 Roquette Frères [2002] ECR I-9011.

(64) - Judgments in Case C-260/89 ERT [1991] ECR I-2925; Case C-112/00 Schmidberger [2003] ECR I-5659; and Case C-101/01 Lindqvist [2003] ECR I-12971. On the freedom of expression of Community officials, see the judgment in Case C-274/99 P Connolly v Commission [2001] ECR I1611.

(65) - Judgments in Case 14/86 Pretore di Salo [1987] ECR 2545; Case 80/86 Kolpinghuis Nijmegen [1987] ECR 3969; Case C168/95 Arcaro [1996] ECR I-4705; and Joined Cases C-74/95 and C129/95 Criminal proceedings against X [1996] ECR I-6609.

(66) - That approach first appears in the judgment in Case 4/73 Nold v Commission [1974] ECR 491, paragraph 13.

(67) - Rubio L lorente, F., examined that process in detail in Mostrar los derechos sin destruir la Union', La estructura constitucional de la Union Europea , Civitas, Madrid, 2002, pp. 113 to 150.

(68) - Pescatore P., Los principios generales del derecho como fuentes del derecho comunitario', Noticias C.E.E. , 1988, No 40, pp. 39 to 54.

(69) - In Nold v Commission , the Court held that, in safeguarding these rights [fundamental rights], the Court is bound to draw inspiration from constitutional traditions common to the Member States, and it cannot therefore uphold measures which are incompatible with fundamental rights recognised and protected by the constitutions of those States' (paragraph 13). Subsequently, in the judgment in Case 11/70 Internationale Handelsgesellschaft [1970] ECR 1125, the Court stated that the protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community' (paragraph 4).

(70) - In Nold v Commission , international treaties for the protection of human rights were regarded as having limited effect and as being capable merely of supplying guidelines which should be followed within the framework of Community law' (paragraph 13). However, a few years later, such treaties were expressly relied on (judgment in Case C-36/75 Rutili [1975] ECR 1219, paragraph 32) and emerged as deciding factors (judgment in Case 222/84 Johnston [1986] ECR 1651, paragraph 18 et seq.).

(71) - Judgment in Criminal proceedings against X , paragraph 25. See also the judgment in ERT , paragraph 41, and the judgments to which it refers. The Court made similar observations in point

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33 of Opinion 2/94 [1996] ECR I-1759, which was delivered pursuant to Article 228 of the EC Treaty (now, after amendment, Article 300 EC).

(72) - The situation would change in the event of the adoption and entry into force of the Treaty establishing a Constitution for Europe, Part II of which incorporates the Charter.

(73) - Díez-Picazo, J.M., Carta de derechos fundamentales de la Union Europea', Constitucionalismo de la Union Europea , Civitas, Madrid, 2002, pp. 21 to 42, in particular, p. 39.

(74) - This Charter reaffirms... the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court of Justice of the European Communities and of the European Court of Human Rights.'

(75) - Although the order for reference makes no mention of it, attention must be drawn to the absence of a universally accepted right not to be extradited. Some States, such as Germany, Cyprus, Finland and Poland, grant that right to their citizens but the legal systems of many other States do not afford that fundamental protection to their citizens and it therefore remains on the fringes of the common constitutional traditions. Austria, Portugal and Slovenia have amended their constitutions to permit the surrender of their nationals.

(76) - Alonso García, R., Las clausulas horizontales de la Carta de los derechos fundamentales de la Union Europea', Encrucijada constitucional de la Union Europea , Civitas, Madrid, 2002, p. 151, maintains that the fact that the Charter of Fundamental Rights does not have binding force does not negate its effectiveness, as evidenced by the role played by the Rome Convention which, although it is not legally binding on the Community, has acted as a fundamental source of inspiration for the Court in the interpretation of fundamental rights. Carrillo Salcedo, J.A., Notas sobre el significado político y jurídico de la Carta de derechos fundamentales de la Union Europea', Revista de derecho comunitario , 2001, p. 7, asserts that the Charter of Fundamental Rights enables criteria to be set for assessing the lawfulness of acts of the public authorities of the Union. Rodríguez Bereijo, A., El valor jurídico de la Carta de los derechos fundamentales de la Union Europea después del Tratado de Niza', Encrucijada ..., p. 220, paraphrasing former Member of the Commission Antonio Vittorino, predicts that, through its interpretation by the Court, the Charter will become binding as a summary and an expression of the general principles of the Community law.

(77) - In the Opinion in Case C173/99 BECTU [2001] ECR I-4881, Advocate General Tizzano argues that, notwithstanding that it has no binding force, in proceedings concerned with the nature and scope of a fundamental right, the relevant statements of the Charter cannot be ignored; in particular, we cannot ignore its clear purpose of serving, where its provisions so allow, as a substantive point of reference for all those involved... in the Community context' (point 28). Some months later, Advocate General Léger proposed in the Opinion in Case C-353/99 P Council v Hautala [2001] ECR I-9565 that the Charter was intended to constitute a privileged instrument for identifying fundamental rights (point 83), because it enshrines certain values which have in common the fact of being unanimously shared by the Member States... The Charter has undeniably placed the rights which form its subject-matter at the highest level of values common to the Member States' (point 80). In my Opinion in Case C-208/00 Überseering [2002] ECR I-9919, I accept that, while the Charter does not constitute binding law in the strict sense, it provides an extremely valuable source for the common denominator of the fundamental legal values of the Member States, from which the general principles of Community law are in turn derived (point 59). Other Advocates General have also taken up the cause.

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(78) - In Case T-54/99 max.mobil v Commission [2002] ECR II-313, the Court of First Instance applied Article 47 of the Charter by an indirect route, stating that judicial review of the activities of the Commission, and, accordingly, the right to effective legal protection, is one of the general principles that are observed in a State governed by the rule of law and are common to the constitutional traditions of the Member States' (paragraph 57). The same approach was taken in the judgments in Case T-177/01 Jégo-Quéré v Commission [2002] ECR II2365, paragraphs 42 and 47; Joined Cases T-377/00, T379/00, T-380/00, T-260/01 and T-272/01 Philip Morris and Others v Commission [2003] ECR II-1, paragraph 122; and Joined Cases T116/01 and T118/01 P & O European Ferries (Vizcaya) and Another v Commission [2003] ECR II-2957.

(79) - In the judgment in Case C-245/01 RTL Television [2003] ECR I-12489, the Court referred in passing to Article 11(2) of the Charter, stating that it enshrines the right to freedom of opinion (paragraph 38). In the judgment in Case C-347/03 Regione autonoma Friuli-Venezia Giulia and ERSA [2005] ECR I-3785, the Court made a similar reference to Article 17 of the Charter (paragraph 118).

(80) - Judgment in Case C-540/03 [2006] ECR I-0000.

(81) - In the judgment of 29 May 1974 in Solange I (2 BvL 52/71), the Bundesverfassungsgericht called into question the competence of the Community institutions to protect fundamental rights, while upholding its jurisdiction where the protection concerned was not equivalent to protection at national level. That judgment resulted in a salutary lesson which was soon reflected in the pages of the European Court Reports to the extent that, in the judgment of 22 October 1986 in Solange II (2 BvR 197/83), the German Constitutional Court stated that the Communities had a system of protection comparable to the Bonn Fundamental Law and announced that in the future it would refrain from reviewing secondary provisions of Community law, although it asserted its opposition to the fundamental rights (Rodríguez Iglesias, G.C. and Woelker, U., Derecho comunitario, derechos fundamentales y control de constitucionalidad (La decision del Tribunal Constitucional Federal aleman de 22 de octubre de 1986)', Revista de Instituciones Europeas , 1987, Volume 14/1987, No 3, pp. 667 to 685). The judgment of the Trybuna Konstytucyjny of 11 May 2005, concerning the Accession Treaty of Poland (Case K 18/04), and the more recent judgment of the Czech Ustavní soud of 8 March 2006, cited above, are in the same spirit as the Solange II judgment. However, I fear that the judgment of the Bundesverfassungsgericht concerning the German law transposing the Framework Decision is inspired by that old mistrust and is a reaction to the restrictions on judicial control in the third pillar (the optional nature of proceedings for a preliminary ruling, the limitation of legal standing to bring actions for annulment, the absence of an action for failure to fulfil obligations). It is rather paradoxical that, in an area where the Union has an increased influence on the fundamental rights of individuals, the powers of the Court have been somewhat restricted, to quote from Alonso García, R. and Sarmiento Ramírez-Escudero, D., Los efectos colaterales de la Convencion sobre el futuro de Europa en la arquitectura judicial de la Union: hacia una jurisdiccion auténticamente constitucional europea?', Revista de Estudios Políticos , No 119, January-March 2003, p. 136.

(82) - Capotosti, P.A., Quelles perspectives pour les rapports entre la Cour constitutionnelle et la Cour de justice des Communautés européennes?', a report submitted to the Conference on Cooperation between the Court of Justice and National Courts, held in Luxembourg on 3 December 2002 on the occasion of the 50th anniversary of the Court, warns of multilayered constitutionalism' (p. 6).

(83) - Paragraph 3 authorises the Council to extend the list by unanimous decision.

(84) - That is the case in Belgium, since Article 5(1) of the Law of 19 December 2003, referred to above, provides that execution of a European arrest warrant must be refused if the acts in question do not constitute a criminal offence under Belgian law.

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(85) - Spanish Law 3/2003 of 14 March 2003, cited in footnote 32, opts for that alternative and leaves the decision in the hands of the courts (Article 12(2)(a) in conjunction with Article 9(2)).

(86) - In fact, it is not the double criminality requirement which is set aside but rather the requirement of verification, because the nature of the acts listed - such as murder, grievous bodily injury, kidnapping, illegal restraint, hostage-taking, organised or armed robbery, and rape - is such that they are classed as offences in all the Member States. Another difficulty, which I will deal with below, concerns the definition of the offences by the legal systems of each Member State (point 96 et seq.). In any case, the list in Article 2(2) of the Framework Decision contains some acts for which there is, or is soon to be, a harmonised definition of the offence, and other acts which are certainly punished in all the Member States. In that connection, see the Council resolution of 21 December 1998 on the prevention of organised crime with reference to the establishment of a comprehensive strategy for combating it (OJ 1998 C 408, p. 1), and the United Nations Convention against Transnational Organised Crime of 15 November 2000, and the protocols thereto. On combating terrorism, see Framework Decision 2002/475/JHA of 13 June 2002 (OJ 2002 L 164, p. 3), and on combating trafficking in human beings, see Framework Decision 2002/629/JHA of 19 July 2002 (OJ 2002 L 203, p. 1). On combating the sexual exploitation of children and child pornography, see Framework Decision 2004/68/JHA of 22 December 2003 (OJ 2004 L 13, p. 44). On the illicit traffic in narcotic drugs and psychotropic substances, see the United Nations Convention of 20 December 1988. On financial crime, see Framework Decision 2000/383/JHA of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro (OJ 2000 L 140, p. 1), amended by Framework Decision 2001/888/JHA of 6 December 2001 (OJ 2001 L 329, p. 3); Framework Decision 2001/413/JHA of 28 May 2001 on combating fraud and counterfeiting of non-cash means of payment (OJ 2001 L 149, p. 1); and Framework Decision 2001/500/JHA of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime (OJ 2001 L 182, p. 1). On corruption, see the Convention drawn up on the basis of Article K.3(2)(c) of the Treaty on European Union on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union (OJ 1997 C 195, p. 2), and Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector (OJ 2003 L 192, p. 54). On computer crime, see Framework Decision 2005/222/JHA of 24 February 2005 on attacks against information systems (OJ 2005 L 69, p. 67). On the protection of the environment in the European Union through criminal law, see Council Framework Decision 2003/80/JHA of 27 January 2003 (OJ 2003 L 29, p. 55), which was annulled by the Court in Case C-176/03 Commission v Council [2005] ECR I-7879, on the ground that legislation on that field must be enacted within the Community pillar by means of a directive. On the protection of victims in cases of illegal entry, see Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence (OJ 2002 L 328, p. 1). Lastly, on racism and xenophobia, see the joint action of 15 July 1996, cited in footnote 45.

(87) - The applicable provision of the Charter of Fundamental Rights of the European Union is Article 20, which provides: Everyone is equal before the law.' Article 14 of the Rome Convention enshrines the principle of equality with regard to the enjoyment of the rights and freedoms it proclaims, while Protocol No 12 of 4 November 2000, which entered into force on 1 April 2005, contains a general prohibition of discrimination.

(88) - Judgments of the Court of Justice in Joined Cases 117/76 and 16/77 Ruckdeschel and Others [1977] ECR 1753, paragraph 7; Case 139/77 Denkavit [1978] ECR 1317, paragraph 15; and Case C110/03 Belgium v Commission [2005] ECR I-2801. Judgments of the European Court of Human Rights in Fretté v. France (26 February 2002, Reports of Judgments and Decisions 2002-I), ° 34, and Pla and Puncernau v. Andorra (13 July 2004, Reports of Judgments and Decisions 2004-VIII),

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º 61. Judgments of the Spanish Constitutional Court 75/1983 (BOE Supplement No 197, 18 August 1983), third legal ground; 46/1999 (BOE Supplement No 100, 27 April 1999), second legal ground; and 39/2002 (BOE Supplement No 63, 14 March 2002), fourth legal ground.

(89) - It includes the offences specifically referred to in Article 29 EU, the offences for which jurisdiction is assigned to Europol in the annex to the Council Act of 26 July 1995 drawing up the Convention on the Establishment of a European Police Office (OJ 1995 C 316, p. 2), and offences which there is a general duty to prosecute under international law.

(90) - A number of writers take the view that Article 2(2) of the Framework Decision reflects the consensus of the Member States on criminal matters (Von Bubnoff, E., Institutionelle Kriminalitätsbekämpfung in der EU - Schritte auf dem Weg zu einem europäischen Ermittlungs- und Verfolgungsraum', Zeitschrift für europarechtliche Studien , 2002, p. 226; Combeaud, S., Premier bilan du mandat d'arrêt européen', Revue du Marché commun et de l'Union européenne , No 495, 2006, p. 116; and Hecker, B., Europäisches Strafrecht , Berlin, 2005, p. 433).

(91) - The cases in question are extraordinary because the double test used (the nature of the offence and the severity of the penalty) normally precludes a Member State from being required to deal with an arrest warrant for an act which is not prosecuted under its own legal system. I find it difficult to imagine an act which is punished in one Member State by a sentence or detention order of a maximum of at least three years but which is lawful in another State.

(92) - The Finnish Government points out (paragraph 49 of its observations) that the principle of territoriality governs criminal matters, so that a foreign national guilty of an offence perpetrated in Finland cannot evade liability by claiming that the act with which he is charged is not punished in his country of origin. With regard to the extraterritorial exercise of the right to punish, the Framework Decision provides (Article 4(7)) that a Member State may refuse to execute a European arrest warrant relating to offences committed in whole or in part in its jurisdiction, and even outside its jurisdiction, if its legislation does not provide for prosecution of such offences.

(93) - Article 8 of the Framework Decision sets out in detail the information which an arrest warrant must contain, and Section (e) in the form provided for is used for the description of the offence and its legal classification. Any particular required by the court in the executing Member State is dealt with by direct contact with the issuing court.

(94) - Rolland, P., La Convention européenne des droits de l'homme (commentaire article par article)', Economica , Second edition, Paris, 1999, p. 293, has described it as the foundation of European legal civilisation.

(95) - Judgments 42/1987 (BOE Supplement No 107, 5 May 1987), second legal ground; 22/1990 (BOE Supplement No 53, 2 March 1990), seventh legal ground; and 276/2000 (BOE Supplement No 299, 14 December 2000), sixth legal ground.

(96) - The principle of legality was developed in the criminal and fiscal fields in the Lower Middle Ages, as a restriction on the powers of the sovereign. In Spain, the communities, towns and cities made the acceptance of subsidies in favour of the crown and the punishment of certain acts conditional on the approval of representative assemblies (cortes). The evolution of a system of negotiation between the monarchy and political society, which consolidated a hierarchical political organisation and prevented further development of the powers of the monarch, is a constant theme, albeit with important differences and nuances, in the formation of the kingdoms of medieval Spain. In Aragon and Navarre, the cortes gained legislative and financial supervisory powers between the end of the 13th century and the middle of the 14th century (Ladero Quesada, M.A., España: reinos y señoríos medievales', España. Reflexiones sobre el ser de España , Real Academia de la Historia, Second edition, Madrid, 1998, pp. 95 to 129). In Castille, the same institution,

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which was at its peak in the 14th and 15th centuries, always had a lower profile and, although it played a crucial role in political life, its powers were more limited (Valdeon, J., Los reinos cristianos a fines de la Edad Media', Historia de España , Historia 16, Madrid, 1986, pp. 391 to 455, in particular pp. 414 to 423).

(97) - Advocate General Kokott put forward a similar view in point 41, in fine , of the Opinion in Pupino.

(98) - According to the judgment in Criminal proceedings against X , the principle of legality precludes bringing criminal proceedings in respect of conduct not clearly defined as culpable by law' (paragraph 25). In the Opinion in the same case, I argued that that principle gives all persons the legal certainty that their conduct will lead to criminal liability only if it contravenes a national provision which defined it beforehand as an offence of that kind' (point 53).

(99) - That may even include taking appropriate legal advice (judgment in Joined Cases C-189/02/ P, C-202/02 P, C205/02 P to C-208/02 P and C-213/02 P Dansk Rørindustri and Others [2005] ECR I-5425, paragraph 219.

(100) - That aspect of the principle of legality in criminal proceedings was upheld in the judgments of the European Court of Human Rights in Kokkinakis v. Greece (25 May 1993, Case 14307/77, A 260-A), º 52; S.W. v. United Kingdom (22 November 1995, Case 20166/92, A 335-B), º 35; and Cases 34044/96, 35532/97 and 44801/98 (22 March 2001, Reports of Judgments and Decisions 2001-II), º 50. It has also been accepted by the Spanish Constitutional Court; see for example judgment 75/1984 (BOE Supplement No 181, 30 July 1984), fifth legal ground, and judgment 95/1992 (BOE Supplement No 169, 15 July 1992), third legal ground.

(101) - The Spanish Constitutional Court held that that individual protection excludes the judicial creation of law and unforeseeable expressions which are incompatible with the wording of provisions or unsuitable with respect to the rights they seek to protect (judgment 25/1999 (BOE Supplement No 89, 14 April 1989), third legal ground), so that the definition of a criminal offence must respect the terms of the provision, the interpretational guidelines which make up the constitutional system, and the minimum criteria imposed by legal logic, in addition to the methods of reasoning adopted by the Community (judgment 42/1999 (BOE Supplement No 100, 27 April 1999), fourth legal ground).

(102) - Academic writers argue that Article 2(2) does not contain offences because the list does not describe the characteristic features of each punishable act (Flore, D., Le mandat d'arrêt européen: première mise en oeuvre d'un nouveau paradigme de la Justice pénale européenne', Journal des Tribunaux , 2002, p. 276, and Unger, E.M., Schutzlos ausgeliefert? - Der Europäische Haftbefehl , Frankfurt am Main, 2005, p. 100). In the event of an argument to the contrary, it must be recalled that framework decisions do not have direct effect (Article 32(2)(b) EU), without prejudice to the principle that national provisions must be interpreted in such a way as to ensure the greatest possible effectiveness of Community law, as stated in the judgment in Pupino (paragraphs 43 to 47). In that case, provisions of national law which transpose the Framework Decision must comply with the principle of legality.

(103) - Judgments in X v. Netherlands (6 July 1976, Case 7512/76, DR 6, p. 184); Polley v. Belgium (6 March 1991,Case 12192/86); and Bakhtiar v. Switzerland (18 January 1996, Case 27292/95). The Spanish Constitutional Court has applied the same criterion (judgments 102/1997 (BOE Supplement No 137, 9 June 1997), sixth legal ground, and 32/2003 (BOE Supplement No 55, 5 March 2003), second legal ground).

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JURCIT	11997E005 : N 61 11997E141 : N 73 11997M001 : N 9 11997M002 : N 49 61 67 11997M002-T4 : N 93 11997M006 : N 18 75 77 11997M006-P1 : N 9 70 11997M006-P2 : N 5 10 28 70 107 11997M002-P1T4 : N 11 11997M012 : N 54 11997M029 : N 49 93 11997M031 : N 12 11997M031-P1 : N 13 16 11997M031-P1LA : N 16 11997M031-P1LB : N 16 38 11997M031-P2 : N 16 11997M032 : N 12 11997M032-P2 : N 52 11997M034-P1 : N 26 11997M034-P2 : N 58 11997M034-P2LA : N 14 11997M034-P2LB : N 3 14 16 28 33 68 11997M034-P2LC : N 14 55 11997M034-P2LD : N 15 11997M037 : N 54 11997M039-P1 : N 58 11997M046-LD : N 10 75 77 32001R0044-A68 : N 59 32002F0584 : N 2 16 - 26 28 30 32002F0584-A01 : N 20 32002F0584-A01P1 : N 19 49 32002F0584-A01P2 : N 17 32002F0584-A01P3 : N 18 70 32002F0584-A02P1 : N 21 84 106 32002F0584-A02P2 : N 22 28 83 - 107 32002F0584-A02P4 : N 21 84 106 32002F0584-A03 : N 20 23 46

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32002F0584-A11P2 : N 24
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32002F0584-C5 : N 17 46
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61959J0031 : N 73
61970J0080 : N 73
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SUB Justice and home affairs

AUTLANG Spanish

NATIONA Belgium

PROCEDU Reference for a preliminary ruling

ADVGEN Ruiz-Jarabo Colomer

JUDGRAP Cunha Rodrigues

DATES of document: 12/09/2006
of application: 29/07/2005

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Judgment of the Court (Second Chamber)
of 15 February 2007
Eirini Lechouritou and Others v Dimosio tis Omospondiakis Dimokratias tis Germanias. Reference for a preliminary ruling: Efeteio Patron - Greece. Brussels Convention - First sentence of the first paragraph of Article 1 - Scope - Civil and commercial matters - Meaning - Action for compensation brought in a Contracting State, by the successors of the victims of war massacres, against another Contracting State on account of acts perpetrated by its armed forces. Case C-292/05.

Convention on Jurisdiction and the Enforcement of Judgments - Scope - Civil and commercial matters - Meaning of civil and commercial matters'

(Convention of 27 September 1968, Art. 1, first para., first sentence)

On a proper construction of the first sentence of the first paragraph of Article 1 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended by the 1978, 1982 and 1989 Accession Conventions, civil matters' within the meaning of that provision does not cover a legal action brought by natural persons in a Contracting State against another Contracting State for compensation in respect of the loss or damage suffered by the successors of the victims of acts perpetrated by armed forces in the course of warfare in the territory of the first State.

The term Civil and commercial matters' does not cover disputes resulting from the exercise of public powers by one of the parties to the case, as it exercises powers falling outside the scope of the ordinary legal rules applicable to relationships between private individuals and there is all the more reason for such an assessment as regards a legal action for compensation deriving from operations conducted by armed forces, as such operations are one of the characteristic emanations of State sovereignty, in particular inasmuch as they are decided upon in a unilateral and binding manner by the competent public authorities and appear as inextricably linked to States' foreign and defence policy.

The question as to whether or not the acts carried out in the exercise of public powers that constitute the basis for such proceedings are lawful concerns the nature of those acts, but not the field within which they fall. Since that field as such must be regarded as not falling within the scope of the Convention, the unlawfulness of such acts cannot justify a different interpretation.

(see paras 34-37, 41-44, operative part)

In Case C-292/05,

REFERENCE for a preliminary ruling under the Protocol of 3 June 1971 on the interpretation by the Court of Justice of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, from the Efetio Patron (Greece), made by decision of 8 June 2005, received at the Court on 20 July 2005, in the proceedings

Irini Lechouritou,

Vasilios Karkoulias,

Georgios Pavlopoulos,

Panagiotis Bratsikas,

Dimitrios Sotiropoulos,

Georgios Dimopoulos

v

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Dimosio tis Omospondiakis Dimokratias tis Germanias,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, R. Schintgen (Rapporteur), J. Kluka, R. Silva de Lapuerta and J. Makarczyk, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 28 September 2006,

after considering the observations submitted on behalf of:

- Ms Lechouritou, Mr Karkoulias, Mr Pavlopoulos, Mr Bratsikas, Mr Sotiropoulos and Mr Dimopoulos, by I. Stamoulis, dikigoros, and J. Lau, Rechtsanwalt,

- the German Government, by R. Wagner, acting as Agent, assisted by Professor B. Heß,

- the Italian Government, by I.M. Braguglia, acting as Agent, assisted by G. Aiello, avvocato dello Stato,

- the Netherlands Government, by H.G. Sevenster and M. de Grave, acting as Agents,

- the Polish Government, by T. Nowakowski, acting as Agent,

- the Commission of the European Communities, by M. Condou-Durande and A.-M. Rouchaud-Joet, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 8 November 2006,

gives the following

Judgment

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

On a proper construction of the first sentence of the first paragraph of Article 1 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended by the Convention of 9 October 1978 on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland, by the Convention of 25 October 1982 on the Accession of the Hellenic Republic and by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic, civil matters' within the meaning of that provision does not cover a legal action brought by natural persons in a Contracting State against another Contracting State for compensation in respect of the loss or damage suffered by the successors of the victims of acts perpetrated by armed forces in the course of warfare in the territory of the first State.

1. This reference for a preliminary ruling relates to the interpretation of Article 1 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (OJ 1978 L 304, p. 36), as amended by the Convention of 9 October 1978 on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland (OJ 1978 L 304, p. 1, and - amended version - p. 77), by the Convention of 25 October 1982 on the Accession of the Hellenic Republic (OJ 1982 L 388, p. 1) and by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic (OJ 1989 L 285, p. 1) (the Brussels Convention').

2. The reference was made in proceedings between Ms Lechouritou, Mr Karkoulias, Mr Pavlopoulos,

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Mr Bratsikas, Mr Sotiropoulos and Mr Dimopoulos, Greek nationals resident in Greece who are the plaintiffs in those proceedings, and the Federal Republic of Germany concerning compensation for the financial loss and non-material damage which the plaintiffs have suffered on account of acts perpetrated by the German armed forces and of which their parents were victims at the time of the occupation of Greece during the Second World War.

Legal context

3. Article 1 of the Brussels Convention, which constitutes Title I thereof, headed Scope', provides:

This Convention shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters.

The Convention shall not apply to:

1. the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession;

2. bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings;

3. social security;

4. arbitration.'

4. The rules on jurisdiction laid down by the Brussels Convention are set out in Articles 2 to 24, which constitute Title II of the Convention.

5. Article 2, which forms part of Section 1 (General provisions') of Title II, sets out in its first paragraph the basic rule of the Brussels Convention in the following terms:

Subject to the provisions of this Convention, persons domiciled in a Contracting State shall, whatever their nationality, be sued in the courts of that State.'

6. The first paragraph of Article 3 of the Brussels Convention, which appears in the same section, is worded as follows:

Persons domiciled in a Contracting State may be sued in the courts of another Contracting State only by virtue of the rules set out in Sections 2 to 6 of this Title.'

7. Articles 5 to 18 of the Brussels Convention, which form Sections 2 to 6 of Title II, lay down rules governing special, mandatory or exclusive jurisdiction.

8. Article 5, which appears in Section 2 (Special jurisdiction') of Title II, provides:

A person domiciled in a Contracting State may, in another Contracting State, be sued:

...

3. in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred;

4. as regards a civil claim for damages or restitution which is based on an act giving rise to criminal proceedings, in the court seised of those proceedings, to the extent that that court has jurisdiction under its own law to entertain civil proceedings;

...'.

The main proceedings and the questions referred for a preliminary ruling

9. It is apparent from the documents sent to the Court by the referring court that the main proceedings have their origins in the massacre of civilians by soldiers in the German armed forces which was

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perpetrated on 13 December 1943 and of which 676 inhabitants of the municipality of Kalavrita (Greece) were victims.

10. In 1995 the plaintiffs in the main proceedings brought an action before the Polimeles Protodikio Kalavriton (Court of First Instance, Kalavrita) for compensation from the Federal Republic of Germany in respect of the financial loss, non-material damage and mental anguish caused to them by the acts perpetrated by the German armed forces.

11. In 1998 the Polimeles Protodikio Kalavriton, before which the Federal Republic of Germany did not enter an appearance, dismissed the action on the ground that the Greek courts lacked jurisdiction to hear it because the defendant State, which was a sovereign State, enjoyed the privilege of immunity in accordance with Article 3(2) of the Greek Code of Civil Procedure.

12. In January 1999 the plaintiffs in the main proceedings appealed against that judgment to the Efetio Patron (Court of Appeal, Patras) (Greece) which, after holding in 2001 that the appeal was formally admissible, stayed proceedings until the Anotato Idiko Dikastirio (Superior Special Court) (Greece) had ruled, in a parallel case, on the interpretation of the rules of international law concerning immunity of sovereign States from legal proceedings and on their categorisation as rules generally recognised by the international community. More specifically, that case concerned, first, whether Article 11 of the European Convention on State Immunity - signed at Basle on 16 May 1972, but to which the Hellenic Republic is not a party - according to which a Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State in proceedings which relate to redress for injury to the person or damage to tangible property, if the facts which occasioned the injury or damage occurred in the territory of the State of the forum, and if the author of the injury or damage was present in that territory at the time when those facts occurred', is to be regarded as a generally recognised rule of international law. Second, the further question was raised as to whether this exception to the immunity of the Contracting States covers, in accordance with international custom, claims for compensation in respect of wrongful acts which, while committed at the time of an armed conflict, adversely affected persons in a specific group or a particular place who had no connection with the armed clashes and did not participate in the military operations.

13. In 2002 the Anotato Idiko Dikastirio held in the case brought before it that, as international law currently stands, a generally recognised rule of international law continues to exist, according to which it is not permitted that a State be sued in a court of another State for compensation in respect of a tort or delict of any kind which took place in the territory of the forum and in which armed forces of the State being sued are involved in any way, whether in wartime or peacetime', so that the State being sued enjoys immunity in that instance.

14. In accordance with Article 100(4) of the Greek Constitution, decisions of the Anotato Idiko Dikastirio are irrevocable'. Also, under Article 54(1) of the Code on the Anotato Idiko Dikastirio, a decision by it determining whether a rule of international law is to be regarded as generally recognised applies erga omnes', so that a decision of the Anotato Idiko Dikastirio which has removed doubt as to whether a particular rule of international law is to be regarded as generally recognised, and the assessment in that regard set out in the decision, bind not only the court which referred the matter to it or the litigants who made the application which is at the origin of the decision, but also every court and body of the Hellenic Republic before which the same legal issue is raised.

15. After the plaintiffs in the main proceedings had pleaded the Brussels Convention, in particular Article 5(3) and (4) which, in their submission, abolished States' right of immunity in all cases of torts and delicts committed in the State of the court seised, the Efetio Patron had doubts, however, as to whether the proceedings brought before it fell within the scope of that Convention, observing in this regard that the question whether the defendant State enjoyed immunity and, consequently, the Greek courts lacked jurisdiction to hear the case before it turned on the answer to disputed

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questions of law.

16. It was in those circumstances that the Efetio Patron decided to stay proceedings and to refer to the Court the following questions for a preliminary ruling:

(1) Do actions for compensation which are brought by natural persons against a Contracting State as being liable under civil law for acts or omissions of its armed forces fall within the scope ratione materiae of the Brussels Convention in accordance with Article 1 thereof where those acts or omissions occurred during a military occupation of the plaintiffs' State of domicile following a war of aggression on the part of the defendant, are manifestly contrary to the law of war and may also be considered to be crimes against humanity?

(2) Is it compatible with the system of the Brussels Convention for the defendant State to put forward a plea of immunity, with the result, should the answer be in the affirmative, that the very application of the Convention is neutralised, in particular in respect of acts and omissions of the defendant's armed forces which occurred before the Convention entered into force, that is to say during the years 1941-1944?'

Procedure before the Court

17. By letter lodged at the Court Registry on 28 November 2006, the plaintiffs in the main proceedings made observations on the Opinion of the Advocate General and requested the Court to decide that the present case is of exceptional importance and refer it to the full Court or a Grand Chamber, in accordance with Article 16 of the Statute of the Court of Justice'.

18. It must be pointed out at the outset that neither the Statute of the Court of Justice nor its Rules of Procedure make provision for the parties to submit observations in response to the Advocate General's Opinion. The Court has therefore held that applications to that effect must be rejected (see, in particular, the order in Case C17/98 Emesa Sugar [2000] ECR I-665, paragraphs 2 and 19).

19. Also, under the third paragraph of Article 16 of the Statute of the Court of Justice, the Court shall sit in a Grand Chamber when a Member State or an institution of the Communities that is party to the proceedings so requests'.

20. It is apparent from the very wording of the third paragraph of Article 16 that individuals do not have standing to make such a request, and in the present instance the request that the case be referred to a Grand Chamber was not made by a Member State or an institution of the Communities that is party to the proceedings.

21. In addition, apart from the cases listed in the fourth paragraph of Article 16, it is the Court alone which, pursuant to the fifth paragraph thereof, has the power to decide, after hearing the Advocate General, to refer a case to the full Court, where it considers that case to be of exceptional importance.

22. Here, the Court holds that there is no good reason for it to make such a reference.

23. Accordingly, the request as set out in paragraph 17 of this judgment must necessarily be refused.

24. It must be added that the same conclusion would be necessary if the request by the plaintiffs in the main proceedings should be regarded as seeking the reopening of the procedure.

25. The Court may, 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 under Article 61 of its Rules of Procedure, if it considers that it lacks sufficient information or that the case must be dealt with on the basis of an argument which has not been debated between the parties (see, inter alia Case C-309/99 Wouters and Others [2002] ECR I1577, paragraph 42; Case C-309/02 Radlberger Getränkegesellschaft

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and S. Spitz [2004] ECR I11763, paragraph 22; and Case C308/04 P SGL Carbon v Commission [2006] ECR I-5977, paragraph 15).

26. However, the Court, after hearing the Advocate General, finds that in the present case it has before it all the information and arguments necessary to reply to the questions referred by the national court and that that material has been debated before it.

Consideration of the questions

Question 1

27. By its first question, the referring court essentially asks whether, on a proper construction of the first sentence of the first paragraph of Article 1 of the Brussels Convention, civil matters' within the meaning of that provision covers a legal action brought by natural persons in a Contracting State against another Contracting State for compensation in respect of the loss or damage suffered by the successors of the victims of acts perpetrated by armed forces in the course of warfare in the territory of the first State.

28. It must be stated at the outset that while the Brussels Convention, in accordance with the first sentence of the first paragraph of Article 1, lays down the principle that its scope is limited to civil and commercial matters', it does not define the meaning or the scope of that concept.

29. It is to be remembered that, in order to ensure, as far as possible, that the rights and obligations which derive from the Brussels Convention for the Contracting States and the persons to whom it applies are equal and uniform, the terms of that provision should not be interpreted as a mere reference to the internal law of one or other of the States concerned. It is thus clear from the Court's settled case-law that civil and commercial matters' must be regarded as an independent concept to be interpreted by referring, first, to the objectives and scheme of the Brussels Convention and, second, to the general principles which stem from the corpus of the national legal systems (see, inter alia, Case 29/76 LTU [1976] ECR 1541, paragraphs 3 and 5; Case 814/79 Rüffer [1980] ECR 3807, paragraph 7; Case C271/00 Baten [2002] ECR I-10489, paragraph 28; Case C-266/01 Préservatrice foncière TIARD [2003] ECR I-4867, paragraph 20; and Case C-343/04 EZ [2006] ECR I-4557, paragraph 22).

30. According to the Court, that interpretation results in the exclusion of certain legal actions and judicial decisions from the scope of the Brussels Convention, by reason either of the legal relationships between the parties to the action or of the subject-matter of the action (see LTU , paragraph 4; Rüffer , paragraph 14; Baten , paragraph 29; Préservatrice foncière TIARD , paragraph 21; EZ , paragraph 22; and Case C167/00 Henkel [2002] ECR I-8111, paragraph 29).

31. Thus, the Court has held that, although certain actions between a public authority and a person governed by private law may come within the scope of the Brussels Convention, it is otherwise where the public authority is acting in the exercise of its public powers (see LTU , paragraph 4; Rüffer , paragraph 8; Henkel , paragraph 26; Baten , paragraph 30; Préservatrice foncière TIARD , paragraph 22; and Case C-172/91 Sonntag [1993] ECR I1963, paragraph 20).

32. It is pursuant to this principle that the Court has held that a national or international body governed by public law which pursues the recovery of charges payable by a person governed by private law for the use of its equipment and services acts in the exercise of its public powers, in particular where that use is obligatory and exclusive and the rate of charges, the methods of calculation and the procedures for collection are fixed unilaterally in relation to the users (LTU , paragraph 4).

33. Similarly, the Court has held that the concept of civil and commercial matters' within the meaning of the first sentence of the first paragraph of the Brussels Convention does not include

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an action brought by the State as agent responsible for administering public waterways against a person having liability in law in order to recover the costs incurred in the removal of a wreck, in performance of an international obligation, carried out by or at the instigation of that administering agent in the exercise of its public authority (Rüffer , paragraphs 9 and 16).

34. Disputes of that nature do result from the exercise of public powers by one of the parties to the case, as it exercises powers falling outside the scope of the ordinary legal rules applicable to relationships between private individuals (see, to this effect, Sonntag , paragraph 22; Henkel , paragraph 30; Préservatrice foncière TIARD , paragraph 30; and Case C-265/02 Frahuil [2004] ECR I1543, paragraph 21).

35. There is all the more reason for such an assessment in a case such as the main proceedings.

36. The legal action for compensation brought by the plaintiffs in the main proceedings against the Federal Republic of Germany derives from operations conducted by armed forces during the Second World War.

37. As the Advocate General has observed in points 54 to 56 of his Opinion, there is no doubt that operations conducted by armed forces are one of the characteristic emanations of State sovereignty, in particular inasmuch as they are decided upon in a unilateral and binding manner by the competent public authorities and appear as inextricably linked to States' foreign and defence policy.

38. It follows that acts such as those which are at the origin of the loss and damage pleaded by the plaintiffs in the main proceedings and, therefore, of the action for damages brought by them before the Greek courts must be regarded as resulting from the exercise of public powers on the part of the State concerned on the date when those acts were perpetrated.

39. Having regard to the case-law recalled in paragraph 30 of this judgment, a legal action such as that brought before the referring court therefore does not fall within the scope ratione materiae of the Brussels Convention as defined in the first sentence of the first paragraph of Article 1 thereof.

40. Such an interpretation cannot be affected by the line of argument, set out in greater detail by the plaintiffs in the main proceedings, that, first, the action brought by them before the Greek courts against the Federal Republic of Germany is to be regarded as constituting proceedings to establish liability that are of a civil nature and, moreover, covered by Article 5(3) and (4) of the Brusssels Convention, and second, that acts carried out iure imperii do not include illegal or wrongful actions.

41. First of all, the Court has already held that the fact that the plaintiff acts on the basis of a claim which arises from an act in the exercise of public powers is sufficient for his action, whatever the nature of the proceedings afforded by national law for that purpose, to be treated as being outside the scope of the Brussels Convention (see Rüffer , paragraphs 13 and 15). The fact that the proceedings brought before the referring court are presented as being of a civil nature in so far as they seek financial compensation for the material loss and non-material damage caused to the plaintiffs in the main proceedings is consequently entirely irrelevant.

42. Second, the reference made to the rules governing jurisdiction which are specifically set out in Article 5(3) and (4) of the Brussels Convention is immaterial, because the issue as to whether the Convention falls to apply to the main proceedings logically constitutes a prior question which, if answered in the negative as here, entirely relieves the court before which the case has been brought of the need to examine the substantive rules laid down by the Convention.

43. Finally, the question as to whether or not the acts carried out in the exercise of public powers that constitute the basis for the main proceedings are lawful concerns the nature of those acts,

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but not the field within which they fall. Since that field as such must be regarded as not falling within the scope of the Brussels Convention, the unlawfulness of such acts cannot justify a different interpretation.

44. In addition, the proposition put forward in this regard by the plaintiffs in the main proceedings, if accepted, would be such as to raise preliminary questions of substance even before the scope of the Brussels Convention can be determined with certainty. Such difficulties would without doubt be incompatible with the broad logic and the objective of that Convention, which - as is apparent from its preamble and from the Jenard Report on the Brussels Convention (OJ 1979 C 59, p. 1) - is founded on the mutual trust of the Contracting States in their legal systems and judicial institutions, and seeks to ensure legal certainty by laying down uniform rules concerning conflict of jurisdiction in the civil and commercial field and to simplify formalities with a view to the rapid recognition and enforcement of judicial decisions made in the Contracting States.

45. Furthermore, in the same field of judicial cooperation in civil matters, Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims (OJ 2004 L 143, p. 15), which likewise provides, in Article 2(1), that it applies in civil and commercial matters', specifies in that provision that it shall not extend... to... the liability of the State for acts and omissions in the exercise of State authority (acta iure imperii)', without drawing a distinction in that regard according to whether or not the acts or omissions are lawful. The same is true of Article 2(1) of Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure (OJ 2006 L 399, p. 1).

46. Having regard to all of the foregoing considerations, the answer to the first question must be that, on a proper construction of the first sentence of the first paragraph of Article 1 of the Brussels Convention, civil matters' within the meaning of that provision does not cover a legal action brought by natural persons in a Contracting State against another Contracting State for compensation in respect of the loss or damage suffered by the successors of the victims of acts perpetrated by armed forces in the course of warfare in the territory of the first State.

Question 2

47. In view of the reply given to the first question, there is no need to answer the second question.

Costs

48. 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.

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SUB Brussels Convention of 27 September 1968

AUTLANG Greek

OBSERV Federal Republic of Germany ; Italy ; Netherlands ; Poland ; Member States ; Commission ; Institutions

NATIONA Greece

NATCOUR *A9* Efeteio Patron, apofasis tis 08/06/2005 (525/2005) ; - Feraci, Ornella: La sentenza Lechouritou e l'ambito di applicazione ratione materiae della convenzione di Bruxelles del 27 settembre 1968, Rivista di diritto internazionale privato e processuale 2007 p.657-674

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PROCEDU Reference for a preliminary ruling

ADVGEN Ruiz-Jarabo Colomer

JUDGRAP Schintgen

DATES of document: 15/02/2007
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Judgment of the Court (Second Chamber)
of 18 July 2007
Criminal proceedings against Jürgen Kretzinger. Reference for a preliminary ruling: Bundesgerichtshof - Germany. Convention implementing the Schengen Agreement - Article 54 - Ne bis in idem principle - Notion of same acts'- Contraband cigarettes - Importation into several Contracting States - Prosecution in different Contracting States - Notion of enforcement' of criminal penalties - Suspension of the execution of the sentence - Setting-off of brief periods of detention pending trial - European arrest warrant. Case C-288/05.

In Case C288/05,

Reference for a preliminary ruling under Article 35 EU, from the Bundesgerichtshof (Germany), made by decision of 30 June 2005, received at the Court on 19 July 2005, in the criminal proceedings against

Jürgen Kretzinger

in the presence of:

Hauptzollamt Augsburg,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, J. Kluka, R. Silva de Lapuerta, J. Makarczyk and L. Bay Larsen (Rapporteur), Judges,

Advocate General: E. Sharpston,

Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 4 July 2006,

after considering the observations submitted on behalf of:

- J. Kretzinger, initially by Mr Kretzinger himself, and subsequently by G. Dannecker, Rechtsanwalt,
- the Federal Republic of Germany, by A. Dittrich and M. Lumma, acting as Agents,
- the Czech Republic, by T. Boek, acting as Agent,
- the Kingdom of Spain, by M. Muñoz Pérez, acting as Agent,
- the Kingdom of the Netherlands, by H.G. Sevenster and C.A.H.M. ten Dam, acting as Agents,
- the Republic of Austria, by C. Pesendorfer, acting as Agent,
- the Republic of Poland, by T. Nowakowski, acting as Agent,
- the Kingdom of Sweden, by K. Petkovska, acting as Agent,
- the Commission of the European Communities, by W. Bogensberger and S. Grünheid, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 5 December 2006,

gives the following

Judgment

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

1. Article 54 of the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and

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the French Republic on the gradual abolition of checks at their common borders, signed on 19 June 1990, in Schengen, must be interpreted as meaning that:

- the relevant criterion for the purposes of the application of that article is identity of the material acts, understood as the existence of a set of facts which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected;

- acts consisting in receiving contraband foreign tobacco in one Contracting State and of importing that tobacco into another Contracting State and being in possession of it there, characterised by the fact that the defendant, who was prosecuted in two Contracting States, had intended from the outset to transport the tobacco, after first taking possession of it, to a final destination, passing through several Contracting States in the process, constitute conduct which may be covered by the notion of same acts' within the meaning of Article 54. It is for the competent national courts to make the final assessment in that respect.

2. For the purposes of Article 54 of the CISA, a penalty imposed by a court of a Contracting State has been enforced' or is actually in the process of being enforced' if the defendant has been given a suspended custodial sentence.

3. For the purposes of Article 54 of the CISA, a penalty imposed by a court of a Contracting State is not to be regarded as having been enforced' or actually in the process of being enforced' where the defendant was for a short time taken into police custody and/or held on remand pending trial and that detention would count towards any subsequent enforcement of the custodial sentence under the law of the State in which judgment was given.

4. The fact that a Member State in which a person has been sentenced by a final and binding judgment under its national law may issue a European arrest warrant for the arrest of that person in order to enforce the sentence under Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States cannot affect the interpretation of the notion of enforcement' within the meaning of Article 54 of the CISA.

1. This reference for a preliminary ruling concerns the interpretation of Article 54 of the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (OJ 2000 L 239, p. 19; the CISA'), signed in Schengen (Luxembourg) on 19 June 1990.

2. The reference was made in the context of criminal proceedings brought in Germany, in which Mr Kretzinger was charged with receiving goods on a commercial basis on which duty had not been paid.

Legal context

Community law

3. Under Article 1 of the Protocol integrating the Schengen acquis into the framework of the European Union, annexed to the Treaty on European Union and to the Treaty establishing the European Community by the Treaty of Amsterdam (the Protocol'), 13 Member States of the European Union, amongst them the Federal Republic of Germany and the Italian Republic, are authorised, within the legal and institutional framework of the Union and of the EU and EC Treaties, to establish closer cooperation among themselves within the scope of the Schengen acquis as set out in the annex to the Protocol.

4. The Schengen acquis thus defined includes, inter alia, the Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (OJ 2000 L 239, p. 13), signed in Schengen on 14 June 1985 (the Schengen Agreement'), and the CISA.

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5. By virtue of the first subparagraph of Article 2(1) of the Protocol, from the date of entry into force of the Treaty of Amsterdam on 1 May 1999 the Schengen acquis was to apply immediately to the 13 Member States referred to in Article 1 of the Protocol.

6. Pursuant to the second sentence of the second subparagraph of Article 2(1) of the Protocol, on 20 May 1999 the Council of the European Union adopted Decision 1999/436/EC determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions or decisions which constitute the Schengen acquis (OJ 1999 L 176, p. 17). It is apparent from Article 2 of that decision, in conjunction with Annex A thereto, that the Council selected Articles 34 EU and 31 EU, which form part of Title VI of the Treaty on European Union entitled Provisions on police and judicial cooperation in criminal matters', as the legal basis for Articles 54 to 58 of the CISA.

7. As provided in Article 54 of the CISA, which forms part of Chapter 3 (Application of the ne bis in idem principle') of Title III (Police and Security') of the CISA:

A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party.'

8. Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190, p. 1; the Framework Decision') defines, in Article 1(1), the European arrest warrant as a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes inter alia of executing a sentence.

9. The Framework Decision provides, in Article 3, headed Grounds for mandatory non-execution of the European arrest warrant':

The judicial authority of the Member State of execution... shall refuse to execute the European arrest warrant in the following cases:

(1) ...

(2) if the executing judicial authority is informed that the requested person has been finally judged by a Member State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State;

...'

10. Article 5 of the Framework Decision, headed Guarantees to be given by the issuing Member State in particular cases', provides:

The execution of the European arrest warrant by the executing judicial authority may, by the law of the executing Member State, be subject to the following conditions:

(1) where the European arrest warrant has been issued for the purposes of executing a sentence... imposed by a decision rendered in absentia and if the person concerned has not been summoned in person or otherwise informed of the date and place of the hearing which led to the decision rendered in absentia , surrender may be subject to the condition that the issuing judicial authority gives an assurance deemed adequate to guarantee the person who is the subject of the European arrest warrant that he or she will have an opportunity to apply for a retrial of the case in the issuing Member State and to be present at the judgment;

...'

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11. According to the information published in the Official Journal of the European Communities of 1 May 1999 (OJ 1999 L 114, p. 56) concerning the date of entry into force of the Treaty of Amsterdam, the Federal Republic of Germany declared, pursuant to Article 35(2) EU, that it accepted the jurisdiction of the Court of Justice to give preliminary rulings in accordance with the arrangements laid down in Article 35(3)(b) EU.

National law

12. In accordance with Paragraph 374 of the German Tax Code (Abgabenordnung), a person may be convicted for evasion of import duties which arose on illegal imports into a Member State other than the Federal Republic of Germany.

13. In order to comply with the provisions of the Framework Decision, the Federal Republic of Germany adopted, following a judgment of the Bundesverfassungsgericht (German Constitutional Court) of 18 July 2005 declaring the first law implementing the Framework Decision in Germany void, the Law of 20 July 2006 on the European arrest warrant (Europäisches Haftbefehlsgesetz, BGBl. 2006 I, p. 1721).

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

14. On two occasions, in May 1999 and April 2000, Mr Kretzinger transported cigarettes from countries that were not members of the European Union, which had previously been smuggled into Greece by third parties, by lorry through Italy and Germany, bound for the United Kingdom. They were not presented for customs clearance at any point.

15. The lorry containing the first consignment, consisting of 34 500 cartons of cigarettes, was seized by officers of the Italian Guardia di Finanza on 3 May 1999. Mr Kretzinger was released after questioning on 4 May 1999.

16. By judgment of 22 February 2001 the Corte d'appello di Venezia (Court of Appeal, Venice (Italy), allowing the appeal brought by the Public Prosecutor against the decision of acquittal at first instance, imposed on Mr Kretzinger in absentia a suspended custodial sentence of one year and eight months. It found him guilty of an offence of importing into Italy and being in possession of 6 900 kilograms of contraband foreign tobacco and an offence of failing to pay the customs duty relating to that tobacco. That judgment has become final under Italian law. The sentence was entered in the defendant's criminal record.

17. The lorry transporting a second consignment was carrying 14 927 cartons of contraband cigarettes when Mr Kretzinger was again stopped by the Italian Guardia di Finanza on 12 April 2000. He was held briefly in Italian police custody and/or on remand pending trial, following which he returned to Germany.

18. By judgment of 25 January 2001 the Tribunale di Ancona (Italy) imposed, again in absentia and applying the same provisions of Italian law, a custodial sentence of two years which was not suspended. That judgment has also become final. The custodial sentence, which has not been executed, was also entered in the defendant's criminal record.

19. The referring court notes that, despite several attempts to obtain clarification of those judgments, it has been unable to establish with certainty precisely which import duties they applied to, and in particular whether at least one of them encompassed any charges relating to, or sentence imposed for, customs fraud.

20. Aware of those judgments by the Italian courts, the Landgericht Augsburg sentenced Mr Kretzinger to one year and ten months' imprisonment in respect of the first consignment and one year's imprisonment in respect of the second. In so doing, the Landgericht Augsburg found Mr Kretzinger guilty of evasion of the customs duties which had arisen on the importation of the smuggled goods into Greece,

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an offence under Paragraph 374 of the German Tax Code.

21. Whilst indicating that the two final sentences imposed in Italy had not yet been enforced, the Landgericht Augsburg rejected the notion that there was any procedural impediment under Article 54 of the CISA. According to that court, although the same two smuggled consignments of cigarettes formed the factual basis of the two convictions in Italy and of its own decisions, that article was not applicable.

22. Mr Kretzinger lodged an appeal before the Bundesgerichtshof, which expressed doubts as to whether the reasoning adopted by the Landgericht Augsburg was compatible with Article 54 of the CISA.

23. First, the Bundesgerichtshof has doubts as to how it should interpret the notion of same acts' within the meaning of Article 54 of the CISA.

24. Next, as regards the notion of enforcement', the Bundesgerichtshof, which, in principle, is of the view that a custodial sentence such as that relating to the first consignment, the enforcement of which was suspended, is covered by Article 54 of the CISA, wishes to ascertain whether a brief period of remand pending trial is sufficient to bar further prosecutions.

25. Finally, as regards the existence of a procedural impediment under Article 54 of the CISA, the Bundesgerichtshof, whilst observing that the Italian authorities took no steps under the Framework Decision to enforce Mr Kretzinger's sentence in respect of the second consignment, wonders whether and to what extent the interpretation of that article is affected by the provisions of the Framework Decision.

26. It was in those circumstances that the Bundesgerichtshof decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

(1) Is it a criminal prosecution of the same acts within the meaning of Article 54 of the CISA if a defendant has been convicted by an Italian court of importing contraband foreign tobacco into Italy and of being in possession of it there, as well as of failing to pay duty at the border on importing the tobacco, and is subsequently convicted by a German court - in connection with his earlier receipt of the same goods in Greece - of being party to evasion in relation to the (technically) Greek import duty that arose when the goods were previously imported by third parties, in so far as the defendant had intended from the outset to transport the goods to the United Kingdom via Italy, after taking delivery of them in Greece?

(2) Has a penalty been enforced or is it actually in the process of being enforced within the meaning of Article 54 of the CISA

(a) if the defendant was given a custodial sentence, the enforcement of which was suspended in accordance with the law of the State in which judgment was given;

(b) if the defendant was for a short time taken into police cus tody and/or held on remand pending trial, and that detention would count towards any subsequent enforcement of the penalty of imprisonment under the law of the State in which judgment was given?

(3) Is the interpretation of the notion of enforcement for the purposes of Article 54 of the CISA affected by

(a) the fact that, having transposed the... Framework Decision... into national law, the (first) State in which judgment was given is in a position at any time to enforce its judgment which, under national law, is final and binding;

(b) the fact that a request for judicial assistance by the State in which judgment was given, with a view to extraditing the convicted person or enforcing judgment within that State, might

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not automatically be complied with because judgment was given in absentia ?'

The Court's jurisdiction

27. It is apparent from paragraph 11 of this judgment that, in the circumstances of this case, pursuant to Article 35 EU the Court has jurisdiction to give a ruling on the interpretation of Article 54 of the CISA and, in so far as it is relevant in this case, of the Framework Decision.

The questions referred for a preliminary ruling

The first question

28. By that question, the Bundesgerichtshof essentially wishes to ascertain the relevant criterion for the purposes of the application of the notion of same acts' within the meaning of Article 54 of the CISA and, more specifically, whether the unlawful acts of receiving contraband foreign tobacco in one Contracting State and of importing that tobacco into another Contracting State and being in possession of it there are covered by that notion, in so far as the defendant, who has been prosecuted in two Contracting States, had intended from the outset to transport the tobacco, after first taking possession of it, to a final destination, passing through several Contracting States in the process.

29. In that respect, the Court has already held, first, at paragraph 36 in Case C436/04 Van Esbroeck [2006] ECR I2333, that the only relevant criterion for the purposes of the application of Article 54 of the CISA is identity of the material acts, understood as the existence of a set of facts which are inextricably linked together and, second, at paragraph 42 of that judgment, that that criterion applies irrespective of the legal classification given to those acts or the legal interest protected (see also Case C150/05 Van Straaten [2006] ECR I9327, paragraphs 48 and 53).

30. It follows, first, that it is irrelevant that the charges against Mr Kretzinger in the first Contracting State (Italy) were based on failure to declare cigarettes and/or nonpayment of customs duties arising from their importation into that State, whilst in the other Contracting State (Germany), the charges related to the initial taking of possession in Greece of the contraband tobacco.

31. Second, the finding of identity of the material acts, understood as the existence of a set of facts which are inextricably linked together, must be made irrespective of the legal interest protected, since that interest may vary from one Contracting State to another.

32. However, the German and Spanish Governments submitted at the hearing, which took place after the judgment in Van Esbroeck , that the criterion based on identity of the material acts should be applied so as to enable the competent national courts to take account also of the legal interest protected when assessing a set of concrete circumstances.

33. In that respect, it must be pointed out that, because there is no harmonisation of national criminal law, considerations based on the legal interest protected might create as many barriers to freedom of movement within the Schengen area as there are penal systems in the Contracting States (see Van Esbroeck , paragraph 35).

34. Consequently, it must be confirmed that the competent national courts which are called upon to determine whether there is identity of the material acts must confine themselves to examining whether those acts constitute a set of facts which are inextricably linked together in time, in space and by their subject-matter (see, to that effect, Van Esbroeck , paragraph 38), and considerations based on the legal interest protected are not to be deemed relevant.

35. As regards more specifically a situation such as that at issue in the main proceedings, it should be recalled that the Court has already held that punishable acts consisting of exporting and importing the same illegal goods and which are prosecuted in different CISA Contracting States

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constitute conduct which may be covered by the notion of same acts' within the meaning of Article 54 of the CISA (see, to that effect, Van Esbroeck , paragraph 42, Van Straaten , paragraph 51, and Case C467/04 Gasparini and Others [2006] ECR I9199, paragraph 57).

36. The transportation of contraband cigarettes such as those at issue in the main proceedings, involving successive crossings of internal Schengen area borders, is therefore capable of constituting a set of facts covered by the notion of same acts'. However, it is for the competent national courts to make a final assessment in that respect; they must determine whether the material acts in question constitute a set of facts which are inextricably linked together in time, in space and by their subjectmatter.

37. In the light of the foregoing, the answer to the first question must be that Article 54 of the CISA must be interpreted as meaning that:

- the relevant criterion for the purposes of the application of that article is identity of the material acts, understood as the existence of a set of facts which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected;

- acts consisting in receiving contraband foreign tobacco in one Contracting State and of importing that tobacco into another Contracting State and being in possession of it there, characterised by the fact that the defendant, who was prosecuted in two Contracting States, had intended from the outset to transport the tobacco, after first taking possession of it, to a final destination, passing through several Contracting States in the process, constitute conduct which may be covered by the notion of same acts' within the meaning of Article 54. It is for the competent national courts to make the final assessment in that respect.

Question 2(a)

38. By that question, the referring court essentially asks whether, for the purposes of Article 54 of the CISA, it is necessary to consider that a penalty imposed by a court of a Contracting State has been enforced' or is actually in the process of being enforced' if a defendant has been given a suspended custodial sentence in accordance with the law of that Contracting State.

39. It should be recalled, first, that, in accordance with Article 54 of the CISA, the prohibition on criminal prosecutions for the same acts applies, in the case of a penalty such as that at issue in the main proceedings, only if it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party' (the enforcement condition').

40. Second, as the Advocate General stated at points 44 and 45 of her Opinion, the mechanism enabling national courts to suspend a sentence if the legal conditions are satisfied is a feature of the criminal systems of the Contracting States.

41. Mr Kretzinger, the governments which submitted observations in this case and the Commission of the European Communities agree that a person who has been given a suspended custodial sentence must be regarded as having been tried, convicted and sentenced, with all the consequences that the legal system concerned attaches thereto.

42. In that respect, it must be noted that, in so far as a suspended custodial sentence penalises the unlawful conduct of a convicted person, it constitutes a penalty within the meaning of Article 54 of the CISA. That penalty must be regarded as actually in the process of being enforced' as soon as the sentence has become enforceable and during the probation period. Subsequently, once the probation period has come to an end, the penalty must be regarded as having been enforced' within the meaning of that provision.

43. That interpretation, according to which a suspended custodial sentence also satisfies the enforcement

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condition, is borne out, as stated in particular by the Czech Government and the Commission, by the fact that it would be inconsistent, on the one hand, to regard any deprivation of liberty actually suffered as enforcement for the purposes of Article 54 of the CISA and, on the other hand, to rule out the possibility of suspended sentences, which are normally passed for less serious offences, satisfying the enforcement condition in that article, thus allowing further prosecutions.

44. In those circumstances, the answer to question 2(a) must be that, for the purposes of Article 54 of the CISA, it is necessary to consider that a penalty imposed by a court of a Contracting State has been enforced' or is actually in the process of being enforced' if the defendant has been given a suspended custodial sentence in accordance with the law of that Contracting State.

Question 2(b)

45. By that question, the referring court essentially asks whether, for the purposes of Article 54 of the CISA, a penalty imposed by a court of a Contracting State must be regarded as having been enforced' or actually in the process of being enforced' where the defendant was for a short time taken into police custody and/or held on remand pending trial and that detention would count towards any subsequent enforcement of the penalty of imprisonment under the law of the State in which judgment was given.

46. In that respect, it is necessary to examine whether, if the other conditions imposed by Article 54 of the CISA were fulfilled, a brief period of deprivation of liberty, such as police custody and/or detention on remand pending trial, before the conviction in a first Contracting State had become final, the length of that period counting towards that of the sentence finally passed, could have the effect of satisfying the enforcement condition in advance and therefore preclude further prosecutions in a second Contracting State.

47. At the hearing, Mr Kretzinger claimed inter alia that, generally, in a case such as that at issue in the main proceedings, where the sentencing Contracting State did not enforce an unconditional custodial sentence and there were no legal reasons preventing it from doing so, the enforcement condition had not been applicable since the Schengen acquis was integrated into the Community framework.

48. On the other hand, the seven governments which submitted written observations to the Court, and the Commission, asserted that periods spent in police custody and/or on remand pending trial must not be regarded automatically as the enforcement of a penalty for the purposes of Article 54 of the CISA.

49. In that respect, the Court notes that it is apparent from the very wording of that article that it cannot apply before the trial [of the person in question] has been finally disposed of'. It is clear that, in judicial proceedings, both police custody and detention on remand pending trial precede final judgment.

50. It follows, as the Advocate General observed at point 59 of her Opinion, that Article 54 of the CISA cannot apply to such periods of deprivation of liberty, even if they are, by virtue of national law, to be taken into account in the subsequent enforcement of any custodial sentence.

51. That interpretation is supported, as the German, Spanish and Austrian Governments and the Commission observed, by the fact that the purpose of detention on remand pending trial is very different from that underlying the enforcement condition laid down in Article 54 of the CISA. Although the purpose of the first is of a preventative nature, that of the second is to avoid a situation in which a person whose trial has been finally disposed of in the first State can no longer be prosecuted for the same acts and therefore ultimately remains unpunished if the State in which sentence was first passed did not enforce the sentence imposed.

52. Consequently, the answer to question 2(b) must be that, for the purposes of Article 54 of the

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CISA, a penalty imposed by a court of a Contracting State is not to be regarded as having been enforced' or actually in the process of being enforced' where the defendant was for a short time taken into police custody and/or held on remand pending trial and that detention would count towards any subsequent enforcement of the custodial sentence under the law of the State in which judgment was given.

The third question

53. By its third question, the referring court essentially asks whether, and to what extent, the provisions of the Framework Decision have an effect on the interpretation of the notion of enforcement' within the meaning of Article 54 of the CISA.

54. Before replying to that question, it must first be pointed out that, since the Framework Decision was implemented in Germany with effect from 2 August 2006, the execution of a European arrest warrant has become possible again and it cannot therefore automatically be ruled out that the provisions of that framework decision could have an effect on the main proceedings.

55. Moreover, it is apparent from Article 32 of the Framework Decision that that decision applies to requests relating to acts which, like those in the main proceedings, were committed before the expiry of the period for implementation of that decision, namely 1 January 2004, provided the Member State of execution has not made a statement indicating that it will continue to deal with such requests in accordance with the extradition system applicable before that date. It appears that the Federal Republic of Germany did not make such a statement.

Question 3(a)

56. By that question, the referring court essentially asks whether the fact that a Member State may, under the Framework Decision, issue a European arrest warrant for the arrest of a person who has been sentenced by a final and binding judgment under its national law in order to enforce that sentence has an effect on the interpretation of the notion of enforcement' within the meaning of Article 54 of the CISA.

57. At the hearing, Mr Kretzinger submitted that the fact that it is legally possible under that the Framework Decision for the sentencing State to issue a European arrest warrant in order to enforce a judgment which has become final and binding means that the enforcement condition must be regarded as satisfied, which is why the competent German courts could no longer prosecute him.

58. By contrast, the seven governments which submitted written observations and the Commission take the view that the Framework Decision has no bearing whatsoever on the interpretation of Article 54 of the CISA and do not agree that the mere option open to the sentencing State to issue a European arrest warrant may in itself be sufficient to satisfy the enforcement condition, which requires that penalties must actually be enforced.

59. In that respect, it must be pointed out that the interpretation of Article 54 of the CISA advocated by Mr Kretzinger would run counter to the actual wording of that provision which, apart from the existence of a final and binding conviction in respect of the same acts, expressly requires the enforcement condition to be satisfied.

60. That enforcement condition could not, by definition, be satisfied where, in a case such as that in the main proceedings, a European arrest warrant were to be issued after trial and conviction in a first Member State precisely in order to ensure the execution of a custodial sentence which had not yet been enforced within the meaning of Article 54 of the CISA.

61. That is confirmed by the Framework Decision itself which, in Article 3(2), requires the Member State addressed to refuse to execute a European arrest warrant if the executing judicial authority is informed that the requested person has been finally judged by a Member State in respect of the

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same acts and that, where there has been sentence, the enforcement condition has been satisfied.

62. In addition, as the Spanish and Austrian Governments and the Commission observed, that outcome is supported by the fact that the interpretation of Article 54 of the CISA cannot depend on the provisions of the Framework Decision without giving rise to legal uncertainty that would result, first, from the fact that the Member States bound by the Framework Decision are not all bound by the CISA which, moreover, applies to certain non-Member States and, second, from the fact that the scope of the European arrest warrant is limited, which is not case in respect of Article 54 of the CISA, which applies to all offences punished by the States which have acceded to that agreement.

63. Accordingly, the fact that a final and binding custodial sentence could possibly be enforced in the sentencing State following the surrender by another State of the convicted person cannot affect the interpretation of the notion of enforcement' within the meaning of Article 54 of the CISA.

64. The answer to question 3(a) must therefore be that the fact that a Member State in which a person has been sentenced by a final and binding judgment under its national law may issue a European arrest warrant for the arrest of that person in order to enforce the sentence under the Framework Decision cannot affect the interpretation of the notion of enforcement' within the meaning of Article 54 of the CISA.

Question 3(b)

65. By its question 3(b), the referring court essentially asks whether, under the set of rules put in place by Article 5(1) of the Framework Decision, the fact that the executing Member State is not automatically required to execute a European arrest warrant issued in order to enforce a judgment given in absentia has an effect on the interpretation of the notion of enforcement' within the meaning of Article 54 of the CISA.

66. In that respect, it must be stated, as follows from paragraphs 59 to 64 of this judgment, that the option open to a Member State to issue a European arrest warrant has no effect on the interpretation of the notion of enforcement' within the meaning of Article 54 of the CISA. As the Spanish Government and the Commission correctly observed, in circumstances such as those described in the main proceedings, the fact that the judgment relied on in support of a European arrest warrant was given in absentia does not undermine that finding.

67. It follows that, in this case, it is not necessary to examine the question whether a judgment given in absentia , the enforceability of which may be subject to conditions under Article 5(1) of the Framework Decision, must be regarded as a decision by which a person's trial has been finally disposed of' within the meaning of Article 54 of the CISA.

68. Consequently, there is no need to answer Question 3(b).

Costs

69. 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. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

DOCNUM 62005J0288

AUTHOR Court of Justice of the European Communities

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FORM	Judgment
TREATY	European Economic Community
PUBREF	European Court reports 2007 Page I-06441
DOC	2007/07/18
LODGED	2005/07/19
JURCIT	11997M031 : N 6 11997M034 : N 6 11997M035 : N 27 11997M035-P2 : N 11 11997M035-P3LB : N 11 JOL_1999_114_R_0056_031 : N 11 31999D0436 : N 6 31999D0436-A02 : N 69 31999D0436-NA : N 6 32002F0584 : N 27 53 54 56 62 64 32002F0584-A01P1 : N 8 32002F0584-A03 : N 9 32002F0584-A03PT2 : N 61 32002F0584-A05 : N 10 32002F0584-A05PT1 : N 65 67 32002F0584-A32 : N 55 42000A0922(01) : N 4 42000A0922(02)-A54 : N 1 6 7 27 - 29 35 37 - 39 42 - 46 48 50 - 53 56 59 60 62 - 67 42000A0922(02)-A55 : N 6 42000A0922(02)-A56 : N 6 42000A0922(02)-A57 : N 6 42000A0922(02)-A58 : N 6 62004J0436 : N 29 33 - 35 62004J0467 : N 35 62005J0150 : N 29 35 62005C0288 : N 40 50
SUB	Justice and home affairs
AUTLANG	German
OBSERV	Federal Republic of Germany ; CZ ; Spain ; Netherlands ; Austria ; Poland ; Sweden ; Member States ; Commission ; Institutions
NATIONA	Federal Republic of Germany
NATCOUR	*A9* Bundesgerichtshof, Beschluß vom 30/06/2005 (5 StR 342/04) ; - Jahrbuch für italienisches Recht Bd.19 p.276-277 (résumé)
NOTES	X: Applicazione del ne bis in idem: Cosa si intenda per "pena eseguita", Cassazione penale 2007 p.4785-4786

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PROCEDU	Reference for a preliminary ruling
ADVGEN	Sharpston
JUDGRAP	Bay Larsen
DATES	of document: 18/07/2007 of application: 19/07/2005

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Opinion of Advocate General Sharpston delivered on 5 December 2006. Criminal proceedings against Jürgen Kretzinger. Reference for a preliminary ruling: Bundesgerichtshof - Germany. Convention implementing the Schengen Agreement - Article 54 - Ne bis in idem principle - Notion of same acts'- Contraband cigarettes - Importation into several Contracting States - Prosecution in different Contracting States - Notion of enforcement' of criminal penalties - Suspension of the execution of the sentence - Setting-off of brief periods of detention pending trial - European arrest warrant. Case C-288/05.

1. In this reference for a preliminary ruling, the Fifth Criminal Division of the Bundesgerichtshof (Federal Court of Justice) seeks clarification of what is meant by the same acts' and by the concept of enforcement' of a criminal penalty in Article 54 of the Convention implementing the Schengen Agreement of 14 June 1985 (2) (the CISA'). The national court also wishes to know whether the definition of enforcement is affected by the implementation into national law of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (3) (the Framework Decision').

Relevant provisions

The CISA

2. Pursuant to Article 1 of the Protocol integrating the Schengen acquis into the framework of the European Union (4) (the Protocol'), 13 Member States, including Italy and Germany, are authorised to establish closer cooperation among themselves within the scope of the so-called Schengen acquis'.

3. The annex to the Protocol defines the Schengen acquis' as including the Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, signed at Schengen on 14 June 1985 (5) (the Schengen Agreement') and, in particular, the CISA.

4. The Protocol provides that, from the date of entry into force of the Treaty of Amsterdam, namely 1 May 1999, the Schengen acquis is to apply immediately to the 13 Member States referred to in Article 1 of the Protocol. (6)

5. Articles 54 to 58 of the CISA together constitute Chapter 3 (entitled Application of the ne bis in idem principle') of Title III, which deals with Police and Security'.

6. Article 54 provides that a person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party'.

7. Article 55 entitles a Contracting Party, when ratifying, accepting or approving this Convention, to declare that it is not bound by Article 54' where the acts to which the foreign judgment relates took place in whole or in part in its own territory, they constitute an offence against national security or other equally essential interests of that Contracting Party and/or they were committed by officials of that Contracting Party in violation of the duties of their office.

8. Article 56 provides that if a further prosecution is brought in a Contracting Party against a person whose trial, in respect of the same acts, has been finally disposed of in another Contracting Party, any period of deprivation of liberty served in the latter Contracting Party arising from those acts shall be deducted from any penalty imposed. To the extent permitted by national law, penalties not involving deprivation of liberty shall also be taken into account'.

The Framework Decision

9. The Framework Decision was adopted under Title VI of the EU Treaty, Provisions on Police

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and Judicial Cooperation in Criminal Matters', and in particular on the basis of Articles 31(a) and (b) and 34(2)(b) thereof.

10. It is, as recital 6 in its preamble notes, the first concrete measure in the field of criminal law implementing the principle of mutual recognition which the [1999] European Council [of Tampere] referred to as the cornerstone of judicial cooperation'.

11. The main aims of the Framework Decision are twofold: first, to abolish formal extradition procedures among Member States in respect of persons who are fleeing from justice after having been finally sentenced and, second, to speed up extradition procedures in respect of persons suspected of having committed an offence. The existing system of extradition between Member States is to be replaced by a new, simplified and swifter system for surrender of persons in the above categories between judicial authorities for the purposes of execution of criminal sentences or prosecution of criminal offences. (7)

12. According to recital 10, the mechanism of the European arrest warrant is based on a high level of confidence between Member States.'

13. Article 1(1) defines the European arrest warrant as a judicial decision issued by a Member State (the issuing Member State') with a view to the arrest and surrender by another Member State (the Member State of execution') of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order. Under Article 1(2), Member States are required to execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of the Framework Decision.

14. Article 2(1) defines the scope of the European arrest warrant: a European arrest warrant may be issued for acts punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 12 months or, where a sentence has been passed or a detention order has been made, for sentences of at least four months'.

15. Article 2(2) contains a list of offences which, if they are punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years, shall give rise to surrender pursuant to a European arrest warrant. Article 2(4) provides that for offences other than those covered by paragraph 2, surrender may be subject to the condition that the acts for which the European arrest warrant has been issued constitute an offence under the law of the executing Member State, whatever the constituent elements or however it is described'.

16. Article 3 sets out grounds on which the judicial authority of the Member State of execution must refuse to execute the European arrest warrant, including cases in which it is informed that the requested person has been finally judged by a Member State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State'. (8)

17. Article 4 sets out grounds on which the executing judicial authority may refuse to execute a European arrest warrant. A refusal to execute is permitted, inter alia, in the following cases:

- where the person who is the subject of the European arrest warrant is being prosecuted in the Member State of execution for the same act as that on which the European arrest warrant is based (Article 4(2));

- where the judicial authorities of the Member State of execution have decided either not to prosecute for the offence on which the European arrest warrant is based or to halt proceedings, or where a final judgment has been passed upon the requested person in a Member State, in respect of the same acts, which prevents further proceedings (Article 4(3));

- if the executing judicial authority is informed that the requested person has been finally judged

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by a third State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing country (Article 4(5)).

18. Article 5 regulates the guarantees to be given by the issuing Member State in particular cases. Article 5(1) provides that where the European arrest warrant has been issued for the purposes of executing a sentence or a detention order imposed by a decision rendered in absentia and if the person concerned has not been summoned in person or otherwise informed of the date and place of the hearing which led to the decision rendered in absentia , surrender may be subject to the condition that the issuing judicial authority gives an assurance deemed adequate to guarantee the person who is the subject of the European arrest warrant that he or she will have an opportunity to apply for a retrial of the case in the issuing Member State and to be present at the judgment'.

19. Article 34 requires Member States to take the necessary measures to comply with the provisions of the Framework Decision by 31 December 2003.

20. The Commission noted in its submissions that whereas Italy had properly implemented the Framework Decision into national law, the Bundesverfassungsgericht (German Constitutional Court) had declared the law implementing the Framework Decision in Germany void by judgment of 18 July 2005. As a result, a new implementing law was adopted by the Bundestag on 20 July 2006, shortly after the hearing in the present case took place. It entered into force on 2 August 2006. (9) .

The national proceedings and the questions referred

21. Mr Kretzinger's appeal against his conviction by the Landgericht Augsburg (Augsburg Regional Court) is pending before the referring court. That court gives the following description of the facts in the main proceedings.

22. On two occasions, in May 1999 and in April 2000, Mr Kretzinger transported cigarettes, smuggled into Greece by third parties, by lorry through Italy and Germany, bound for the United Kingdom. They were concealed under other loads. They were not presented for customs clearance at any point.

23. The first consignment, consisting of 34 500 cartons of smuggled cigarettes, was seized by officials of the Italian Guardia di Finanza on 3 May 1999. Mr Kretzinger was held briefly in Italian police custody and/or on remand pending trial. On 22 February 2001, allowing the appeal brought by the Public Prosecutor against the decision of acquittal at first instance, the Corte d'Appello di Venezia found him guilty, after a trial in absentia , of importing and being in possession of 6 900 kilograms of contraband foreign tobacco, and of failing to pay customs duty on that tobacco. It imposed a custodial sentence of one year and eight months... in respect of both of the offences with which he was charged'. It appears that the sentence was suspended. Under Italian law, that judgment has now become final.

24. The second consignment consisted of 14 927 cartons of contraband cigarettes. Mr Kretzinger was stopped by the Italian Guardia di Finanza on 12 April 2000. Again, he was held briefly in Italian police custody and/or on remand pending trial. By judgment of 25 January 2001 the Tribunale di Ancona imposed, again in absentia and applying the same provisions of Italian law, a custodial sentence of two years (not suspended). That judgment has also become final under Italian law.

25. The referring court notes that, despite several attempts to obtain clarification of those judgments, it has been unable to establish with certainty precisely which import duties each judgment applied to, and in particular whether either or both encompassed any charges relating to, or sentence imposed for, customs fraud.

26. Mr Kretzinger was charged before the Landgericht Ausburg with evading the customs duties which had arisen on the initial importation of the smuggled goods into Greece (an offence under paragraph

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374 of the German Tax Code) and was found guilty. The Landgericht sentenced him to one year and ten months imprisonment in relation to the first consignment and one year's imprisonment in relation the second consignment.

27. The Landgericht Augsburg was aware of the Italian convictions, but noted that the sentences imposed on Mr Kretzinger in Italy had not been enforced. It took the view that, although the same two cigarette shipments formed the factual basis of the two convictions in Italy and of its own decisions, Article 54 of the CISA was not applicable.

28. The Italian authorities appear to have taken no steps under the Framework Decision in order to enforce the convictions in Italy.

29. Mr Kretzinger appealed to the Criminal Division of the Bundesgerichtshof (the referring court) on a point of law. That court has doubts about the compatibility with EU law of the reasoning adopted by the Landgericht Augsburg.

30. In particular, it questions the latter's conclusion that Mr Kretzinger's convictions in Italy do not give rise to the application of the rule of ne bis in idem as embodied in Article 54 of the CISA and, therefore, do not bar further criminal proceedings in Germany. It wonders whether, as a result of a single journey from Greece to northern Europe, a smuggler can be punished in separate criminal proceedings in every Member State through which he passes for the revenue offence committed each time he crosses a border, so that he may have to serve each of those sentences consecutively, or whether a sentence passed in one Member State in respect of (only) one part of that single smuggling journey can bar further prosecutions throughout Europe'.

31. The referring court therefore asks the Court to give a preliminary ruling on the following questions:

[1] Is it a criminal prosecution of the same acts within the meaning of Article 54 of the CISA if a defendant has been convicted by an Italian court of importing contraband foreign tobacco into Italy and of being in possession of it there, as well as of failing to pay duty at the border on importing the tobacco, and is subsequently convicted by a German court - in connection with his earlier receipt of the same goods in Greece - of being party to evasion in relation to the (technically) Greek import duty that arose when the goods were previously imported by third parties, in so far as the defendant had intended from the outset to transport the goods to the United Kingdom via Italy, after taking delivery of them in Greece?

[2] Has a penalty been enforced or is it actually in the process of being enforced within the meaning of Article 54 of the CISA

(a) if the defendant was given a custodial sentence, the enforcement of which was suspended in accordance with the law of the State in which judgment was given;

(b) if the defendant was for a short time taken into police custody and/or held on remand pending trial, and that detention would count towards any subsequent enforcement of the penalty of imprisonment under the law of the State in which judgment was given?

[3] Is the interpretation of the notion of enforcement for the purposes of Article 54 of the CISA affected by

(a) the fact that, having transposed the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190, p. 1) into national law, the (first) State in which judgment was given is in a position at any time to enforce its judgment which, under national law, is final and binding;

(b) the fact that a request for judicial assistance by the State in which judgment was given, with

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a view to extraditing the convicted person or enforcing judgment within that State, might not automatically be complied with because judgment was given in absentia ?'

32. Written observations have been submitted by the Governments of Austria, the Czech Republic, Germany, Poland, Spain and Sweden, and by the Commission. Counsel for Mr Kretzinger was appointed only after the deadline for the written procedure had expired. For that reason the main submissions for Mr Kretzinger were presented at the hearing on 4 July 2006, at which Germany, the Netherlands, Spain and the Commission also presented oral argument.

33. It should be noted that the written observations were submitted before the judgment in Van Esbroeck. (10) However, the hearing took place after that judgment was delivered.

Assessment

The first question

34. By its first question, the referring court asks essentially what the term same acts' in Article 54 of the CISA means and, in particular, whether one may regard the transportation by lorry of smuggled goods from Greece, through Italy and Germany, bound for the United Kingdom as constituting a single act for the purposes of that provision in so far as the defendant had intended from the outset to transport the goods from Greece to the United Kingdom.

35. I consider that the issues raised by the first question have now been resolved by Van Esbroeck , as confirmed by subsequent case-law. (11)

36. In Van Esbroeck the Court held that the only relevant criterion' for the purposes of Article 54 of the CISA is that there should be an identity of the material facts, understood in the sense of the existence of a set of concrete circumstances which are inextricably linked together'. (12) Material facts qualify as the same acts' if they constitute a set of facts which are inextricably linked together in time, in space and by their subject-matter'. (13) The Court declined to hold that either identity of the protected legal interest or identity of the legal classification of the acts was required for the acts to be categorised as the same acts' for the purposes of Article 54 of the CISA. (14) It is for the national court to determine, on the facts, whether the material acts at issue constitute a set of facts which are inextricably linked together in time, in space and by their subject-matter'. (15)

37. It follows from Van Esbroeck that it is for the national court to examine whether the prosecutions against Mr Kretzinger in Germany for smuggling the cigarettes into Greece, and in Italy for smuggling the same goods into Italy, relate to acts which are inextricably linked together in time, in space and by their subject-matter.

38. In that respect, the national court should bear in mind that, in Van Esbroeck , the Court observed that a sequence of events consisting of linked export and import transactions may, in principle, constitute a set of facts which, by their very nature, are inextricably linked'. (16) As Advocate General Ruiz-Jarabo Colomer correctly stressed in that case, it is ludicrous to refer to import and export in a territory governed by a legal system which, in essence, is designed to remove borders for both persons and goods'. (17)

39. The same reasoning may apply by analogy here. The referring court indicates that Mr Kretzinger had intended to transport the smuggled goods in question by land from their point of entry into the Community (Greece) to their final destination (the United Kingdom) in a single journey. That necessarily involved successive crossings of internal EU borders. Those crossings are distinct stages of a single overall course of action and may not artificially be severed. They may, in principle, be regarded as linked in time, in space and (by virtue of the final aim of the journey of which they form part and the unity of intention underlying them) by their subject-matter. The

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smuggling of cigarettes into Greece (the German prosecution) and the smuggling of the same cigarettes into Italy as the lorry crossed the Italian border on its way to its final destination in the United Kingdom (the Italian prosecutions) appear therefore to be based on the same acts' for the purposes of Article 54 of the CISA.

40. I therefore propose that the Court answers the first question as follows:

The phrase the same acts in Article 54 of the CISA refers to identity of material facts, understood as a set of concrete circumstances which are inextricably linked together in time, in space and by their subject-matter. The determination of whether the facts in the main proceedings are so linked is a matter for the competent national court. However, where a defendant intended from the outset to transport smuggled goods from their point of entry to a final destination in the Community in a single operation, any successive crossings of internal borders in the course of that operation may, in principle, be regarded as acts which are inextricably linked for that purpose.'

The second question

41. The second question consists of two branches.

2(a) The first branch

42. The referring court asks whether a suspended custodial sentence issued under national law may be considered to be a penalty which has been enforced' or is actually in the process of being enforced' for the purposes of Article 54 of the CISA. In what follows, I shall refer to those two requirements as the enforcement condition'.

43. I agree with all the parties submitting observations that for the purposes of the principle of ne bis in idem in Article 54 of the CISA a suspended custodial sentence amounts to a penalty which has either been enforced' or is actually in the process of being enforced'.

44. Even a brief comparative law survey demonstrates that, although the detailed requirements may vary from one Member State to another, all recognise the concept that a custodial sentence imposed on a defendant who has been found guilty may, by way of reducing the severity of the sentence, be suspended in particular circumstances. The underlying philosophy is that, for relatively short terms of imprisonment imposed on offenders who are thought to be unlikely to re-offend, it is not in the interests of society - and equally not in the interests of the individual concerned - to expose them to the negative impact of prison life. Reintegration of the offender is better ensured by suspending the sentence, subject to the fulfilment of certain conditions by the offender during the probation period.

45. The circumstances in which a sentence is suspended vary as between national legal systems, but present overall substantial similarities. They relate to the seriousness of the offence (and thus to the applicable penalty) and to the personal circumstances of the offender. The sentencing judge usually enjoys some discretion when assessing the latter.

46. Suspension of a custodial sentence is always made dependent on the offender respecting certain conditions imposed by the competent court over the probation period. These conditions vary as between Member States, and also depend on the circumstances of the case. The competent authorities monitor the offender's compliance with those conditions and the competent court retains the power to activate the suspended sentence if they are broken. Usually, activation is discretionary, but it may sometimes be mandatory. In general, conviction for another criminal offence will trigger the suspended sentence.

47. If the suspended sentence is activated, the full sentence of imprisonment originally imposed must then be served.

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48. If, however, the offender respects the conditions applicable during the probation period, he is then (depending on the Member State) either recorded as having duly served his sentence or regarded as though the offence and the conviction had never taken place.

49. Viewed substantively, a suspended custodial sentence incorporates within it a penalty which is being enforced. A person subject to a suspended custodial sentence has been tried, convicted and sentenced. By virtue of the probation period during which that person must respect certain compulsory conditions, his normal freedom of action is temporarily circumscribed. He also knows that, if he breaches the conditions of the suspension, he is likely to go to prison to serve the custodial sentence. He lives with that sword of Damocles hanging over his head.

50. It is therefore clear that a suspended custodial sentence does indeed penalise' the offender, albeit to a lesser extent than an immediate custodial sentence. As a result it should, during its currency, be regarded as a penalty which has been enforced [or] is actually being enforced' within the meaning of Article 54 of the CISA.

51. I also note that, within a national context, a person subject to a suspended sentence is generally regarded as benefiting from the principle of ne bis in idem. He has already been placed in jeopardy once and should not have to run the risk of prosecution in respect of the same facts a second time. (18) I do not see any reason why the conclusion should be different in the context of the Schengen agreement.

52. I therefore suggest that the Court should answer question 2 (a) as follows:

A custodial sentence, the enforcement of which has been suspended provided that, during a fixed period of time, the offender respects certain conditions set in accordance with the law of the State in which judgment was given, is a penalty that has been enforced or is actually in the process of being enforced within the meaning of Article 54 of the CISA and, provided the other conditions under that provision are met, gives rise to the application of the principle of ne bis in idem enshrined in that article.'

2(b) The second branch

53. The referring court asks whether the enforcement condition in Article 54 of the CISA is fulfilled if the defendant is taken for a short time into police custody and/or held on remand pending trial, and that detention would count towards any subsequent enforcement of the penalty of imprisonment under the law of the State in which judgment was given. For convenience, I shall refer to the latter concept as the principle of set-off'.

54. The referring court has explicitly limited the scope of its question to the case where the detention periods pending trial are of a short duration. It is, however, not clear from the order for reference whether the brief periods of detention served by Mr Kretzinger in Italy (19) were spent in police custody for questioning without the intervention of a judge, or whether he was also remanded in custody pending trial by a decision of the competent judge. The question of the referring court explicitly mentions both types of detention. For that reason, and also in the light of the written observations submitted, I will examine, first, detention on remand pending trial in general, whatever its duration, and, second, time spent in police custody.

- Detention on remand pending trial

55. It is helpful to begin with two preliminary observations.

56. First, detention on remand pending trial is a sensitive area of criminal law and policy in democratic societies in so far as it protects the public interest at the expense of individual freedom. The general rule is that citizens may not be deprived of their individual freedom unless they have been convicted of a criminal offence by a competent court following a process established by law.

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(20) For precisely that reason, preventive detention is subject to strict procedural and material safeguards under the European Convention of Human Rights (ECHR'). (21) Similarly, persons subjected to pre-trial detention who are subsequently released without charge, or tried but acquitted, may, under certain circumstances, be entitled to compensation. (22)

57. Second, the aim of pre-trial detention is not (and could not be) the punishment of the defendant for a criminal offence of which he has yet to be convicted. As the European Court of Human Rights has pointed out, the aim of detention pending trial is to avert the risk that the accused will fail to appear for trial, or that, if released, he may take action to prejudice the administration of justice, commit further offences or cause public disorder. (23) Thus, as Germany, Spain and Austria indicate, pre-trial detention precedes any sentence or resolution of the criminal proceedings.

58. Turning now to the question raised, I agree with all parties submitting observations (with the obvious exception of Mr Kretzinger) that periods of detention on remand cannot automatically be considered to be (partial or full) enforcement of a penalty for the purposes of Article 54 of the CISA.

59. Article 54 of the CISA applies only once the trial has been disposed of'. Detention on remand takes place pending trial. It thus by definition occurs before the trial is disposed of' in accordance with the applicable rules. On a literal interpretation, Article 54 of the CISA therefore cannot apply to such periods, even if these are, by virtue of national law, to be taken into account for the purposes of any subsequent custodial sentence.

60. Furthermore, the aims of detention pending trial are quite different from those pursued by society when enforcing a penalty. (24)

61. I thus reject the argument that a person who has been subject to detention pending trial (especially if the detention was for a short time) has thereby necessarily satisfied the enforcement condition under Article 54 of the CISA.

62. That being said, as Mr Kretzinger, Austria, the Netherlands and the Commission submit, there may be circumstances where pre-trial detention will have that effect. If the defendant who has been detained pending trial is subsequently convicted and receives a custodial sentence, the trial has been finally disposed of and - at that point - the first condition for the application of Article 54 of the CISA is met. In those circumstances, the question is whether the time spent in detention pending trial, which under national law must count towards the enforcement of the custodial sentence imposed, can be held to satisfy the enforcement condition in Article 54 of the CISA.

63. In answering that question, two scenarios need to be distinguished.

64. In the first scenario, the time spent in detention pending trial is at least equal to the term of imprisonment imposed in the final custodial sentence. So far as I have ascertained, the criminal law systems of all Member States contain some version of the principle of set-off (25) when any custodial sentence is enforced. As counsel for Kretzinger and Spain rightly point out, this principle is a specific manifestation of the general principle of proportionality in criminal justice (and, I may add, of natural justice): the sentence must be in proportion to the offence. Thus, under national law, deprivation of liberty pending trial is to be deducted from any terms of imprisonment finally imposed by sentence. Where the former periods are at least equal in duration to the latter, the custodial sentence is regarded as having being served by the time spent in detention pending trial. Otherwise the offender would be subjected to a harsher penalty than society considers appropriate for that offence.

65. The same conclusion applies for the purposes of Article 54 of the CISA. In fact, that conclusion is unavoidable if one considers, as I do, that the principle of set-off arises from applying the

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requirements of natural justice and the principle of proportionality in criminal justice, and that, as such, it enjoys the status of a general principle of EU law. (26) It follows that, even if national law did not provide for any principle of set-off, (27) EU law would require Member States to treat the enforcement condition in Article 54 of the CISA as being satisfied where a convicted defendant has been held in custody on remand in one Member State for a period equal to, or greater than, the length of the custodial sentence imposed in another Member State for the same acts. As a result, any further criminal proceedings against the same person for the same material facts would be precluded by Article 54 of the CISA.

66. In the second scenario, the periods spent in detention pending trial are less than the length of the final custodial sentence. Within that scenario, two situations need to be distinguished.

67. In the first situation, the offender goes on to serve the remainder of his term of imprisonment (that is, the difference between the time spent in detention and the custodial sentence imposed). (28) It is obvious that since the penalty is actually in the process of being enforced', the enforcement condition in Article 54 of the CISA is satisfied. Assuming the other conditions in Article 54 of the CISA are fulfilled, other Member States must refrain from prosecuting that offender a second time on the basis of the same facts.

68. In the second situation, the offender has served periods of detention pending trial, but is at liberty when the custodial sentence is passed. The penalty cannot be held to have been fully enforced (since part of the sentence is still to be served), nor is it actually in the process of being enforced (since the defendant is not in prison). The enforcement condition is therefore not met. In those circumstances, the defendant cannot rely on Article 54 of the CISA if further criminal proceedings are brought against him in another Member State for the same acts.

69. In the latter case, an offender would nevertheless be able to rely by virtue of Community law on the principle of set-off in order to have any time served on remand in the first Member State deducted from the term of imprisonment imposed by the sentence in the second Member State.

70. As I have indicated above, I consider the principle of set-off to be a general principle of EU law arising from the principles of proportionality in criminal law and of natural justice, which is distinct from, although related to, the principle of ne bis in idem. As such, it can be relied upon directly by the offender.

71. Even if the Court were to reject that proposition, Article 56 of the CISA (29) would still oblige, as the Commission and Sweden submit, a Member State to set off any period of detention served by the defendant in another Member State against any custodial sentence it wished to impose.

72. The broad drafting of Article 56 of the CISA indicates that it applies when, for whatever reason, a prosecution against the same defendant is initiated in a Member State despite the fact that his trial for the same acts has been disposed of in another Member State. (30) One can see that that might happen either where one of the derogations in Article 55 of the CISA applies, or where the trial has been disposed of' but the enforcement condition in Article 54 of the CISA has not been fulfilled. In other circumstances, the principle of ne bis in idem in Article 54 of the CISA would apply.

- Time spent in police custody

73. In most Member States the police are permitted to hold a suspect in custody for a brief period of time in order to question him or to carry out preliminary inquiries. In general, such periods may not exceed between 48 and 72 hours, within which the suspect must be brought before a competent judge, who must decide whether to authorise further police detention, remand the defendant in custody or release him, with or without charging him. (31) As with remand in custody pending trial (and

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for the same reasons relating to the primacy of individual liberty, essential democratic values and respect of the rule of law), police custody is subject to stringent conditions under Article 5(1)(c) and (3) of the ECHR, as interpreted by the European Court of Human Rights. (32)

74. I see no valid reason why periods spent in police custody should be treated differently to time spent on remand pending trial for the purposes of the enforcement condition in Article 54 of the CISA. (33) The same reasoning applies, mutatis mutandis.

75. I therefore suggest that the Court should answer the second branch of the second question as follows:

Periods spent by a defendant in police custody and/or on remand pending trial in one Member State are not to be considered as a penalty that has been enforced or that is actually in the process of being enforced for the purposes of Article 54 of the CISA, unless those periods are at least equal to any term of imprisonment imposed by the sentence finally disposing of the trial in relation to which the defendant has been in police custody or in remand.

The third question

76. In its third question the referring court enquires as to the effect, if any, of the Framework Decision on the interpretation of the enforcement condition' in Article 54 of the CISA. The third question also consists of two branches.

77. As I have indicated (34) the law implementing the Framework Decision in Germany was annulled by the Bundesverfassungsgericht on 18 July 2005, just one day before the present request for a preliminary ruling was lodged before the Court. The Framework Decision appears at present not to be applicable in Germany. However, a new implementing law was adopted on 20 July 2006, and entered into force on 2 August 2006, after the hearing in the present case took place.

78. As the Czech Republic has pointed out, it is not obvious why an answer to the second branch of the third question - which asks about the effects of sentences passed following a trial in absentia and, more particularly, of Article 5(1) of the Framework Decision, on Article 54 of the CISA - is relevant to the outcome of the proceedings before the national court. The Italian authorities have not issued a European arrest warrant. Nor, according to the order for reference, are they about to do so.

79. On those grounds the third question is arguably merely hypothetical and therefore inadmissible pursuant to the case-law. (35)

80. However, on the basis of the information available, it is possible that those questions, which clearly raise a point of interpretation of EU law, may be relevant to the main proceedings. Only the referring court can make that assessment. Consequently, the Court is, in principle, bound to give a ruling. (36)

81. Furthermore, as regards the second branch, the referring court notes in its order for reference that the status of sentences rendered after a trial in absentia by foreign courts is a matter of some controversy in Germany. It therefore seems that an answer to the question might indeed be of assistance to the referring court in considering how such sentences should be treated, irrespective of Article 5(1) of the Framework Decision, in the context of Article 54 of the CISA.

82. I will therefore suggest a reply to both branches of the third question.

83. I also note that the third question envisages the situation in which a European arrest warrant is issued for the purposes of executing a custodial sentence or detention order' against the requested person. My analysis is limited to those circumstances.

3(a) The first branch

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84. The first branch asks in essence whether the interpretation of the concept of enforcement' for the purposes of Article 54 of the CISA is affected by the fact that, under the Framework Decision as implemented in national law, the issuing Member State (in this case Italy) in which final sentence was passed may request the arrest and surrender of the defendant from the executing Member State (in this case Germany) in order to enforce that judgment at any time.

85. I cannot see how the Framework Decision affects the interpretation of the enforcement condition in Article 54 of the CISA.

86. Article 1 of the Framework Decision provides that the purpose of the issuing of an arrest warrant is the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order'.

87. Article 3(2) of the Framework Decision expressly lists, as one of the grounds for mandatory non-execution of a European arrest warrant, the case in which the judicial authority of the Member State of execution... is informed that the requested person has been finally judged by a Member State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State'.

88. It follows from those provisions, and as matter of logic, that where a European arrest warrant for the purposes of executing a custodial sentence is issued after trial and conviction, the enforcement condition in Article 54 of the CISA is, by definition, not met. Clearly, a European arrest warrant for the execution of a custodial sentence is issued precisely because the sentence in question has not been enforced or is not in the process of being enforced. Article 54 of the CISA cannot therefore apply. It follows irresistibly that, in those circumstances, a Member State is not prevented by the principle of ne bis in idem from commencing criminal proceedings for the same acts, even if the offender in question has been tried and convicted for the same acts in another Member State.

89. Thus, it is clear from the Framework Decision itself that the actual issue of a European arrest warrant, let alone the mere possibility that it might be issued in the future, has no implications for the principle of ne bis in idem. On the contrary, as Article 3(2) shows, the principle of ne bis in idem governs whether a European arrest warrant issued under the Framework Decision will, or will not, be executed.

90. That conclusion is further warranted by the fact that, as noted by Austria in its observations, the parties to the Schengen Agreement (37) are not the same as those subject to the Framework Decision. If the application of the ne bis in idem principle in Article 54 of the CISA were dependent on the provisions of the Framework Decision, the result would be legal uncertainty.

91. I therefore suggest that the Court should answer the first branch of the third question in the following terms:

The concept of enforcement for the purposes of Article 54 of the CISA is not affected by the fact that a Member State in which a defendant has been sentenced by a final and binding judgment under national law may at any time issue a European arrest warrant for the surrender of that defendant so as to enforce that sentence under the Council Framework Decision on the European arrest warrant and the surrender procedures between Member States.'

3(b) The second branch

92. The second branch of the third question asks in essence whether the interpretation of the enforcement condition in Article 54 of the CISA is affected by the fact that the sentence which is the subject-matter of the European arrest warrant was passed after a trial in absentia .

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93. The referring court analyses that question by reference to Article 5(1) of the Framework Decision. It considers that the possibility of insisting on a retrial as a pre-condition for surrender in the circumstances envisaged by that provision may cast doubt on whether the Italian convictions are properly to be categorised as trials which have been finally disposed of' for the purposes of Article 54 of the CISA (assuming that the term final' is not to be defined solely by reference to domestic legislation). It draws attention to the possibility that acts which concern several Member States and which are directed also against the Community's financial interests could effectively remain unpunished. That would be the case if one Member State's judgment in absentia had the effect of barring prosecutions in other Member States, but the judgment in absentia was never enforced and the State in which judgment was given made no effort to enforce it. (38)

94. The wording of the question concentrates on the impact that sentences passed after trials in absentia in the first Member State may have on the interpretation of the enforcement condition contained in Article 54 of the CISA. However, as several parties submitting observations have correctly noted, the substance of the referring court's question appears, rather, to be whether sentences in absentia should be considered to be decisions finally disposing' of a trial for the purposes of Article 54 of the CISA.

95. Article 5(1) of the Framework Decision expressly considers the implications of sentences imposed after a trial in absentia for the purposes of a European arrest warrant. Article 5(1) provides that, if the requested person has not been summoned in person or otherwise informed of the date and place of the hearing which led to the decision rendered in absentia ', the executing Member State is entitled to make the surrender of that person subject to the condition that the issuing judicial authority give an assurance deemed adequate to guarantee that he or she will have an opportunity to apply for a retrial of the case in the issuing Member State and to be present at the judgment'.

96. That provision reflects the requirements laid down by the European Court of Human Rights in its case-law on Article 6 of the ECHR (right to a fair trial). Pursuant to that case-law (and contrary to the position advanced by Poland), trials in absentia are not of themselves incompatible with Article 6 of the Convention. They must, however, be carried out in accordance with the strict procedural and substantive requirements set out by the ECHR so as to prevent a denial of justice. In essence, trials in absentia are permissible under the ECHR only where it is unequivocally established that the defendant has waived his right to attend the trial or has deliberately absented himself from the jurisdiction. (39)

97. If one takes the second branch of the third question literally, the straightforward answer (as Spain correctly observes) must be that the fact that final sentences are rendered following a trial in absentia is of no relevance to the enforcement condition under Article 54 of the CISA. The issuing of a European arrest warrant for the purposes of enforcing a sentence in absentia implies, by definition, that the enforcement condition in Article 54 of the CISA is not met. Whether it is not met because the defendant was sentenced in absentia (so that the sentence was never likely to be enforced) or because the defendant absented himself after sentence can make no difference to the plain fact that there has been no enforcement of the sentence. By necessary corollary, the fact that the execution or non-execution of that warrant may be affected by Article 5(1) of the Framework Decision can have no bearing on the correct interpretation of Article 54 of the CISA. (40)

98. As I have indicated, behind the actual question referred lies the question of whether, in the light of Article 5 of the Framework Decision, a judgment after a trial in absentia is to be considered as a decision finally disposing' of a trial for the purposes of Article 54 of the CISA. Part of the answer to that question is to be found in Gözütok and Brügge. (41) In that case, the Court held that decisions which under national law definitively bar further proceedings or definitively

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discontinue prosecutions were to be considered as decisions which finally disposed of' a trial for the purposes of Article 54 of the CISA.

99. Clearly, as both the Court's decision in Gözütok and Brügge and the wording of Article 54 of the CISA itself imply, it is for the domestic legal order of the sentencing Member State to determine whether, and in what circumstances, a judgment, including one arrived at after a trial in absentia , definitively bars further criminal proceedings for the same acts under national law and is a decision that finally disposes of a trial. That conclusion is in line with other international instruments, in particular Article 4 of Protocol No 7 to the ECHR, regulating the application of the principle of ne bis in idem at the domestic level. All those instruments leave it to the domestic legal system in question to determine what is a final decision definitively disposing of criminal proceedings. (42)

100. When assessing a claim based on Article 54 of the CISA by a defendant convicted in absentia in a Member State, all other Member States are therefore bound by whether the sentencing Member State treats a judgment following a trial in absentia as a decision finally disposing' of the trial. If so, and the other conditions in Article 54 of the CISA are met, that judgment will trigger the application of the principle of ne bis in idem in the supranational Schengen context, in accordance with the principle of mutual trust on which Article 54 of the CISA is founded. (43)

101. That conclusion is subject to one important proviso. The trial in absentia which led to the judgment must have complied with the requirements laid down by Article 6 of the ECHR. By virtue of the general principles of EU law and Article 6(1) and (2) EU, those requirements are applicable by extension in the EU context. A judgment following a trial in absentia which had been issued in a manner that contravened the ECHR, even if it were regarded as valid and final under national law, would ipso facto violate those general principles of EU law that encapsulate basic and fundamental human rights. As a result, it could not lawfully be regarded as a judgment finally disposing' of a trial for the purposes of Article 54 of the CISA.

102. That is, indeed, precisely why the wording of Article 5(1) of the Framework Decision echoes the conditions laid down by the case-law of the European Court of Human Rights on Article 6 of the ECHR for determining when a sentence in absentia is valid.

103. I therefore suggest that the Court answers the second branch of the third question as follows:

The concept of enforcement for the purposes of Article 54 of the CISA is not affected by the fact that, under Article 5(1) of the Framework Decision, the judicial authorities of the executing Member State are not required automatically to execute a European arrest warrant issued to enforce sentence imposed upon conviction after a trial in absentia.

Where, under the legal system of the sentencing Member State, a decision reached following a trial in absentia definitively bars further criminal proceedings, that decision finally disposes of the trial for the purposes of Article 54 of the CISA, provided that the trial complied with the requirements of Article 6 EU and general principles of Community law guaranteeing respect for fundamental rights as enshrined in the European Convention on Human Rights and Fundamental Freedoms.'

Conclusion

104. In view of the foregoing I consider that the Court should reply to the preliminary questions posed by the referring court as follows:

(1) The phrase the same acts' in Article 54 of the CISA refers to identity of material facts, understood as a set of concrete circumstances which are inextricably linked together in time, in space and by their subject-matter. The determination of whether the facts in the main proceedings

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are so linked is a matter for the competent national court. However, where a defendant intended from the outset to transport smuggled goods from their point of entry to a final destination in the Community in a single operation, any successive crossings of internal borders in the course of that operation may, in principle, be regarded as acts which are inextricably linked for that purpose.

(2)(a) A custodial sentence, the enforcement of which has been suspended provided that, during a fixed period of time, the offender respects certain conditions set in accordance with the law of the State in which judgment was given, is a penalty that has been enforced or is actually in the process of being enforced within the meaning of Article 54 of the CISA and, provided the other conditions under that provision are met, gives rise to the application of the principle of ne bis in idem enshrined in that article.

(2)(b) Periods spent by a defendant in police custody and/or on remand pending trial in one Member State are not to be considered as a penalty that has been enforced or that is actually in the process of being enforced for the purposes of Article 54 of the CISA, unless those periods are at least equal to any term of imprisonment imposed by the sentence finally disposing of the trial in relation to which the defendant has been in police custody or in remand.

(3)(a) The concept of enforcement for the purposes of Article 54 of the CISA is not affected by the fact that a Member State in which a defendant has been sentenced by a final and binding judgment under national law may at any time issue a European arrest warrant for the surrender of that defendant so as to enforce that sentence under the Council Framework Decision on the European arrest warrant and the surrender procedures between Member States.

(3)(b) The concept of enforcement for the purposes of Article 54 of the CISA is not affected by the fact that, under Article 5(1) of the Framework Decision, the judicial authorities of the executing Member State are not required automatically to execute a European arrest warrant issued to enforce sentence imposed upon conviction after a trial in absentia.

Where, under the legal system of the sentencing Member State, a decision reached following a trial in absentia definitively bars further criminal proceedings, that decision finally disposes of the trial for the purposes of Article 54 of the CISA, provided that the trial complied with the requirements of Article 6 EU and general principles of Community law guaranteeing respect for fundamental rights as enshrined in the European Convention on Human Rights and Fundamental Freedoms.

(1) .

(2) - OJ 2000 L 239, p. 19.

(3) - OJ 2002 L 190, p. 1.

(4) - Annexed by the Treaty of Amsterdam to the Treaty on the European Union (TEU') and to the Treaty establishing the European Community.

(5) - OJ 2000 L 239, p. 13.

(6) - Article 2(1), first subparagraph.

(7) - Recital 5.

(8) - Article 3(2).

(9) - Bundesgesetzblatt 2006 Teil I Nr. 6 of 25.07.06.

(10) - The Court's judgment in Case C-436/04 Van Esbroeck [2006] ECR I-2333, was given on 9 March 2006. Advocate General Ruiz-Jarabo Colomer had delivered his Opinion on 20 October 2005.

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(11) - See Case C-150/05 Van Straaten [2006] ECR I-0000 and Case C-467/04 Gasparini [2006] ECR I-0000.

(12) - At paragraph 36.

(13) - At paragraph 37.

(14) - Van Esbroeck , cited in footnote 10, paragraphs 31, 32 and 35. In the case of concurrent Community and national sanctions for the same acts in the field of competition law, the Court has additionally required that for the principle of ne bis in idem to apply, the legal interest protected by the Community and the national rules has to be identical. For the reasons that I gave in my Opinion in Gasparini , cited in footnote 11 above, at points 155 to 158, I take the view that the apparent contradiction between the two strands of case-law can be resolved.

(15) - At paragraph 38.

(16) - Paragraph 37.

(17) - Point 52 of his Opinion, cited in footnote 10 above.

(18) - C.f. the analysis of the association between the rule against double jeopardy and the principle of ne bis in idem set out at points 72 to 77 of my opinion in Gasparini , cited in footnote 11 above.

(19) - The order for reference indicates that Mr Kretzinger spent only one day in police custody in relation to the first prosecution. No information on that point is available as regards the second prosecution in Ancona.

(20) - See Article 5(1)(c) and (3) of the ECHR.

(21) - There is abundant case-law of the European Court of Human Rights on Article 5(1)(c) and (3) of the ECHR. See in particular, Jeius v. Lithuania , no. 34578/97 ECHR 2000-IX.

(22) - As is the case, for instance, in France.

(23) - See, for instance, Smirnova v. Russia , nos 46133/99 and 48183/99, º 59 ECHR 2003-IX and the case-law cited therein.

(24) - See point 57 above.

(25) - That principle is specifically referred to as principe d'imputation in French criminal law or Anrechnungsprinzip in German criminal law. See also the decision of the House of Lords in Regina v Governor of Her Majesty's Prison Brockhill, Ex parte Evans (No 2) [2001] 2 AC 19, where Lord Hope of Craighead referred to the broad principle ... that periods spent in custody before trial or sentence which are attributable only to the offence for which the offender is being sentenced are to be taken into account in calculating the length of the period which the offender must spend in custody after he has been sentenced'. That principle is also reflected in Article 26(1) of the Framework Decision (which is part of Chapter 3, entitled Effects of the surrender'), according to which the issuing Member State shall deduct all periods of detention arising from the execution of a European arrest warrant from the total period of detention to be served in the issuing Member State as a result of a custodial sentence or detention order being passed'. In some Member States, such as Germany and parts of the United Kingdom, sentencing rules allow the competent judge to reject the application of the principle for reasons relating to the behaviour of the offender while on remand. Any departure must however be duly justified.

(26) - See the analysis in points 53 to 64 of my Opinion in Case C-367/05 Kraaijenbrink , which I have also delivered today.

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(27) - That possibility is of course merely theoretical. As I have explained above, all national criminal laws recognise the principle of set-off detention periods pending trial.

(28) - Or completes the probation period associated with a suspended (custodial) sentence, as described above.

(29) - I regard Article 56 of the CISA as merely spelling out the general principle of set-off (which applies to any previous penalty imposed for the same acts, whatever its nature) for the purposes of Schengen and only in so far as penalties involving deprivation of liberty are concerned. The fact that Articles 54 and 56 are both in Chapter 3 of Title III of the CISA, under the heading Application of the ne bis in idem principle', does in my view not detract from the fact that they are two autonomous principles in EU law. I discuss the principle of set-off in my Opinion in Kraaijenbrink , cited in footnote 26 above, at points 53 to 64 and refer to that analysis.

(30) - In Kraaijenbrink , cited in footnote 26 above, the Dutch Government vehemently opposed the Commission's oral submissions to this effect. See point 54 of my Opinion in that case.

(31) - The arrangements for detaining terrorist suspects in police custody may be less liberal.

(32) - The leading case is Brogan and Others v the United Kingdom , judgment of 29 November 1988, series A no. 145-B.

(33) - It is true that some national systems provide that some periods of detention in police custody (usually those not exceeding 24 hours in length) are not to be deducted from any final term of imprisonment imposed by sentence. That constitutes a negligible exception to the normal rule.

(34) - Point 20 above.

(35) - See, for instance, Van Straaten , cited in footnote 11 above, paragraph 34.

(36) - Ibid., paragraph 33.

(37) - Whereas the Framework Decision applies to all EU Member States, the CISA is only applicable to those Member States which have fully implemented the Schengen acquis, plus Norway and Iceland as contracting parties to the CISA and the United Kingdo m and Ireland as regards, inter alia, Articles 54 to 58 of the CISA. See point 75 of my opinion in Gasparini , cited in footnote 11 above.

(38) - In the referring court's view, that is precisely what has happened in respect of the sentences imposed in Italy.

(39) - The principles applying to trials in absentia have recently been summarised by the European Court of Human Rights in Sejdovic v. Italy [GC], no. 56581/00, ° 81 et seq., ECHR 2006.

(40) - See the analysis at points 85 to 90 above in respect of the first branch of the third question, which is equally applicable here.

(41) - Case C-187/01 [2003] ECR I-1345.

(42) - See also Article 14(7) of the 1966 International Covenant on Civil and Political Rights, which provides that no one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country '.

(43) - See Gözütok and Brügge , cited in footnote 41 above.

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AUTLANG	English
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Notice for the OJ

Reference for a preliminary ruling from the Hof van Beroep, Antwerp by judgment of that court of 30 June 2005 in 1. ..., 2. ... and 3. Bowens, Werner Constant Maria.

(Case C-272/05)

(Language of the case: Dutch)

Reference has been made to the Court of Justice of the European Communities by judgment of the Hof van Beroep, Antwerp of 30 June 2005, received at the Court Registry on 5 July 2005, for a preliminary ruling in the proceedings between 1. ..., 2. ... and 3. Bowens, Werner Constant Maria on the following question:

'Must Article 54 of the Convention of 19 June 1990 implementing the Schengen Agreement, read in conjunction with Article 71 thereof, be construed as meaning that offences of possession for the purposes of export and import in respect of the same narcotic drugs and psychotropic substances and which are prosecuted as exports and imports respectively in different countries which have signed the Convention implementing the Schengen Agreement, are deemed to be the 'same acts', as referred to in Article 54 of that Convention?'

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ORDONNANCE DU PRÉSIDENT DE LA COUR

7 juin 2006(*)

«Radiation»

- 751938 -

Dans l'affaire C-272/05,

ayant pour objet une demande de décision préjudicielle au titre de l'article 35 UE, introduite par le hof van beroep te Antwerpen (Belgique), par arrêt du 30 juin 2005, parvenu à la Cour le 5 juillet 2005, dans la procédure pénale contre

Werner Bouwens,

LE PRÉSIDENT DE LA COUR,

l'avocat général, M. D. Ruiz-Jarabo Colomer, entendu,

rend la présente

Ordonnance

1 Par lettre du 13 mars 2006, le greffe de la Cour a transmis à la juridiction de renvoi l'arrêt rendu le 9 mars 2006 dans l'affaire C-436/04, Leopold Henri Van Esbroeck (non encore publié au Recueil), en l'invitant à bien vouloir lui indiquer si, à la lumière de cet arrêt, elle souhaitait maintenir son renvoi préjudiciel.

2 Par lettre du 28 avril 2006, parvenue au greffe de la Cour le 4 mai 2006, le hof van beroep te Antwerpen a informé le greffe de la Cour qu'il n'entendait pas maintenir sa demande de renvoi préjudiciel.

3 Dans ces conditions, il y a lieu d'ordonner la radiation de la présente affaire du registre de la Cour.

4 La procédure revêtant, à l'égard des parties au principal, le caractère d'un incident soulevé devant la juridiction nationale, il appartient à celle-ci de statuer sur les dépens.

Par ces motifs, le président de la Cour ordonne:

L'affaire C-272/05 est radiée du registre de la Cour.

Fait à Luxembourg, le 7 juin 2006.

Le greffier	Le président
R. Grass	V. Skouris

* Langue de procédure: le néerlandais.

Judgment of the Court (First Chamber)
of 28 September 2006
Jean Leon Van Straaten v Staat der Nederlanden and Republiek Italie. Reference for a preliminary ruling: Rechtbank 's-Hertogenbosch - Netherlands. Convention implementing the Schengen Agreement - Ne bis in idem principle -Meaning of "the same acts' and of "trial disposed of' - Exporting in one State and importing in another State - Acquittal of the accused. Case C-150/05.

1. Preliminary rulings - Jurisdiction of the Court - Limits

(Art. 234 EC)

2. Preliminary rulings - Jurisdiction of the Court - Limits

(Art. 234 EC)

3. European Union - Police and judicial cooperation in criminal matters - Protocol integrating the Schengen acquis - Convention implementing the Schengen Agreement - Ne bis in idem principle

(Convention implementing the Schengen Agreement, Art. 54)

4. European Union - Police and judicial cooperation in criminal matters - Protocol integrating the Schengen acquis - Convention implementing the Schengen Agreement - Ne bis in idem principle

(Convention implementing the Schengen Agreement, Art. 54)

1. In the context of the cooperation between the Court of Justice and national courts that is provided for by Article 234 EC, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of Community law, the Court is, in principle, bound to give a ruling.

The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it.

(see paras 33-34)

2. Although the Court has no jurisdiction under Article 234 EC to apply a rule of Community law to a particular case and thus to judge a provision of national law by reference to such a rule, it may, in the framework of the judicial cooperation provided for by that article and on the basis of the material presented to it, provide the national court with an interpretation of Community law which may be useful to it in assessing the effects of the provision in question.

(see para. 37)

3. Article 54 of the Convention implementing the Schengen Agreement must be interpreted as meaning that the relevant criterion for the purposes of the application of that article is identity of the material acts, understood as the existence of a set of facts which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected.

In the case of offences relating to narcotic drugs, first, the quantities of the drug that are at issue in the two Contracting States concerned or the persons alleged to have been party to the acts in the two States are not required to be identical. It is therefore possible that a situation in which such identity is lacking involves a set of facts which, by their very nature, are inextricably

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linked. Second, punishable acts consisting of exporting and of importing the same narcotic drugs and which are prosecuted in different Contracting States party to the Convention are, in principle, to be regarded as the same acts' for the purposes of Article 54 of the Convention, the definitive assessment in that respect being the task of the competent national courts.

(see paras 48-51, 53, operative part 1)

4. The ne bis in idem principle, enshrined in Article 54 of the Convention implementing the Schengen Agreement, a provision which has the objective of ensuring that no one is prosecuted for the same acts in several Contracting States on account of the fact that he exercises his right to freedom of movement, falls to be applied in respect of a decision of the judicial authorities of a Contracting State by which the accused is acquitted finally for lack of evidence.

The main clause of the single sentence comprising Article 54 of the Convention makes no reference to the content of the judgment that has become final. It is only in the subordinate clause that Article 54 refers to the case of a conviction by stating that, in that situation, the prohibition of a prosecution is subject to a specific condition. If the general rule laid down in the main clause were applicable only to judgments convicting the accused, it would be superfluous to provide that the special rule is applicable in the event of conviction.

Furthermore, not to apply Article 54 of the Convention to a final decision acquitting the accused for lack of evidence would have the effect of jeopardising exercise of the right to freedom of movement.

Finally, in the case of a final acquittal for lack of evidence, the bringing of criminal proceedings in another Contracting State for the same acts would undermine the principles of legal certainty and of the protection of legitimate expectations. The accused would have to fear a fresh prosecution in another Contracting State although a case in respect of the same acts has been finally disposed of.

(see paras 56-59, 61, operative part 2)

In Case C-150/05,

REFERENCE for a preliminary ruling under Article 35 EU from the Rechtbank 's-Hertogenbosch (Netherlands), made by decision of 23 March 2005, received at the Court on 4 April 2005, in the proceedings

Jean Leon Van Straaten

v

Staat der Nederlanden,

Republiek Italie,

THE COURT (First Chamber),

composed of K. Schiemann, President of the Fourth Chamber, acting for the President of the First Chamber, N. Colneric (Rapporteur), J.N. Cunha Rodrigues, M. Ilei and E. Levits, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,

Registrar: H. von Holstein, Deputy Registrar,

having regard to the written procedure and further to the hearing on 4 May 2006,

after considering the observations submitted on behalf of:

- the Netherlands Government, by H.G. Sevenster and D.J.M. de Grave, acting as Agents,

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- the Italian Government, by I.M. Braguglia, acting as Agent, and G. Aiello, avvocato dello Stato,

- the Czech Government, by T. Boek, acting as Agent,

- the Spanish Government, by M. Muñoz Pérez, acting as Agent,

- the French Government, by G. de Bergues and J.-C. Niollet, acting as Agents,

- the Austrian Government, by E. Riedl, acting as Agent,

- the Polish Government, by T. Nowakowski, acting as Agent,

- the Swedish Government, by K. Wistrand, acting as Agent,

- the Commission of the European Communities, by W. Bogensberger and R. Troosters, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 8 June 2006,

gives the following

Judgment

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

1. Article 54 of the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, signed on 19 June 1990 in Schengen, must be interpreted as meaning that:

- the relevant criterion for the purposes of the application of that article is identity of the material acts, understood as the existence of a set of facts which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected;

- in the case of offences relating to narcotic drugs, the quantities of the drug that are at issue in the two Contracting States concerned or the persons alleged to have been party to the acts in the two States are not required to be identical;

- punishable acts consisting of exporting and of importing the same narcotic drugs and which are prosecuted in different Contracting States party to that Convention are, in principle, to be regarded as the same acts' for the purposes of Article 54 of the Convention, the definitive assessment in that respect being the task of the competent national courts.

2. The ne bis in idem principle, enshrined in Article 54 of that Convention, falls to be applied in respect of a decision of the judicial authorities of a Contracting State by which the accused is acquitted finally for lack of evidence.

1. This reference for a preliminary ruling concerns the interpretation of Article 54 of the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (OJ 2000 L 239, p. 19; the CISA'), signed in Schengen (Luxembourg) on 19 June 1990.

2. The reference was made in proceedings between, first, Mr Van Straaten and, second, the Staat der Nederlanden (the Netherlands State) and the Republiek Italie (the Italian Republic) relating to the alert concerning Mr Van Straaten's conviction in Italy for drug trafficking which the Italian authorities had entered in the Schengen Information System (the SIS') for the purpose of his extradition.

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Legal context

Community law

3. Under Article 1 of the Protocol integrating the Schengen acquis into the framework of the European Union, annexed to the Treaty on European Union and to the Treaty establishing the European Community by the Treaty of Amsterdam (the Protocol'), 13 Member States of the European Union, amongst them the Italian Republic and the Kingdom of the Netherlands, are authorised to establish closer cooperation among themselves within the scope of the Schengen acquis as set out in the annex to the Protocol.

4. The Schengen acquis thus defined includes, inter alia, the Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, signed in Schengen on 14 June 1985 (OJ 2000 L 239, p. 13; the Schengen Agreement'), and the CISA. The Italian Republic signed an agreement for its accession to the CISA on 27 November 1990 (OJ 2000 L 239, p. 63), and it entered into force on 26 October 1997.

5. By virtue of the first subparagraph of Article 2(1) of the Protocol, from the date of entry into force of the Treaty of Amsterdam the Schengen acquis was to apply immediately to the 13 Member States referred to in Article 1 of the Protocol.

6. Pursuant to the second sentence of the second subparagraph of Article 2(1) of the Protocol, on 20 May 1999 the Council of the European Union adopted Decision 1999/436/EC determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions or decisions which constitute the Schengen acquis (OJ 1999 L 176, p. 17). It is apparent from Article 2 of the decision, in conjunction with Annex A thereto, that the Council selected Articles 34 EU and 31 EU, which form part of Title VI of the Treaty on European Union entitled Provisions on police and judicial cooperation in criminal matters', as the legal basis for Articles 54 to 58 of the CISA.

7. Articles 54 to 58 form Chapter 3 (Application of the ne bis in idem principle') of Title III (Police and security') of the CISA.

8. Article 54 of the CISA provides:

A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party.'

9. Article 55(1) of the CISA states:

A Contracting Party may, when ratifying, accepting or approving this Convention, declare that it is not bound by Article 54 in one or more of the following cases:

(a) where the acts to which the foreign judgment relates took place in whole or in part in its own territory; in the latter case, however, this exception shall not apply if the acts took place in part in the territory of the Contracting Party where the judgment was delivered;

...'

10. Article 71(1) of the CISA, for which Article 34 EU and Articles 30 EU and 31 EU were selected as the legal basis, provides:

The Contracting Parties undertake as regards the direct or indirect sale of narcotic drugs and psychotropic substances of whatever type, including cannabis, and the possession of such products

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and substances for sale or export, to adopt in accordance with the existing United Nations Conventions..., all necessary measures to prevent and punish the illicit trafficking in narcotic drugs and psychotropic substances.'

11. Article 95(1) and (3) of the CISA are worded as follows:

1. Data on persons wanted for arrest for extradition purposes shall be entered at the request of the judicial authority of the requesting Contracting Party.

3. A requested Contracting Party may add to the alert in the data file of its national section of the Schengen Information System a flag prohibiting arrest on the basis of the alert until the flag is deleted. The flag must be deleted no later than 24 hours after the alert has been entered, unless the Contracting Party refuses to make the requested arrest on legal grounds or for special reasons of expediency. In particularly exceptional cases where this is justified by the complex nature of the facts behind the alert, the above time-limit may be extended to one week. Without prejudice to a flag or a decision to refuse the arrest, the other Contracting Parties may make the arrest requested in the alert.'

12. Article 106(1) of the CISA states:

Only the Contracting Party issuing the alert shall be authorised to modify, add to, correct or delete data which it has entered.'

13. Article 111 of the CISA provides:

1. Any person may, in the territory of each Contracting Party, bring before the courts or the authority competent under national law an action to correct, delete or obtain information or to obtain compensation in connection with an alert involving them.

2. The Contracting Parties undertake mutually to enforce final decisions taken by the courts or authorities referred to in paragraph 1, without prejudice to the provisions of Article 116.'

14. Article 35 EU governs the Court's jurisdiction to give preliminary rulings in this field. Article 35(3) EU is worded as follows:

A Member State making a declaration pursuant to paragraph 2 shall specify that either:

(a) ...; or

(b) any court or tribunal of that State may request the Court of Justice to give a preliminary ruling on a question raised in a case pending before it and concerning the validity or interpretation of an act referred to in paragraph 1 if that court or tribunal considers that a decision on the question is necessary to enable it to give judgment.'

15. The Kingdom of the Netherlands has declared its acceptance of the Court's jurisdiction in accordance with the arrangements laid down in Article 35(2) and (3)(b) EU (OJ 1997 C 340, p. 308).

International law

16. Article 4 of Protocol No 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, is worded as follows:

1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.

2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered

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facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

3. No derogation from this Article shall be made under Article 15 of the Convention.'

17. Article 14(7) of the International Covenant on Civil and Political Rights, which was adopted on 16 December 1966 and entered into force on 23 March 1976, is worded as follows:

No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.'

18. Article 36 of the Single Convention on Narcotic Drugs, concluded in New York on 30 March 1961 under the aegis of the United Nations, is worded as follows:

1. (a) Subject to its constitutional limitations, each Party shall adopt such measures as will ensure that cultivation, production, manufacture, extraction, preparation, possession, offering, offering for sale, distribution, purchase, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation and exportation of drugs contrary to the provisions of this Convention, and any other action which in the opinion of such Party may be contrary to the provisions of this Convention, shall be punishable offences when committed intentionally, and that serious offences shall be liable to adequate punishment particularly by imprisonment or other penalties of deprivation of liberty.

(b) ...

2. Subject to the constitutional limitations of a Party, its legal system and domestic law,

(a) (i) Each of the offences enumerated in paragraph 1, if committed in different countries, shall be considered as a distinct offence;

...'

The main proceedings and the questions referred for a preliminary ruling

19. It is apparent from the order for reference that on or about 27 March 1983 Mr Van Straaten was in possession of a consignment of approximately 5 kilograms of heroin in Italy, that this heroin was transported from Italy to the Netherlands and that Mr Van Straaten had a quantity of 1 000 grams of that consignment of heroin at his disposal during the period from 27 to 30 March 1983.

20. Mr Van Straaten was prosecuted in the Netherlands for (i) importing a quantity of approximately 5 500 grams of heroin from Italy into the Netherlands on or about 26 March 1983, together with A. Yilmaz, (ii) having a quantity of approximately 1 000 grams of heroin at his disposal in the Netherlands during or around the period from 27 to 30 March 1983 and (iii) possessing firearms and ammunition in the Netherlands in March 1983. By judgment of 23 June 1983, the Rechtbank 's-Hertogenbosch ('s-Hertogenbosch District Court, Netherlands) acquitted Mr Van Straaten on the charge of importing heroin, finding it not to have been legally and satisfactorily proved, and convicted him on the other two charges, sentencing him to a term of imprisonment of 20 months.

21. In Italy, Mr Van Straaten was prosecuted along with other persons, for possessing on or about 27 March 1983, and exporting to the Netherlands on several occasions together with Mr Karakus Coskun, a significant quantity of heroin, totalling approximately 5 kilograms. By judgment delivered in absentia on 22 November 1999 by the Tribunale ordinario di Milano (District Court, Milan, Italy), Mr Van Straaten and two other persons were, upon conviction on the charges, sentenced to a term of imprisonment of 10 years, fined ITL 50 000 000 and ordered to pay the costs.

22. The main proceedings are between, first, Mr Van Straaten and, second, the Netherlands State and the Italian Republic. The national court refers to an alert regarding Mr Van Straaten the

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legality of which is at issue in those proceedings, and which the national court examines in the light of the CISA. By order made on 16 July 2004, the Italian Republic was summoned to appear in the proceedings.

23. Before the national court, the Italian Republic rejected Mr Van Straaten's claims that, by virtue of Article 54 of the CISA, he should not have been prosecuted by or on behalf of the Italian State and that all acts connected with that prosecut ion were unlawful. According to the Italian Republic, no decision was given on Mr Van Straaten's guilt by the judgment of 23 June 1983, in so far as it concerns the charge of importing heroin, since he was acquitted on that charge. Mr Van Straaten's trial had not been disposed of, within the meaning of Article 54 of the CISA, as regards that charge. The Italian Republic further submitted that, as a result of the declaration as referred to in Article 55(1)(a) of the CISA which it had made, it was not bound by Article 54 of the CISA, a plea which was rejected by the national court.

24. No further information on the nature of the proceedings is given in the order for reference.

25. According to the Netherlands Government, the judgment of the Rechtbank 's-Hertogenbosch of 23 June 1983 was upheld by a judgment of the Gerechtshof te 'sHertogenbosch (Regional Court of Appeal, 'sHertogenbosch) of 3 January 1984, which amended the terms of the second charge against Mr Van Straaten. The Gerechtshof te 'sHertogenbosch described the act as voluntary possession of a quantity of approximately 1 000 grams of heroin in the Netherlands during or around the period from 27 to 30 March 1983'. The appeal on a point of law brought by Mr Van Straaten against that judgment was dismissed by judgment of the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) of 26 February 1985. That judgment became final. Mr Van Straaten served the sentence imposed upon him.

26. The Netherlands Government then states that in 2002, at the request of the Italian judicial authorities, an alert was entered in the SIS for the arrest of Mr Van Straaten with a view to his extradition, on the basis of an arrest warrant of the Milan Public Prosecutor's Office of 11 September 2001. The Kingdom of the Netherlands added to that alert a flag as referred to in Article 95(3) of the CISA, so that he could not be arrested in the Netherlands.

27. After Mr Van Straaten had, in 2003, been informed of that alert and, therefore, of his conviction in Italy, he first requested, in vain, from the Italian judicial authorities the deletion of the data in the SIS concerning him. The Korps Landelijke Politiediensten (Netherlands National Police Services; the KLPD') stated to him by letter of 16 April 2004 that, since the KLPD was not the authority that issued the alert, under Article 106 of the CISA it was not authorised to delete it from the SIS.

28. The Netherlands Government further states that Mr Van Straaten then applied to the Rechtbank 's-Hertogenbosch for an order requiring the minister concerned and/or the KLPD to delete his personal data from the police register. The national court found in an order of 16 July 2004 that, by virtue of Article 106(1) of the CISA, only the Italian Republic was authorised to delete the data as requested by Mr Van Straaten. In light of that fact, the court treated the application as an application for an order requiring the Italian Republic to delete the data. The Italian Republic was consequently joined as a party to the main proceedings.

29. According to the Netherlands Government, the national court then found that, under Article 111(1) of the CISA, Mr Van Straaten had the right to bring an action before the competent court under national law challenging the entry by the Italian Republic in the SIS of data concerning him. Pursuant to Article 111(2), the Italian Republic would be required to enforce a final decision of the Netherlands court on such an action.

30. It was in those circumstances that the Rechtbank 's-Hertogenbosch decided to stay proceedings

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and to refer the following questions to the Court for a preliminary ruling:

(1) What is to be understood by the same acts within the meaning of Article 54 of the [CISA]? (Is having at one's disposal approximately 1 000 grams of heroin in the Netherlands in or around the period from 27 to 30 March 1983 the same act as being in possession of approximately 5 kilograms of heroin in Italy on or about 27 March 1983, regard being had to the fact that the consignment of heroin in the Netherlands formed part of the consignment of heroin in Italy? Is exporting a consignment of heroin from Italy to the Netherlands the same act as importing the same consignment of heroin from Italy into the Netherlands, regard also being had to the fact that Mr Van Straaten's co-accused in the Netherlands and Italy are not entirely the same? Having regard to the acts as a whole, consisting of possessing the heroin in question in Italy, exporting it from Italy, importing it into the Netherlands and having it at one's disposal in the Netherlands, are those the same acts?)

(2) Is a person's trial disposed of, for the purposes of Article 54 of the CISA, if the charge brought against that person has been declared not to have been legally and satisfactorily proved and that person has been acquitted on that charge by way of a judgment?'

Admissibility of the reference for a preliminary ruling

31. In the present case, the Court has jurisdiction to rule on the interpretation of Article 54 of the CISA since the system under Article 234 EC is capable of applying to references for a preliminary ruling pursuant to Article 35 EU, subject to the conditions laid down in the latter article (see, in this regard, Case C-105/03 Pupino [2005] ECR I-5285, paragraph 28), and the Kingdom of the Netherlands made a declaration in accordance with Article 35(3)(b) EU taking effect on 1 May 1999, the date upon which the Treaty of Amsterdam entered into force.

32. The French Government expresses doubts as to the admissibility of the reference for a preliminary ruling, on the ground that the information provided by the national court is brief and does not make it possible to understand what the purpose of the action is or why answers to the two questions submitted are necessary.

33. In that regard, it must be borne in mind that it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court (see Case C-437/97 EKW and Wein & Co. [2000] ECR I1157, paragraph 52, and Case C-448/01 EVN and Wienstrom [2003] ECR I14527, paragraph 74). Consequently, where the questions submitted concern the interpretation of Community law, the Court is, in principle, bound to give a ruling.

34. The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, inter alia, Case C-379/98 PreussenElektra [2001] ECR I-2099, paragraph 39; Case C-35/99 Arduino [2002] ECR I-1529, paragraph 25; and Case C-13/05 Chacon Navas [2006] ECR I-0000, paragraph 33).

35. In the present case, although the grounds of the order for reference are succinct and lack structure, the information which they contain is sufficient, first, to rule out that the questions submitted bear no relation to the actual facts of the main action or its purpose or that the problem is hypothetical and, second, to enable the Court to give a useful answer to those questions. It is apparent from the context of the order for reference that Mr Van Straaten's action is for the

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annulment of the alert concerning him entered in the SIS and that, in the view of the national court, the action can succeed only if, under the ne bis in idem principle pursuant to Article 54 of the CISA, the conviction in the Netherlands precludes the prosecution of him in Italy which is the cause of that alert.

36. The Spanish Government submits that the first question is inadmissible. It maintains that this question concerns only the facts of the main action and that the national court is in actual fact asking the Court to apply Article 54 of the CISA to the facts which gave rise to the domestic proceedings.

37. As to those submissions, although the Court has no jurisdiction under Article 234 EC to apply a rule of Community law to a particular case, it may, in the framework of the judicial cooperation provided for by that article and on the basis of the material presented to it, provide the national court with an interpretation of Community law which may be useful to it in assessing the effects of the provision in question (Joined Cases C-515/99, C-519/99 to C-524/99 and C-526/99 to C540/99 Reisch and Others [2002] ECR I-2157, paragraph 22).

38. By its first question, the national court seeks an interpretation of Article 54 of the CISA in light of the facts which it takes pains to specify in parentheses. The Court is not requested, on the other hand, to apply that article to the facts set out.

39. It follows from the foregoing that the reference for a preliminary ruling is admissible.

The questions

Question 1

40. By this question, the national court essentially asks what the relevant criteria are for the purposes of applying the concept of the same acts' within the meaning of Article 54 of the CISA, having regard to the facts which it has specified in parentheses.

41. The Court held in Case C-436/04 Van Esbroeck [2006] ECR I-2333, at paragraph 27, that the wording of Article 54 of the CISA, the same acts', shows that that provision refers only to the nature of the acts in dispute and not to their legal classification.

42. The wording used in that article thus differs from that in other international instruments which enshrine the ne bis in idem principle (Van Esbroeck , paragraph 28).

43. There is a necessary implication in the ne bis in idem principle enshrined in Article 54 of the CISA that the Contracting States have mutual trust in their criminal justice systems and that each of them recognises the criminal law in force in the other Contracting States even when the outcome would be different if its own national law were applied (Van Esbroeck , paragraph 30).

44. The possibility of divergent legal classifications of the same acts in two different Contracting States is therefore no obstacle to the application of Article 54 of the CISA (Van Esbroeck , paragraph 31).

45. The above findings are further reinforced by the objective of Article 54 of the CISA, which seeks to ensure that no one is prosecuted for the same acts in several Contracting States on account of his having exercised his right to freedom of movement (Van Esbroeck , paragraph 33, and the case-law cited).

46. That right to freedom of movement is effectively guaranteed only if the perpetrator of an act knows that, once he has been found guilty and served his sentence, or, where applicable, been acquitted by a final judgment in a Contracting State, he may travel within the Schengen area without fear of prosecution in another Contracting State on the basis that the legal system of that Member State treats the act concerned as a separate offence (see Van Esbroeck , paragraph 34).

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47. Because there is no harmonisation of national criminal law, a criterion based on the legal classification of the acts or on the legal interest protected might create as many barriers to freedom of movement within the Schengen area as there are penal systems in the Contracting States (Van Esbroeck , paragraph 35).

48. In those circumstances, the only relevant criterion for the application of Article 54 of the CISA is identity of the material acts, understood as the existence of a set of concrete circumstances which are inextricably linked together (Van Esbroeck , paragraph 36).

49. In the case of offences relating to narcotic drugs, the quantities of the drug that are at issue in the two Contracting States concerned or the persons alleged to have been party to the acts in the two States are not required to be identical.

50. It is therefore possible that a situation in which such identity is lacking involves a set of facts which, by their very nature, are inextricably linked.

51. In addition, the Court has already held that punishable acts consisting of exporting and of importing the same narcotic drugs and which are prosecuted in different Contracting States party to the CISA are, in principle, to be regarded as the same acts' for the purposes of Article 54 (Van Esbroeck , paragraph 42).

52. However, as rightly pointed out by the Netherlands Government, the definitive assessment in this regard is a matter for the competent national courts which are charged with the task of determining whether the material acts at issue constitute a set of facts which are inextricably linked together in time, in space and by their subject-matter (Van Esbroeck , paragraph 38).

53. In the light of the foregoing, the answer to the first question must be that Article 54 of the CISA must be interpreted as meaning that:

- the relevant criterion for the purposes of the application of that article is identity of the material acts, understood as the existence of a set of facts which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected;

- in the case of offences relating to narcotic drugs, the quantities of the drug that are at issue in the two Contracting States concerned or the persons alleged to have been party to the acts in the two States are not required to be identical;

- punishable acts consisting of exporting and of importing the same narcotic drugs and which are prosecuted in different Contracting States party to that Convention are, in principle, to be regarded as the same acts' for the purposes of Article 54 of the Convention, the definitive assessment in that respect being the task of the competent national courts.

Question 2

54. By this question, the national court essentially asks whether the ne bis in idem principle, enshrined in Article 54 of the CISA, applies in respect of a decision of the judicial authorities of a Contracting State by which the accused is acquitted for lack of evidence.

55. Under Article 54 of the CISA, a person may not be prosecuted in a Contracting State for the same acts as those in respect of which his trial has already been finally disposed of' in another Contracting State provided that, in the event of conviction, the penalty has been enforced, is actually in the process of being enforced or can no longer be enforced.

56. The main clause of the single sentence comprising Article 54 of the CISA makes no reference to the content of the judgment that has become final. It is only in the subordinate clause that Article 54 refers to the case of a conviction by stating that, in that situation, the prohibition of a prosecution is subject to a specific condition. If the general rule laid down in the main

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clause were applicable only to judgments convicting the accused, it would be superfluous to provide that the special rule is applicable in the event of conviction.

57. It is settled case-law that Article 54 of the CISA has the objective of ensuring that no one is prosecuted for the same acts in several Contracting States on account of the fact that he exercises his right to freedom of movement (see Joined Cases C187/01 and C-385/01 Gözütok and Brügge [2003] ECR I-1345, paragraph 38).

58. Not to apply that article to a final decision acquitting the accused for lack of evidence would have the effect of jeopardising exercise of the right to freedom of movement (see, to this effect, Van Esbroeck , paragraph 34).

59. Furthermore, in the case of a final acquittal for lack of evidence, the bringing of criminal proceedings in another Contracting State for the same acts would undermine the principles of legal certainty and of the protection of legitimate expectations. The accused would have to fear a fresh prosecution in another Contracting State although a case in respect of the same acts has been finally disposed of.

60. It should be added that, in Case C-469/03 Miraglia [2005] ECR I-2009, at paragraph 35, the Court held that the ne bis in idem principle, enshrined in Article 54 of the CISA, does not fall to be applied in respect of a decision of the judicial authorities of one Member State declaring a case to be closed, after the Public Prosecutor has decided not to pursue the prosecution on the sole ground that criminal proceedings have been started in another Member State against the same defendant and for the same acts, without any determination whatsoever as to the merits of the case. While there is no need to give a ruling in the present case as to whether an acquittal which is not based on a determination as to the merits of the case may fall within that article, it must be found that an acquittal for lack of evidence is based on such a determination.

61. Consequently, the answer to the second question must be that the ne bis in idem principle, enshrined in Article 54 of the CISA, falls to be applied in respect of a decision of the judicial authorities of a Contracting State by which the accused is acquitted finally for lack of evidence.

Costs

62. 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 submitti ng observations to the Court, other than the costs of those parties, are not recoverable.

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PROCEDU Reference for a preliminary ruling

ADVGEN Ruiz-Jarabo Colomer

JUDGRAP Colneric

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Opinion of Mr Advocate General Ruiz-Jarabo Colomer delivered on 8 June 2006. Jean Leon Van Straaten v Staat der Nederlanden and Republiek Italie. Reference for a preliminary ruling: Rechtbank 's-Hertogenbosch - Netherlands. Convention implementing the Schengen Agreement - Ne bis in idem principle -Meaning of ''the same acts' and of ''trial disposed of' - Exporting in one State and importing in another State - Acquittal of the accused. Case C-150/05.

I - Introduction

1. This reference for a preliminary ruling under Article 35 EU, from the Rechtbank 'sHertogenbosch ('sHertogenbosch District Court), (2) affords the Court of Justice a fourth opportunity to interpret Article 54 of the Convention implementing the Schengen Agreement (hereinafter the CISA'), which sets out the ne bis in idem principle.

2. On the first two occasions it held that the principle applies when the prosecution is discontinued on fulfilment of certain conditions agreed with the Public Prosecutor, (3) but does not, however, operate where a case is closed as the result of the Public Prosecutor's Office itself deciding not to pursue the prosecution, on the ground that proceedings have commenced in another Member State against the same defendant and for the same acts. (4)

3. The third opportunity arose in Van Esbroeck , (5) which examined the temporal scope of the principle, and outlined the concept of the same acts' .

4. The definition of the latter notion and the manner of determining the exercise of State power to combat criminal conduct come to the fore once again, since the referring court is unsure of the import of the expression the same acts' and seeks to know whether the trial of a person who has been acquitted on the grounds of insufficient evidence has been disposed of' within the meaning of Article 54 of the CISA. (6)

5. Those doubts arise in proceedings brought by Mr Van Straaten under Article 111(1) of the CISA, against the entry of his data in the Schengen Information System.

II - The Schengen acquis

A - General considerations

6. The body of law in question consists of:

a) the Agreement signed on 14 June 1985 in the Luxembourg town which gives it its name by the States comprising the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders; (7)

b) the Convention implementing that agreement, signed on 19 June 1990, (8) which establishes cooperation measures to counteract the effect of the elimination of those checks;

c) the accession protocols and instruments of the other Member States, the declarations and decisions of the Executive Committee created under the CISA, and those of the organs upon which that Committee has conferred decision-making powers. (9)

7. Protocol (No 2) to the Treaty on European Union and to the Treaty establishing the European Community integrated that acquis into the framework of the Union and, by virtue of the first subparagraph of Article 2(1), has applied to the 13 States set out in Article 1, which include the Kingdom of the Netherlands and the Italian Republic, (10) since the entry into force of the Treaty of Amsterdam (1 May 1999).

8. The aim, according to the preamble to the Protocol, is to enhance European integration and, in particular, to enable the European Union to develop more rapidly into an area of freedom, security and justice.

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9. Pursuant to the second subparagraph of Article 2(1) of the Protocol, on 20 May 1999 the Council adopted Decisions 1999/435/EC and 1999/436/EC, in which it defined the Schengen Agreement and, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, determined the legal basis for the provisions which constitute the acquis. (11)

B - The ne bis in idem principle

10. Title III of the CISA, Police and Security', begins with a chapter on Police Cooperation' (Articles 39 to 47) and continues with another concerning Judicial Assistance in Criminal Matters' (Articles 48 to 53).

11. Chapter three, under the heading Application of the ne bis in idem principle' consists of Articles 54 to 58, which have their legal basis, according to Article 2 and Annex A of Decision 1999/436, in Articles 34 EU and 31 EU.

12. Article 54 of the CISA provides :

A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party.'

13. Article 55(1)(a) states that, when ratifying the Convention, a State can declare that it is not bound by Article 54 where the acts did not take place in the country where the judgment is delivered and took place, in full or in part, in its own territory.

C - Combating drug trafficking

14. After chapters four (Extradition'; Articles 59 to 66) and five (Transfer of the Enforcement of Criminal Judgments'; Articles 67 to 69), Title III devotes a further chapter to Narcotic Drugs' (Articles 70 to 76), Article 71(1) of which, having its legal basis not only in Articles 34 EU and 31 EU, but in Article 30 EU, states:

The Contracting Parties undertake as regards the direct or indirect sale of narcotic drugs and psychotropic substances of whatever type, including cannabis, and the possession of such products and substances for sale or export, to adopt in accordance with the existing United Nations Conventions, all necessary measures to prevent and punish the illicit trafficking in narcotic drugs and psychotropic substances.'

15. A final, seventh, chapter (Articles 77 to 91) concerns Firearms and Ammunition'.

D - The Schengen Information System

16. Title IV of the Convention (Articles 92 to 119) establishes the Schengen Information System, (12) consisting of a national section in each of the signatory States and a technical support unit to enable access, by means of an automated search procedure, to alerts on persons and property for the purposes under Articles 95 to 100 (Article 92(1) in conjunction with Article 94(1) and Article 102(1)).

17. One of those objectives is arrest for extradition purposes, in which circumstances data on persons wanted is to be entered in the system at the request of the judicial authority of the requesting State (Article 95(1)), the only body authorised to modify, add to, correct or delete that data (Article 106(1)). Where the requested State considers that the alert is incompatible with its national law, international obligations or essential national interests, it may insert a flag prohibiting the arrest in its territory (Article 95(3) in conjunction with Article 94(4)).

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18. Each country designates a competent authority to manage the national part of the system (Article 108(1)). Persons affected may bring an action to correct or delete an alert, to obtain information or to seek compensation (Article 111(1)), and the Contracting Parties undertake mutually to enforce any final decisions taken (Article 111(2)).

III - The facts, the main proceedings and the questions raised for a preliminary ruling (13)

19. In March 1983, Mr Van Straaten, a Community national, was in possession in Italy of approximately five kilograms of heroin, which he brought into the Netherlands, where he had around 1 000 grams at his disposal.

20. He was charged in the Netherlands with three offences: (1) on or about 26 March, importing 5 500 grams of heroin from Italy, together with Mr Yilmaz, (2) having a quantity of approximately 1 000 grams of heroin at his disposal during the period from 27 March to 30 March 1983 and (3) possessing firearms and ammunition.

21. The Rechtsbank 'sHertogenbosch, in its judgment of 23 June 1983, acquitted him of the first charge on the grounds of insufficient evidence, (14) and sentenced him in respect of the other two to 20 months' imprisonment, which he duly served, once the sentence had become final. (15)

22. In Italy, Mr Van Straaten was prosecuted for possessing and exporting to the Netherlands approximately five kilograms of heroin, in various consignments up to 27 March 1983, with the aggravating circumstance that he acted as a member of a criminal organisation. The trial was heard in his absence, although he had been duly summoned, and the Tribunale Ordinario di Milano (Court of First Instance, Milan), in a judgment of 22 November 1999, without ruling on the aggravating circumstance, imposed a prison sentence of 10 years and a fine of 50 million lira and ordered him to pay costs.

23. At the request of the Italian authorities, an alert in respect of Mr Van Straaten was entered in the Schengen Information System, for the purpose of his arrest and subsequent extradition, for which the Milan Public Prosecutor applied on 11 September 2001. Invoking Article 95(3) of the CISA, the Netherlands inserted a flag, preventing the detention from being carried out in its territory.

24. Once he learned of the second sentence and of his inclusion in the system, Mr Van Straaten, through the Korps Landelijke Politidiensten (16) (Netherlands National Police Services), sought the deletion of his data and, since he obtained no reply, immediately applied to the Rechtbank 'sHertogenbosch. Under Article 106(1) of the CISA, on 16 July 2004, that court summoned the Italian Republic to appear.

25. The Rechtbank takes the view that, in accordance with Article 111 of the CISA, Mr Van Straaten has standing to bring the action and Italy is bound to accept the decision it delivers.

26. Mr Van Straaten argues that the sentence imposed in Italy infringes the CISA and that, as a result, its enforcement would be unlawful. Italy counters that no trial relating to the offending import was disposed of' in the Netherlands, since there was an acquittal, and that there is nothing to prevent a second set of proceedings.

27. The Rechtbank 'sHertogenbosch stayed the proceedings and referred the following questions to the Court:

(1) What is to be understood by the same acts within the meaning of Article 54 of the CISA? (Is having at one's disposal approximately 1 000 grams of heroin in the Netherlands in or around the period from 27 to 30 March 1983 the same act as being in possession of approximately five kilograms of heroin in Italy on or about 27 March 1983, regard being had to the fact that the consignment of heroin in the Netherlands formed part of the consignment of heroin in Italy? Is exporting a consignment of heroin from Italy to the Netherlands the same act as importing the same consignment

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of heroin from Italy into the Netherlands, regard also being had to the fact that Mr Van Straaten's fellow accused in the Netherlands and Italy are not entirely the same? Having regard to the acts as a whole, consisting of possessing the heroin in question in Italy, exporting it from Italy, importing it into the Netherlands and having it at one's disposal in the Netherlands, are those the same acts?

(2) Is a person's trial disposed of, for the purposes of Article 54 of the CISA, if the charge brought against that person has been declared not to have been legally and satisfactorily proved and that person has been acquitted on that charge by way of a judgment?'

IV - The proceedings before the Court of Justice

28. The Commission and the Austrian, Czech, Spanish, French, Italian, Netherlands, Polish and Swedish Governments have submitted written observations, and the representatives of Spain, the Netherlands and the Commission appeared at the hearing of 4 May 2006, at which they presented oral arguments.

V - Admissibility of the questions referred for a preliminary ruling

29. The French and Spanish Governments, although on different grounds, dispute whether these proceedings are relevant.

30. The French Government laments the frugality of the information provided by the referring court which, because it obscures the subjectmatter of the dispute, makes it impossible to gauge the need for interpretation by the Court of Justice in order to determine it.

31. The Spanish Government's preliminary objection (17) is lesser in scope, since it relates only to the first question and, in the alternative, to the second part of that question which, in its view, goes to the determination of the facts. It argues that to define whether acts tried in one set of proceedings are the same as those assessed in earlier proceedings exceeds the interpretative role of the Court of Justice.

A - Relevance of the referral

32. The French Government is not wide of the mark in saying that the Rechtbank's order barely gives a glimpse of the nature and purpose of Mr Van Straaten's claim. However, the fog lifts if one turns to the original proceedings and to the written submission of the Netherlands.

33. Invoking Article 111(1) of the CISA, Mr Van Straaten asked the court to cancel the alert against him in the Schengen Information System, which it is for the Italian Republic to do, since it is bound by the decision made (Article 106(1) in conjunction with Article 111(2) of the CISA).

34. The alert derives from the judgment of the Tribunale Ordinario di Milano, which, in order to enforce it, the Public Prosecutor commenced proceedings for extradition, which requires arrest.

35. In short, the lawfulness of the penalty determines that of the entry in the System or, conversely, the application seeking the cancellation can only succeed if the act on which it depends is unlawful. Accordingly, a court decision which infringes the ne bis idem principle could not justify handing over the convicted person, previously the subject of an entry in the system, for detention. (18) There is, therefore, nothing surprising in the fact that the Rechtbank 'sHertogenbosch, in the interests of upholding that principle, should examine the meaning of the expression the same acts', used in Article 54 of the CISA, in enquiring whether an acquittal on the grounds of insufficient evidence triggers application of the principle.

36. There is an argument that the referral serves no purpose, since Mr Van Straaten did not have to fear arrest in his country, because the Netherlands authorities, by virtue of Article 95(3) of the CISA, inserted a flag (which I mentioned in paragraph 17 of this Opinion). However, that

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approach is wrong on two counts: on the one hand, to analyse the interest of the claimant in the main proceedings and to address his standing to be a party to the action, is to encroach on an area out of bounds to the Community judicature; at the same time, that approach overlooks the fact not only that such specific intervention by the requested State does not prevent detention in other Member States, but also that Article 54 of the CISA seeks to ensure freedom of movement of citizens within the Union, (19) an aim set out in the fourth indent of the first paragraph of Article 2 EU.

37. Furthermore, the system under Article 234 EC applies to Article 35 EU, (20) adjusted to meet its specific characteristics, but with all its accrued doctrine and caselaw. According to both provisions, the referral of questions to the Court of Justice is subject to the national court considering that a preliminary ruling is necessary in order to enable it to give judgment, and there is, therefore, a presumption that a referral is relevant, unless it: (a) bears no relation to the actual facts of the main action or to its purpose; or (b) the issue is merely hypothetical; or (c) the wording of the referral withholds from the Court of Justice information necessary to give a useful answer, (21) none of which circumstances, as I have indicated, obtains in the present situation.

38. A final obstacle to admissibility, which the Commission noted only to refute it, relating to the redundancy to which the French Government alluded, lies in ascertaining whether Article 54 of the CISA applies ratione temporis to the original proceedings.

39. Van Esbroeck addressed the effects in time of Article 54, and in my Opinion in that case I suggested that the right not to be prosecuted or punished repeatedly for the same offence is to be classed as a fundamental individual right designed to ensure that no one who has committed an offence and served their sentence is prosecuted and punished again', and takes full effect when those conditions are met, at which moment, as the other side of the coin, the obligation of the State to refrain completely from all punitive measures arises. In order for the principle to apply a final judgment must already been delivered (paragraph 31). The date of the first trial is immaterial, provided the second took place after the entry into force of the CISA, which contains no provision dealing specifically with the effects in time of Article 54 (points 32 and 29 of that Opinion). Accepting my recommendations, the judgment in that case held that the ne bis in idem maxim did apply in circumstances similar to those of the present facts (points 23 and 24).

40. The international instrument in question, unpublished when the facts occurred (approval of the first decision in the Netherlands and commencement of proceedings in Italy), was in force at the time of the conviction in the latter country, at which moment, accordingly, the ne bis in idem principle was fully effective, and the considerations in paragraphs 33 to 37 above therefore remain completely valid.

B - An indeterminate legal concept

41. Nor does the Spanish Government err in observing that the first question concerns the facts, but it is mistaken to propose its dismissal at the outset.

42. It does not suggest such a fate for the question in its entirety, only the enquiries in parentheses, in which the referring court requests guidance on the specific circumstances of the dispute, which the Court of Justice cannot give, because to do so would go beyond its interpretative role.

43. So, the referral starts with an enquiry which, despite alluding to facts, affords undeniable scope for interpretation, since it relates to an indeterminate legal concept (22) (the same acts') in the provision in question.

44. A similar issue arose in Van Esbroeck , in which I stated that the task of ascertaining whether the acts on account of which a prosecution is opened are the same as those which were at issue in

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a previous prosecution is at the very heart of the role of administering justice, and only the court having direct knowledge of the situation to be the subject of its assessment is qualified for that task, without prejudice to the right of review at second instance (paragraph 36 of the Opinion). The role of the Court is restricted to furnishing interpretative criteria which, having regard to the basis and the aim of Article 54 of the CISA, indicate the most suitable approach in the interests of ensuring uniform treatment throughout the whole territory of the European Union (paragraph 37).

45. In that endeavour it seems futile to extract, in the context of Community law, a number of autonomous guidelines on the basis of which to put forward a general criterion to apply to cases which may arise in the future, since the contingent nature of criminal law policies and the characteristics of criminal proceedings are not conducive to the creation of universally valid rules', and an approach which may be helpful with regard to certain types of offence or certain types of participation is liable to prove inappropriate for others (paragraphs 38 and 39). I regard it as more sensible to adopt an intermediate approach which, rather than becoming mired in the vicissitudes of the main proceedings, assesses the particular circumstances of the case, in order to assist the national court by furnishing rules enabling it to resolve the dispute in accordance with the spirit of the provision (paragraph 40).

46. In my view such an approach provides a useful answer to the referring court, whilst not usurping its role, and averts the risks signalled by the Spanish Government.

VI - Analysis of the questions referred

47. Having cleared the way, and with no further preliminaries, it is necessary to dispel the doubts of the Rechtbank 'sHertogenbosch. The first, as commented, has been examined in Van Esbroeck. The judgments in Gözutök and Brügge , on the one hand, and Miraglia , on the other, offer guidelines for the second. However, the present proceedings are to interpret a number of variations on the same theme.

48. I shall begin at the end because if it is found that an acquittal on the grounds that the charges were not made out does not preclude a subsequent review of the same acts', any speculation about the latter concept is superfluous.

A - The concept of a second trial: acquittal on the grounds of insufficient evidence (second question)

49. In my Opinion in Gözütok and Brügge , I stated that no one whose trial has been finally disposed of in one State which is party to the Convention may be prosecuted again, for the same acts, irrespective of whether he has been acquitted or convicted (paragraph 46).

50. My view has not altered one iota since then but, unlike the situation on that occasion, when the issue was not contentious, it is now necessary to articulate the reasons why such a finding triggers the protective effect of the ne bis in idem principle.

1. The literal interpretation

51. The wording of Article 54 of the CISA affords no room for discussion since, after referring to a trial which has been finally disposed of, without alluding to the outcome, it prohibits any future prosecution, with the qualification that, if a penalty has been imposed', (23) the bar is conditional on it being enforced or that it can no longer be enforced. That clarification would be redundant if the principle were only effective after imposition of a penalty.

52. Miraglia , albeit by implication, since that case likewise did not broach the issue directly, expressed the same view, stressing the notion of examination as to the merits of the case' (paragraph 30) and rejecting application of Article 54 of the CISA where the case has been discontinued because other proceedings have been started in another Member State (paragraph 35). The key lies

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in the fact of exercise of the ius puniendi , by means of an assessment of all the elements of the case, and the verdict is immaterial (I explore this notion further below).

53. The emphatic terms of the Charter of Fundamental Rights of the European Union (24) support that observation. Article 50 bars any later examination if the person concerned has been finally acquitted or convicted'. (25)

54. Those arguments render meaningless an interpretation such as that which the Austrian Government sets out, only to reject it, in paragraph 37 of its written observations. In the Schengen context, to hold that ne bis in idem requires a conviction, irrespective of whether there is also a penalty, would run counter to the spirit of Article 54 of the Convention, as well as unjustifiably reducing its scope of application by excluding acquittals because that factor was missing from the person tried. (26)

55. The Spanish Government's thesis displays a similar antagonism and is, as well as contradictory, (27) mistaken, since it identifies the rationale of the maxim in the principle of proportionality, and calls for a response fitting the crime. (28)

2. Teleological interpretation

(a) The ne bis in idem principle in Schengen

56. Other principles inspire the axiom in question: legal certainty and equity. The offender must know that, by paying the penalty, he has expiated his guilt and need not fear further sanction. If he is acquitted, he must have the certainty that he will not be prosecuted again in further proceedings (paragraphs 49 of the Opinion in Gözütock and Brügge and 19 of that in Van Esbroeck).

57. The ne bis in idem principle is a fundamental right of citizens, linked to the right to due process and a fair trial; it is also a structural requirement of the legal system and its lawfulness is founded on respect for res judicata (paragraph 21 of the Opinion in Van Esbroeck).

58. Where, in a situation involving multiple penalties, one invokes proportionality to ensure that, on imposing them, the court takes previous sanctions into account, alleviating those penalties, there comes into play the Anrechnungsprinzipi ' or taking into consideration principle', (29) not to be confused with the ne bis in idem principle, although they are complementary. Article 54 of the CISA is not a procedural guideline which works as a palliative, in the interests of that proportionality, when a person is prosecuted and punished more than once for identical acts, but a fundamental safeguard, which prevents a second judgment on the same matter (Erledigungsprinzip or exhaustion of procedure principle'). (30)

59. In the Schengen acquis , intended to enhance European integration and, in particular, to make the Union an area of freedom, security and justice, the ne bis in idem principle also operates in conjunction with the right to freedom of movement. (31) The gradual removal of border checks, an evitable stage on the way to that common area, is not without risks, since it favours those who take advantage of the reduction in surveillance to extend their unlawful activities, necessitating an increase in police and judicial cooperation. Yet that more robust impact must be achieved with no erosion of the inalienable freedoms inherent to a democratic society governed by the rule of law.

60. A multinational context demands, as already indicated, more collaboration, but also greater crossborder recognition of judicial proceedings.

(a) Mutual trust

61. The ne bis in idem principle serves the principle of legal certainty, (32) ensuring that decisions adopted by the public authorities, once definitive and final, cannot be challenged indefinitely.

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When a prosecution has run its course in one Member State, the others cannot disregard that circumstance. Integration requires assistance, unlikely without mutual confidence in the criminal justice systems of each Member State and without the mutual recognition of judgments, adopted in a true common home' of fundamental rights. (33)

62. Even when one State may not deal with a matter in the same or even a similar way as another, the result will be accepted as equivalent because it reflects the same principles and values. In a project as ambitious as the European Union, the States must trust in the adequacy of their partners' rules and also trust that they apply them correctly, accepting their consequences, even though they may produce different outcomes; (34) that concept implies taking those outcomes into consideration, one corollary of which is the ne bis in idem principle.

63. In short, if one Member State judges the perpetrator of or a participant in an offence, (35) the courts of the other States must refrain from reexamining the matter, whatever the verdict, (36) a conviction or an acquittal, since, in either instance, the court is expressing the ius puniendi.

3. The panoply of possible judgments

64. Where a penalty is imposed, there is no room whatsoever for doubt, and the term includes, in addition to judgments in the strict sense, the discontinuance of the prosecution as the result of fulfilment of the conditions imposed on the defendant by the Public Prosecutor (judgment in Gözütok and Brügge).

65. In the event of an acquittal, any subsequent step is prohibited, provided the State monopoly on punishing crime has come into operation, in the form of an analysis of the merits'. (37) That expression, coined in Miraglia , embraces several situations, depending on the grounds of the decision, some intrinsic to the defendant and others extrinsic. The intrinsic grounds include those for exonerating a defendant who lacks the indispensable requirements for accountability (grounds relating to lack of criminal responsibility, such as being under age or mental disorder). The extrinsic grounds cover factual situations, in which no other behaviour could be expected (justifying circumstances: selfprotection, necessity or overwhelming fear) or in which the personal requirements of the offence (elements relating to the perpetrator of the crime) are not satisfied, and those relating to the passage of time (38) and to the substantive truth of the facts under analysis.

66. That latter group includes three types of acquittal, depending on whether: (1) the acts do not constitute a criminal offence, (2) the defendant did not commit them or (3) it is not proven that the defendant committed them; (39) the question now referred concerns that third category.

4. In particular, acquittal on the grounds of insufficient evidence

67. That type of verdict entails an investigation of the merits or, in other words, implies a decision on the conduct in relation to its attribution to a perpetrator and, as such, exhausts the State ius puniendi .

68. The ne bis in idem principle precludes a person being either punished, or prosecuted' or tried' more than once. Article 54 of the CISA uses the first term, whilst Article 50 of the Charter of Fundamental Rights of the European Union (Spanish version) contains the second. The judgment in Gözütock and Brügge ruled very clearly, pointing out that the objective of Article 54 is to ensure that no one is prosecuted on the same acts in several Member States' (paragraph 38). The judgments in Miraglia and Van Esbroeck reiterated that interpretation (paragraphs 32 and 33 respectively), which is no arbitrary construction, since the principle in question, as indicated, serves the interests of equity and legal certainty, and is linked to the right to a fair trial; it also protects the dignity of the individual visàvis inhuman and degrading treatment, since that is a fitting description of the practice of repeatedly punishing the same offence. (40)

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69. Criminal proceedings represent, of themselves, a necessary imposition on a person in respect of whom there are reasonable grounds to suspect they have committed an offence. However, if the courts in a final judgment find that the charges have not been substantiated, nothing authorises the reopening of the case, even if new evidence comes to light proving who perpetrated the illegal acts.

70. That is not the consequence of a secondary criterion, such as the principle of adopting the interpretation most favourable to the accused, which operates at the time of assessing the evidence, (41) but of a fundamental right, intended to protect the citizen visàvis the public authorities, which only permits acquittal if, all the guarantees having been observed and after the appropriate evidential procedures, innocence does not fall away.

71. It is unacceptable to cause concern to a person who has been found not guilty (42) both if that finding is made in substantive terms and where it derives from the basic right of the individual referred to above, common to the constitutional traditions of the Member States and incorporated in the Charter of Fundamental Rights of the European Union (Article 48(1)), as well as being declared in Article 6(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms and enshrined, in Article 6(2) EU, as a general principle of Community law.

72. In short, I share the view of the Commission and of the participating Member States, with the exception of Spain, that a person who has been acquitted because the charge has not been proven must be regarded as having had their trial disposed of' for the purposes of Article 54 of the CISA. (43)

73. No one, including the Spanish Government, disputes that the ne bis in idem principle is effective in such a situation within a national legal system, and there should therefore be no question as to a similar outcome in a supranational framework such as that of the European Union, unless one were to take a parsimonious and reticent approach, which denies two pillars of that common space: mutual trust, with the reciprocal acceptance of judicial decisions, and respect for the fundamental rights of citizens.

B - The concept of idem: the same acts' (first question)

74. The judgment in Van Esbroeck has addressed that aspect of the reference for a preliminary ruling, in which it was held that Article 54 of the CISA requires that the acts must be the same, in the sense of a set of inextricably linked circumstances, independently of the legal classification of the acts and the interests protected by the criminal offences. (44) It the adds that the import and export of a consignment of narcotics, punishable in different Member States subject to the Schengen acquis , do fall within that definition, without prejudice to the fact that it is for the national courts to make the definitive assessment.

75. That approach takes up the recommendations in my Opinion in Van Esbroeck on the purely factbased dimension of the concept (paragraphs 41 to 49), on its application to the transporting of a specific quantity of a drug from one Contracting State to another (paragraphs 50 to 52), and on the interpretation of Article 71 of the CISA and of the United Nations sectoral conventions (paragraphs 53 to 58).

76. Although, at the present stage of my analysis, I am tempted to stop, the particular features of the instant case suggest that I should go one step further and make a number of additional remarks about the same acts', without impinging on the task of the referring court, to which it falls to ascertain whether the account of the facts which gave rise to one action is the same as that of the earlier proceedings .

77. That last observation concurs with the Spanish Government, according to which the second part of the first question (the part in parentheses) should be disregarded, since it is conducive to becoming involved in the facts, which this Court must not do.

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1. The subjectmatter of the same acts'

78. The Van Esbroeck judgment refers to a set of concrete circumstances which are inextricably linked together' (paragraph 36). That way of putting it conceals two objective aspects.

79. On the one hand, one has to have regard for time and for space, in such a way that, if there is unity in both dimensions, the substantive facts cannot be divided into artificially separate episodes.

80. At the same time, whilst not overlooking the factual aspect, the offender's mental link with his own acts deserves consideration.

81. A single time, a single place, but, also, a single intention.

82. It is necessary to work with that trinity in order to ascertain the equality which the ne bis in idem principle requires, clearly understanding that they do not all have to exist at the same time. The place may change, as in Van Esbroeck , where a quantity of prohibited substances was transported from one Member State to another, but the event does not change. The sequence of offending acts tends to be lengthy and to be divided into distinct phases but, for the purpose of punishment, retains its unity. (45) Lastly, there is nothing to prevent the perpetrator's intention, on occasion from changing, and yet, that circumstance notwithstanding, the offence remains unaltered.

2. The personal element: the existence and fate of other defendants

83. The ne bis in idem principle, a personal guarantee, bars a second trial for the same conduct. Accordingly, as well as objective identity, there must be subjective identity, such that it is sufficient for the trial of one individual to be disposed of for that person not to be troubled again.

84. In consequence, the collaboration of other people, the possibility that they might change in the course of the criminal behaviour and the fate which criminal justice metes out to them are of secondary importance.

85. That is to say, the principle under analysis in this case operates only in relation to the person accused a first time, and the story does not chang e because others take part, replacing each other during the execution of the offending acts.

VII - Conclusion

86. In the light of the foregoing, I suggest that the Court of Justice should respond as follows to the questions referred by the Rechtbank 'sHertogenbosch:

(1) A person's trial has been disposed of within the meaning of Article 54 of the Convention implementing the Schengen Agreement if, after assessment of the evidence, that person is acquitted on the ground that the charges alleged have not been established.

(2) In order to assess whether the acts are the same it is necessary:

- to have regard to the essence of the acts prosecuted in both sets of proceedings, irrespective of their legal classification and the principles or interests which punishment of that person protects in the legal systems of the Contracting States or in those in which the Schengen acquis applies; and

- to define acts as a set of inextricably linked circumstances, for which purpose it is necessary to consider whether they display unity in time and space, and in the intention of the perpetrator, and it is irrelevant that, in both sets of proceedings, the person benefiting from the ne bis in idem principle might appear with different codefendants.

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(3) It falls to the national court to determine, in accordance with the foregoing criteria, whether the possession of a consignment of heroin in Italy, transporting it to the Netherlands and possession, in the latter State, of some or all of that consignment, constitute the same acts.'

(1) .

(2) - 'sHertogenbosch, a town in Brabante, near Antwerp, and the birthplace, in 1450, of Jeroen van Aken, known under the pseudonym Hieronymus Bosch. The Netherlands has accepted the jurisdiction of the Court of Justice to give preliminary rulings and has granted all courts power to refer questions to it (OJ 1999 C 120, p. 24).

(3) - Joined Cases C187/01 and C385/01 Gözutök and Brügge [2003] ECR I1345, in which I delivered an Opinion on 19 September 2002.

(4) - Case C469/03 Miraglia [2005] ECR I2009.

(5) - Case C436/04 Van Esbroeck [2006] ECR I2333. I also issued the Opinion in that case, delivered on 20 October 2005.

(6) - The Commission of the European Communities has produced a Green Paper on Conflicts of Jurisdiction and the Principle of ne bis in idem in Criminal Proceedings (Brussels, 23 December 2005, COM/2005/0696 final), which explores the types of decision which trigger the application of that principle (p. 9).

(7) - OJ 2000 L 239, p. 13.

(8) - OJ 2000 L 239, p. 19.

(9) - OJ 2000 L 239, p. 63 et seq.

(10) - The other States are the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, the GrandDuchy of Luxembourg, the Republic of Austria, the Portuguese Republic, the Republic of Finland and the Kingdom of Sweden. The United Kingdom and the Republic of Ireland have not subscribed fully to that common project, and have chosen to participate on an ad hoc basis [Council Decisions 2000/365/EC of 29 May 2000 (OJ 2000 L 131, p. 43), and 2002/192/EC of 28 February 2002 (OJ 2002 L 64, p. 20) respectively, address the requests of each of those Member States to take part in some of the provisions of the Schengen acquis]. Denmark has a unique status, enabling it to opt out of decisions made in the field. The combined provisions in question have been binding on the 10 new Member States since entry into the European Union, even where many of the provisions require intervention by the Council (Article 3 of the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded).

(11) - OJ 1999 L 176, p. 1 and 17 respectively.

(12) - The Court of Justice looked at the System for the first time in Case C503/03 Commission v Spain [2006] ECR I1097.

(13) - In view of the paucity of the information supplied in the order for reference, in drafting the following paragraphs I have also used a number of the observations filed in the prelitigation proceedings, in particular those of the Netherlands Government and those of the Commission.

(14) - The allegation of a defect in the statement of reasons is, to my mind, irrelevant and vexatious. The crucial point is that the Dutch court acquitted Mr Van Straaten because, in its view, the facts were not proven.

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(15) - The Gerechstshof 'sHertogenbosch ('sHertogenbosch Regional Court of Appeal) upheld the decision, although it amended the legal classification of the second charge by a judgment of 3 January 1984, confirmed on appeal by the decision of the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) of 26 February 1985.

(16) - The authority designated in compliance with Article 108(1) of the Convention.

(17) - The text of the objection points up a regrettable confusion between questions referred for preliminary rulings on validity and those relating to interpretation (paragraphs 5 and 7).

(18) - The Commission explores these ideas in paragraphs 30 to 36 of its observations.

(19) - Judgments in Gözütok and Brügge (paragraph 38) and Miraglia (paragraph 32).

(20) - Case C105/03 Pupino [2005] ECR I5285, paragraphs 19 and 28.

(21) - Pupino , paragraphs 29 and 30.

(22) - That is how I describe it in my Opinion in Van Esbroeck (point 38).

(23) - Equivalent expressions appear in other language versions; for example: en cas de condamnation (French); im Fall einer Verurteilung (German); en caso de condena (Spanish); and in caso di condanna (Italian).

(24) - OJ 2000 C 346, p. 1.

(25) - The International Covenant on Civil and Political Rights of 19 December 1966 (Article 14(7)), Protocol No 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 4(1)) and the Rome Statue of the International Criminal Court (Article 20(1)) are similarly categoric.

(26) - The principle would operate when, despite being culpable, the act is not sanctioned (exonerating circumstances, where the acts are not objectively punishable or liable to prosecution), but would not apply where the non-imposition of a penalty was due to a finding of a ground of lack of criminal responsibility.

(27) - In paragraph 31 of its observations, it argues that the words if a penalty has been imposed' reveals that Article 54 of the CISA excludes acquittals, overlooking the fact that the main proposition of the provision occurs in the expression person whose trial has been finally disposed of '.

(28) - Its approach, taken to its absurd extreme, would permit a subsequent trial, not only when the defendant is acquitted, but also when the first penalty did not reflect the assessment made in a different Member State of the severity of the conduct, with scope for an additional penalty' to make the punishment reflect the social disapproval, with the effect that sovereignty in criminal matters, which no one would deny exists, would be undermined, not by a freely accepted international agreement, but rather by the unilateral intervention of foreign authorities.

(29) - Article 56 of the CISA reflects that notion. Where, under Article 55, a Member State declares itself not bound by Article 54 and commences proceedings against a person whose trial has already been finally disposed of by another Contracting Party, previous penalties must be taken into account' by that State.

(30) - I use equivalent expressions in my Opinions in Cases C213/00 P Italcementi v Commission (points 96 and 97) and C217/00 P Buzzi Unicem v Commission (points 178 and 179), joined with four others, the judgment being delivered on 7 January 2004. See footnote 19 to the Opinion in Gözütock and Brügge.

(31) - That understanding is evident in paragraph 38 of the judgment in Gözütok and Brügge and

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paragraph 32 of Miraglia.

(32) - I advance that view in paragraph 119 et seq of my Opinion in Gözütok and Brügge.

(33) - The Programme of measures to implement the principle of mutual recognition of decisions in criminal matters' (OJ 2001 C 12, p. 10) regards the ne bis in idem principle as one of the measures appropriate for that purpose (p. 12). In a similar vein is the Communication from the Commission to the Council and the European Parliament on the mutual recognition of judicial decisions in criminal matters and the strengthening of mutual trust between Member States [COM(2005) 195 final, point 2.2.2.].

(34) - Paragraph 33 of the judgment in Gözütok and Brügge and paragraph 30 of that in Van Esbroeck.

(35) - I suggest that approach in point 119 of my Opinion in Gözütok and Brügge , laying emphasis on the final word of the State, whether by a court in its role as judge, or by an examining magistrate as the result of his investigations or by a Prosecutor bringing the prosecution against the criminal acts.

(36) - The European Court of Human Rights, in an inadmissibility decision of 3 October 2002 (Case No 48154/99, Zigarella v Italy), held that the ne bis in idem guarantee operates independently of the outcome. A more recent decision, of 15 March 2005 (Case No 70982/01, Horciag v Rumania), restated that view.

(37) - In the Green Paper to which I referred in footnote 6 to this Opinion, the Commission asks (question 18) whether, for the ne bis in idem principle to operate, there must be an assessment of the merits' (p. 12).

(38) - In Case C467/04, Gasparini, a reference for a preliminary ruling from the Audiencia Provincial de Malaga (Provincial Court, Malaga)(Spain), as the criminal court of first instance, the Court of Justice is called upon to rule on an acquittal due to the timebarring of the prosecution.

(39) - One might speak of proof of innocence' and lack of proof of guilt', were it not that there is a presumption of innocence, a not insignificant distinction and one of relevance to the Rechtbank 'sHertogenbosch's question.

(40) - I lay emphasis on that aspect in footnote 10 to my Opinion in Van Esbroeck.

(41) - If there is uncertainty as to whether the subject-matter and the perpetrator satisfy the subjective and objective elements of the offence, benefit of the doubt must go to acquittal.

(42) - The Initiative of the Hellenic Republic with a view to adopting a Council Framework Decision concerning the application of the ne bis in idem' principle (OJ 2003 C 100, p. 24) sought to broaden its scope to situations where there is an acquittal (Article 2(1)).

(43) - It is common ground in academic legal circles that a final acquittal involves the disposal of a trial within the meaning of Article 54 of the CISA (Dannecker, G., La garantía del principio ne bis in idem en Europa', in Dogmatica y ley penal. Libro homenaje a Enrique Bacigalupo, volume I, Madrid 2004, p. 171).

(44) - In my Opinion in Gözütok and Brügge (points 48 and 56) I allude, in passing, to the legal principles and the interests which the penalising provision protects, but that statement should not be taken out of context to reach hasty conclusions, casting me as the champion of a position which I expressly reject in the Opinion in Van Esbroeck . In that first Opinion, in order to assert the international dimension of the ne bis in idem principle, I refer to values, although hinting that within the European Union and the Schengen area they are irrelevant, since all the contracting States share those values (paragraph 55 in fine).

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(45) - The peregrinations of Mr Van Straaten, who drove a quantity of heroin from Italy to the Netherlands, where he was in possession of part of that quantity, fit that description.

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SUB Justice and home affairs

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PROCEDU Reference for a preliminary ruling

ADVGEN Ruiz-Jarabo Colomer

JUDGRAP Colneric

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Judgment of the Court (First Chamber)
of 28 September 2006
Criminal proceedings against Giuseppe Francesco Gasparini and Others. Reference for a preliminary ruling: Audiencia Provincial de Malaga - Spain. Convention implementing the Schengen Agreement - Article 54 - Ne bis in idem principle - Scope - Acquittal of the accused because their prosecution for the offence is time-barred. Case C-467/04.

1. European Union - Police and judicial cooperation in criminal matters - Protocol integrating the Schengen acquis - Convention implementing the Schengen Agreement - Ne bis in idem principle

(Convention implementing the Schengen Agreement, Art. 54)

2. European Union - Police and judicial cooperation in criminal matters - Protocol integrating the Schengen acquis - Convention implementing the Schengen Agreement - Ne bis in idem principle

(Art. 2, first para., fourth indent, EU; Convention implementing the Schengen Agreement, Art. 54)

3. Free movement of goods - Products in free circulation

(Art. 24 EC; Convention implementing the Schengen Agreement, Art. 54)

4. European Union - Police and judicial cooperation in criminal matters - Protocol integrating the Schengen acquis - Convention implementing the Schengen Agreement - Ne bis in idem principle

(Convention implementing the Schengen Agreement, Art. 54)

1. The ne bis in idem principle, enshrined in Article 54 of the Convention implementing the Schengen Agreement, applies in respect of a decision of a court of a Contracting State, made after criminal proceedings have been brought, by which the accused is acquitted finally because prosecution of the offence is time-barred.

The main clause of the single sentence comprising Article 54 of the Convention makes no reference to the content of the judgment that has become final. It is not applicable solely to judgments convicting the accused.

Furthermore, not to apply Article 54 where the accused is finally acquitted because prosecution for the offence is time-barred would undermine the implementation of the objective of that provision which is to ensure that no one is prosecuted for the same acts in several Contracting States on account of the fact that he exercises his right to freedom of movement. Such a person must therefore be regarded as having had his trial finally disposed of for the purposes of that provision.

It is true that the laws of the Contracting States on limitation periods have not been harmonised. However, nowhere in Title VI of the EU Treaty, relating to police and judicial cooperation in criminal matters, or in the Schengen Agreement or the Convention implementing the latter is the application of Article 54 made conditional upon harmonisation, or at the least approximation, of the criminal laws of the Member States relating to procedures whereby further prosecution is barred or, more generally, upon harmonisation or approximation of their criminal laws. There is a necessary implication in the ne bis in idem principle that the Contracting States have mutual trust in their criminal justice systems and that each of them recognises the criminal law in force in the other Contracting States even when the outcome would be different if its own national law were applied.

Finally, Framework Decision 2002/584 on the European arrest warrant and the surrender procedures between Member States does not preclude the ne bis in idem principle from applying in the case of a final acquittal because prosecution of the offence is time-barred. Exercise of the power, provided for in Article 4(4) of the framework decision, to refuse to execute a European arrest warrant inter alia where the criminal prosecution of the requested person is time-barred according

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to the law of the executing Member State and the acts fall within the jurisdiction of that State under its own criminal law is not conditional on the existence of a judgment whose basis is that a prosecution is time-barred. The situation where the requested person has been finally judged by a Member State in respect of the same acts is governed by Article 3(2) of the framework decision, a provision which lays down a mandatory ground for non-execution of a European arrest warrant.

(see paras 24, 27-31, 33, operative part 1)

2. The ne bis in idem principle, enshrined in Article 54 of the Convention implementing the Schengen Agreement, does not apply to persons other than those whose trial has been finally disposed of in a Contracting State. This interpretation, based on the wording of Article 54 of the Convention, is borne out by the purpose of the provisions of Title VI of the Treaty on European Union, as set out in the fourth indent of the first paragraph of Article 2 EU.

(see paras 36-37, operative part 2)

3. A criminal court of a Contracting State cannot hold goods to be in free circulation in national territory solely because a criminal court of another Contracting State has found, in relation to the same goods, that prosecution for the offence of smuggling is time-barred.

In order for products coming from a third country to be considered to be in free circulation in a Member State the three conditions laid down in Article 24 EC must be met. A finding by a court of a Member State that prosecution of a defendant for the offence of smuggling is time-barred does not alter the legal classification of the products in question, since the ne bis in idem principle, enshrined in Article 54 of the Convention implementing the Schengen Agreement, binds the courts of a Contracting State only in so far as it precludes a defendant who has already had his case finally disposed of in another Contracting State from being prosecuted a second time for the same acts.

(see paras 49-52, operative part 3)

4. The only relevant criterion for applying the concept of the same acts' within the meaning of Article 54 of the Convention implementing the Schengen Agreement is identity of the material acts, understood as the existence of a set of concrete circumstances which are inextricably linked together. Accordingly, the marketing of goods in another Member State, after their importation into the Member State where the accused was acquitted because prosecution for the offence of smuggling was time-barred, constitutes conduct which may form part of the same acts' within the meaning of Article 54 of the Convention. However, the definitive assessment in this regard is a matter for the competent national courts which are charged with the task of determining whether the material acts at issue constitute a set of facts which are inextricably linked together in time, in space and by their subject-matter.

(see paras 54, 56-57, operative part 4)

In Case C-467/04,

REFERENCE for a preliminary ruling under Article 35 EU from the Audiencia Provincial de Malaga (Spain), made by decision of 8 July 2004, received at the Court on 2 November 2004, in the criminal proceedings against

Giuseppe Francesco Gasparini,

José M a L.A. Gasparini,

Giuseppe Costa Bozzo,

Juan de Lucchi Calcagno,

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Francesco Mario Gasparini,

José A. Hormiga Marrero,

Sindicatura Quiebra,

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, N. Colneric (Rapporteur), J.N. Cunha Rodrigues, M. Ilei and E. Levits, Judges,

Advocate General: E. Sharpston,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 16 March 2006,

after considering the observations submitted on behalf of:

- G.F. Gasparini, by H. Oliva García, L. Pinto, I. Ayala Gomez and P. Gonzalez Rivero, abogados,

- J. M¬ L.A. Gasparini, by C. Font Felíu, abogado,

- G. Costa Bozzo, by L. Rodríguez Ramos, abogado, and J.C. Randon Reyna, procurador,

- J. de Lucchi Calcagno, by F. García Guerrero-Strachan, abogado, and B. De Lucchi Lopez, procuradora,

- F.M. Gasparini, by J. García Alarcon, abogado,

- the Spanish Government, by M. Muñoz Pérez, acting as Agent,

- the French Government, by J.-C. Niollet, acting as Agent,

- the Italian Government, by I.M. Braguglia, acting as Agent, and G. Aiello, avvocato dello Stato,

- the Netherlands Government, by H.G. Sevenster, C. Wissels and C. ten Dam, acting as Agents,

- the Polish Government, by T. Nowakowski, acting as Agent,

- the Commission of the European Communities, by L. Escobar Guerrero, W. Bogensberger and F. Jimeno Fernandez, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 15 June 2006,

gives the following

Judgment

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

1. The ne bis in idem principle , enshrined in Article 54 of the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, signed in Schengen on 19 June 1990, applies in respect of a decision of a court of a Contracting State, made after criminal proceedings have been brought, by which the accused is acquitted finally because prosecution of the offence is time-barred.

2. That principle does not apply to persons other than those whose trial has been finally disposed of in a Contracting State.

3. A criminal court of a Contracting State cannot hold goods to be in free circulation in national territory solely because a criminal court of another Contracting State has found, in relation to

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the same goods, that prosecution for the offence of smuggling is time-barred.

4. The marketing of goods in another Member State, after their importation into the Member State where the accused was acquitted, constitutes conduct which may form part of the same acts' within the meaning of Article 54 of the Convention.

1. This reference for a preliminary ruling concerns the interpretation of, first, Article 54 of the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (OJ 2000 L 239, p. 19), signed in Schengen (Luxembourg) on 19 June 1990 (the CISA'), and, second, Article 24 EC.

2. The reference was made in the course of criminal proceedings brought against Mr G.F. Gasparini, Mr J. M a L.A. Gasparini, Mr Costa Bozzo, Mr de Lucchi Calcagno, Mr F.M. Gasparini, Mr Hormiga Marrero and the Sindicatura Quiebra, who are suspected of having put smuggled olive oil on the Spanish market.

Legal context

Community legislation

3. Under Article 1 of the Protocol integrating the Schengen acquis into the framework of the European Union, annexed to the Treaty on European Union and to the Treaty establishing the European Community by the Treaty of Amsterdam (the Protocol'), 13 Member States of the European Union, amongst them the Kingdom of Spain and the Portuguese Republic, are authorised to establish closer cooperation among themselves within the scope of the Schengen acquis as set out in the annex to the Protocol.

4. The Schengen acquis thus defined includes, inter alia, the Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (OJ 2000 L 239, p. 13), signed in Schengen on 14 June 1985 (the Schengen Agreement'), and the CISA.

5. By virtue of the first subparagraph of Article 2(1) of the Protocol, from the date of entry into force of the Treaty of Amsterdam the Schengen acquis was to apply immediately to the 13 Member States referred to in Article 1 of the Protocol.

6. Pursuant to the second sentence of the second subparagraph of Article 2(1) of the Protocol, on 20 May 1999 the Council of the European Union adopted Decision 1999/436/EC determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions or decisions which constitute the Schengen acquis (OJ 1999 L 176, p. 17). It is apparent from Article 2 of the decision, in conjunction with Annex A thereto, that the Council selected Articles 34 EU and 31 EU, which form part of Title VI of the EU Treaty entitled Provisions on police and judicial cooperation in criminal matters', as the legal basis for Articles 54 to 58 of the CISA.

7. Articles 54 to 58 form Chapter 3 (Application of the ne bis in idem principle') of Title III (Police and security') of the CISA.

8. Article 54 of the CISA provides:

A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party.'

9. Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and

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the surrender procedures between Member States (OJ 2002 L 190, p. 1) provides in Article 3, headed Grounds for mandatory non-execution of the European arrest warrant':

The judicial authority of the Member State of execution (hereinafter executing judicial authority) shall refuse to execute the European arrest warrant in the following cases:

...

(2) if the executing judicial authority is informed that the requested person has been finally judged by a Member State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State;

...'

10. Article 4 of the framework decision, headed Grounds for optional non-execution of the European arrest warrant', is worded as follows:

The executing judicial authority may refuse to execute the European arrest warrant:

...

(4) where the criminal prosecution or punishment of the requested person is statute-barred according to the law of the executing Member State and the acts fall within the jurisdiction of that Member State under its own criminal law;

...'

11. The Court's jurisdiction to give preliminary rulings on matters falling within Title VI of the EU Treaty is governed by Article 35 thereof.

12. The Kingdom of Spain has declared that it accepts the jurisdiction of the Court of Justice to give preliminary rulings on the validity and interpretation of the acts referred to in Article 35 EU in accordance with the arrangements laid down in Article 35(2) and (3)(a) EU (OJ 1999 C 120, p. 24).

13. Article 24 EC provides:

Products coming from a third country shall be considered to be in free circulation in a Member State if the import formalities have been complied with and any customs duties or charges having equivalent effect which are payable have been levied in that Member State, and if they have not benefited from a total or partial drawback of such duties or charges.'

National legislation

14. The first two subparagraphs of Article 1(1) of Organic Law No 7/1982 of 13 July 1982 amending the legislation on smuggling and regulating related offences and administrative infringements (BOE No 181, 30 July 1982, p. 20623) provide:

1. The offence of smuggling is committed, where the value of the goods or articles is ESP 1 000 000 or more, by any person who:

(1) imports or exports lawfully traded goods without presenting them to a customs office;

(2) carries out commercial transactions in respect of, possesses or puts into circulation lawfully traded goods from abroad without fulfilling the statutory conditions for importation.'

15. In accordance with Article 847 of the Ley de Enjuiciamento Criminal (Code of Criminal Procedure), no appeal lies against a decision made on appeal by an Audiencia Provincial (Provincial Court).

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The main proceedings and the questions referred for a preliminary ruling

16. According to the Audiencia Provincial de Malaga (Provincial Court, Malaga), there is coherent evidence that, at some unspecified time in 1993, the shareholders and directors of the company Minerva agreed to import through the port of Setubal (Portugal) lampante (refined) olive oil from Tunisia and Turkey, which was not declared to the customs authorities. The goods were then transported in lorries from Setubal to Malaga (Spain). The defendants devised a system of false invoicing to create the impression that the oil came from Switzerland.

17. The Audiencia Provincial de Malaga further states that the Supremo Tribunal de Justiça (Supreme Court of Justice, Portugal), in a decision on an appeal against a judgment of the Tribunal de Setubal, found that the lampante olive oil imported into Portugal originated on ten occasions in Tunisia and on one occasion in Turkey and that a lesser quantity than was actually imported was declared to the Portuguese customs authorities.

18. The Supremo Tribunal de Justiça acquitted two of the defendants in the case before it, on the ground that their prosecution was time-barred. They are both also being prosecuted in the main proceedings.

19. The Audiencia Provincial de Malaga explains that it has to rule on whether an offence of smuggling can be found or whether, on the contrary, no such offence can be found having regard to the binding force of the judgment of the Supremo Tribunal de Justiça or to the fact that the goods were in free circulation in the Community.

20. It was in those circumstances that the Audiencia Provincial de Malaga decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

(1) Is a finding by the courts of one Member State that prosecution of an offence is time-barred binding on the courts of the other Member States?

(2) Does the acquittal of a defendant on account of the fact that prosecution of the offence is time-barred benefit, by extension, persons being prosecuted in another Member State where the facts are identical? In other words, can persons being prosecuted in another Member State on the basis of the same facts also benefit from a limitation period?

(3) If the criminal courts of one Member State declare that the extra-Community nature of goods has not been established for the purposes of an offence of smuggling and acquit the defendant, may the courts of another Member State broaden the investigation in order to prove that the introduction of goods without payment of customs duties was from a non-member State?

(4) Where a criminal court in a Member State has declared either that it is not established that goods have been unlawfully introduced into the Community or that prosecution of the offence of smuggling is time-barred:

(a) can the goods be regarded as being in free circulation in the rest of the Community?

(b) can the sale of the goods in another Member State following their importation into the Member State where the acquittal was given be regarded as independent conduct which may therefore be punished or, instead, as conduct forming an integral part of the importation?'

The Court's jurisdiction

21. It is apparent from paragraphs 12 and 15 of this judgment that in the present case the Court has jurisdiction to rule on the interpretation of Article 54 of the CISA by virtue of Article 35(1) to (3)(a) EU.

The questions

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Question 1

22. By this question, the national court essentially asks whether the ne bis in idem principle, enshrined in Article 54 of the CISA, applies in respect of a decision of a court of a Contracting State by which the accused is acquitted finally because prosecution of the offence is time-barred.

23. Under Article 54 of the CISA, a person may not be prosecuted in a Contracting State for the same acts as those in respect of which his trial has already been finally disposed of' in another Contracting State provided that, in the event of conviction, the penalty has been enforced, is actually in the process of being enforced or can no longer be enforced.

24. The main clause of the single sentence comprising Article 54 of the CISA makes no reference to the content of the judgment that has become final. It is not applicable solely to judgments convicting the accused (see, to this effect, the judgment delivered today in Case C-150/05 Van Straaten [2006] ECR I-0000, paragraph 56).

25. Thus, the ne bis in idem principle, enshrined in Article 54 of the CISA, falls to be applied in respect of a decision of the judicial authorities of a Contracting State by which the accused is acquitted finally for lack of evidence (Van Straaten , paragraph 61).

26. The main proceedings raise the question whether the same is true with regard to a final acquittal because prosecution of the offence is time-barred.

27. It is settled case-law that Article 54 of the CISA has the objective of ensuring that no one is prosecuted for the same acts in several Contracting States on account of the fact that he exercises his right to freedom of movement (see Joined Cases C187/01 and C-385/01 Gözütok and Brügge [2003] ECR I-1345, paragraph 38, and Van Straaten , paragraph 57). It ensures that persons who, when prosecuted, have their cases finally disposed of are left undisturbed. They must be able to move freely without having to fear a fresh prosecution for the same acts in another Contracting State.

28. Not to apply Article 54 of the CISA when a court of a Contracting State, following the bringing of criminal proceedings, has made a decision acquitting the accused finally because prosecution of the offence is time-barred would undermine the implementation of that objective. Such a person must therefore be regarded as having had his trial finally disposed of for the purposes of that provision.

29. It is true that the laws of the Contracting States on limitation periods have not been harmonised. However, nowhere in Title VI of the EU Treaty, relating to police and judicial cooperation in criminal matters (Articles 34 and 31 of which were selected as the legal basis for Articles 54 to 58 of the CISA), or in the Schengen Agreement or the CISA itself is the application of Article 54 of the CISA made conditional upon harmonisation or approximation of the criminal laws of the Member States relating to procedures whereby further prosecution is barred (Gözütok and Brügge , paragraph 32) or, more generally, upon harmonisation or approximation of their criminal laws (see Case C-436/04 Van Esbroeck [2006] ECR I-2333, paragraph 29).

30. It should be added that there is a necessary implication in the ne bis in idem principle, enshrined in Article 54 of the CISA, that the Contracting States have mutual trust in their criminal justice systems and that each of them recognises the criminal law in force in the other Contracting States even when the outcome would be different if its own national law were applied (Van Esbroeck , paragraph 30).

31. Framework Decision 2002/584 does not preclude the ne bis in idem principle from applying in the case of a final acquittal because prosecution of the offence is time-barred. Article 4(4) of the framework decision, relied upon by the Netherlands Government in the observations which it

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submitted to the Court, permits the executing judicial authority to refuse to execute a European arrest warrant inter alia where the criminal prosecution of the requested person is time-barred according to the law of the executing Member State and the acts fall within the jurisdiction of that State under its own criminal law. In order for that power to be exercised, a judgment whose basis is that a prosecution is time-barred does not have to exist. The situation where the requested person has been finally judged by a Member State in respect of the same acts is governed by Article 3(2) of the framework decision, a provision which lays down a mandatory ground for non-execution of a European arrest warrant.

32. Having regard to the complexity of the main proceedings, it should be pointed out, finally, that it is for national courts to determine whether the acts in respect of which a case has been finally disposed of are the same as those at issue before them.

33. It follows from the foregoing that the answer to the first question must be that the ne bis in idem principle, enshrined in Article 54 of the CISA, applies in respect of a decision of a court of a Contracting State, made after criminal proceedings have been brought, by which the accused is acquitted finally because prosecution of the offence is time-barred.

Question 2

34. By its second question, the national court essentially asks who is capable of benefiting from the ne bis in idem principle.

35. It is clear from the wording of Article 54 of the CISA that only persons who have already had a trial finally disposed of once may derive advantage from the ne bis in idem principle.

36. This interpretation is borne out by the purpose of the provisions of Title VI of the EU Treaty, as set out in the fourth indent of the first paragraph of Article 2 EU, namely to maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to... the prevention and combating of crime'.

37. Consequently, the answer to the second question must be that the ne bis in idem principle, enshrined in Article 54 of the CISA, does not apply to persons other than those whose trial has been finally disposed of in a Contracting State.

Question 3

38. The third question is based on the premiss that the criminal courts of a Member State declare that it has not been established for the purposes of the offence of smuggling that the goods are from outside the Community.

39. Such a premiss is inconsistent, however, with the facts of the main proceedings as described by the national court and reproduced in paragraphs 16 to 18 of the present judgment.

40. Admittedly, the majority of the defendants in the main proceedings allege that the national court has misread the judgment of the Supremo Tribunal de Justiça. They contend that, contrary to what is stated in the order for reference, the Supremo Tribunal de Justiça did not find that a lesser quantity than was actually imported into Portugal was declared to the customs authorities. According to them, the criminal proceedings relating to the offences of smuggling and of falsification of documents were declared time-barred by a judicial decision made prior to the commencement of the hearing before the Supremo Tribunal de Justiça. In addition, judgment was given in favour of the defendants on an application for compensation under civil law made in the same proceedings, because the facts alleged were not proved.

41. It is to be recalled that the system under Article 234 EC is capable of being applied to references

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for a preliminary ruling pursuant to Article 35 EU, subject to the conditions laid down in the latter article (see Case C-105/03 Pupino [2005] ECR I-5285, paragraph 28). Under the procedure envisaged in Article 234 EC, which is based on a clear separation of functions between the national courts and the Court of Justice, any assessment of the facts in the case is a matter for the national court. The Court of Justice is thus empowered to rule on the interpretation or validity of Community provisions only on the basis of the facts which the national court puts before it (see Case C-235/95 Dumon and Froment [1998] ECR I4531, paragraph 25, and Case C-421/01 Traunfellner [2003] ECR I11941, paragraph 21).

42. In the light of the national court's reading of the judgment of the Supremo Tribunal de Justiça, doubts arise as to the admissibility of the third question.

43. On such a reading, the premiss upon which the third question is founded, namely the acquittal of the defendants because there was no, or insufficient, evidence that the goods were from outside the Community, is not present.

44. According to the Court's settled case-law, while the Court is in principle bound to give a ruling where the questions submitted concern the interpretation of Community law, it can in exceptional circumstances examine the conditions in which the case was referred to it by the national court, in order to confirm its own jurisdiction. The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, inter alia, Case C-13/05 Chacon Navas [2006] ECR I-0000, paragraphs 32 and 33, and the case-law cited).

45. Here, having regard to the national court's description of the facts, the third question concerns a hypothetical problem.

46. Consequently, there is no reason for the Court to answer this question.

Question 4

47. For the reasons set out in paragraphs 41 to 45 of the present judgment, the fourth question is inadmissible in so far as it is founded on the premiss of acquittal of the defendants because there was no, or insufficient, evidence. On the other hand, it is admissible in so far as it relates to the situation where a court of a Member State has declared that prosecution of the offence of smuggling is time-barred.

Question 4(a)

48. By Question 4(a), the national court essentially asks whether it may be inferred from the decision of a court of a Contracting State which has become final finding that a prosecution for the offence of smuggling is time-barred that the goods in question are in free circulation in the other Member States.

49. Under Article 24 EC, three conditions must be met in order for products coming from a third country to be considered to be in free circulation in a Member State. Products are regarded as so being if (i) the import formalities have been complied with, (ii) any customs duties or charges having equivalent effect which are payable have been levied in that Member State and (iii) the products have not benefited from a total or partial drawback of such duties or charges.

50. A finding by a court of a Member State that prosecution of a defendant for the offence of smuggling is time-barred does not alter the legal classification of the products in question.

51. The ne bis in idem principle binds the courts of a Contracting State only in so far as it

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precludes a defendant who has already had his case finally disposed of in another Contracting State from being prosecuted a second time for the same acts.

52. The answer to Question 4(a) must therefore be that a criminal court of a Contracting State cannot hold goods to be in free circulation in national territory solely because a criminal court of another Contracting State has found, in relation to the same goods, that prosecution for the offence of smuggling is time-barred.

Question 4(b)

53. By Question 4(b), the national court essentially asks whether the marketing of goods in another Member State, after their importation into the Member State where the accused was acquitted because the prosecution was time-barred, forms part of the same acts or constitutes conduct independent of importation into the latter Member State.

54. The only relevant criterion for applying the concept of the same acts' within the meaning of Article 54 of the CISA is identity of the material acts, understood as the existence of a set of concrete circumstances which are inextricably linked together (see Van Esbroeck , paragraph 36).

55. More specifically, a situation such as that at issue in the main proceedings may involve such a set of facts.

56. However, the definitive assessment in this regard is a matter for the competent national courts which are charged with the task of determining whether the material acts at issue constitute a set of facts which are inextricably linked together in time, in space and by their subject-matter (see Van Esbroeck , paragraph 38).

57. It follows from the foregoing that the marketing of goods in another Member State, after their importation into the Member State where the accused was acquitted, constitutes conduct which may form part of the same acts' within the meaning of Article 54 of the CISA.

Costs

58. 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.

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PROCEDU Reference for a preliminary ruling;Reference for a preliminary ruling - inadmissible

ADVGEN Sharpston

JUDGRAP Colneric

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Opinion of Advocate General Sharpston delivered on 15 June 2006. Criminal proceedings against Giuseppe Francesco Gasparini and Others. Reference for a preliminary ruling: Audiencia Provincial de Malaga - Spain. Convention implementing the Schengen Agreement - Article 54 - Ne bis in idem principle - Scope - Acquittal of the accused because their prosecution for the offence is time-barred. Case C-467/04.

1. In this request for a preliminary ruling, the Seccion Primera de la Audiencia Provincial de Malaga (First Section, Provincial Court, Malaga) (the referring court') seeks clarification of the scope of the principle of ne bis in idem embodied in Article 54 of the Convention implementing the Schengen Agreement (CISA'). (2)

2. The referring court wishes in particular to know whether, by virtue of that principle, a decision of a court of one Member State barring any further criminal proceedings arising out of particular facts on grounds that the prosecution for the offence is time-barred under national law constitutes a decision which precludes the criminal courts of another Member State from prosecuting the same or other defendants for a crime arising out of the same facts.

3. Answering that question requires the Court to define one of the fundamental aspects of the principle of ne bis in idem in Article 54 of the CISA (and hence, necessarily, more generally in Community law), namely whether the principle can apply only where the first court reached its decision after an assessment of the merits.

Relevant provisions

Provisions relating to the Schengen acquis and the CISA

4. Pursuant to Article 1 of the Protocol integrating the Schengen acquis into the framework of the European Union (3) (the Protocol'), 13 Member States, including Spain and Portugal, are authorised to establish closer cooperation among themselves within the scope of the so-called Schengen acquis'.

5. The annex to the Protocol defines the Schengen acquis' as including the Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, signed at Schengen on 14 June 1985 (4) (the Schengen Agreement') and, in particular, the CISA.

6. The aim of the signatories of the Schengen Agreement and the CISA is to abolish checks at their common borders on the movement of persons ...', (5) given that the ever closer union of the peoples of the Member States of the European Communities should find expression in the freedom to cross internal borders for all nationals of the Member States...'. (6) Pursuant to the first paragraph of the preamble to the Protocol, the Schengen acquis is aimed at enhancing European integration and, in particular, at enabling the European Union to develop more rapidly into an area of freedom, security and justice'.

7. Under the fourth indent of the first paragraph of Article 2 EU the maintenance and development of such an area, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime, is one of the objectives of the European Union.

8. The first subparagraph of Article 2(1) of the Protocol provides that, from the date of entry into force of the Treaty of Amsterdam, the Schengen acquis is to apply immediately to the 13 Member States referred to in Article 1 of the Protocol.

9. Acting under the second sentence of the second subparagraph of Article 2(1) of the Protocol, the Council adopted Decision 1999/436/EC determining, in conformity with the relevant provisions

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of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions or decisions which constitute the Schengen acquis. (7) It is apparent from Article 2 of that decision, in conjunction with Annex A thereto, that the Council selected Articles 31 EU and 34 EU, which form part of Title VI of the Treaty on European Union, Provisions on Police and Judicial Cooperation in Criminal Matters', as the legal basis for Articles 54 to 58 of the CISA.

10. Articles 54 to 58 of the CISA together constitute Chapter 3, entitled Application of the ne bis in idem principle', of Title III, which deals with Police and Security'. (8)

11. Article 54 provides that a person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party.'

12. Article 57 lays down rules to ensure that the competent authorities of the Contracting Parties cooperate in order to exchange information to give effect to the principle of ne bis in idem.

International conventions concerning the principle of ne bis in idem

13. Several conventions directly or indirectly regulate the application of the principle of ne bis in idem internationally and at the European level. (9) Amongst these, Article 4 of Protocol No 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR') deals specifically with the principle of ne bis in idem.

14. Article 4 (1) of Protocol No 7 states No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State'. Article 4(2) provides, however, that the provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case'.

15. Article 4(2) of Protocol No 7 was cited by the Court when it held that the principle of ne bis in idem was a fundamental principle of Community law. (10)

The national proceedings and the questions referred

16. The reference arises out of criminal proceedings brought in Spain against a number of individuals connected with the Spanish company Minerva SA, in respect of the sale of olive oil.

17. It appears from the order for reference that Minerva, located in Malaga, was established in 1989 for the purpose of refining olive oil and selling it in bulk. It marketed its products both in Spain and abroad. In 1997, criminal proceedings were brought in Portugal against its shareholders and directors, whom I shall refer to as the defendants in Portugal'. In those proceedings, it was apparently alleged that the shareholders and directors agreed in 1993 to import low-grade olive oil from Tunisia and Turkey through the port of Setubal, in Portugal; that a series of consignments were brought into Setubal; that the oil was not declared to the customs authorities, but was transported by road to Malaga, in Spain; and that a system of false invoicing was devised to create the impression that the oil came from Switzerland.

18. It appears that the defendants in the Spanish proceedings (the defendants in Spain') include two of the defendants in Portugal.

19. The order for reference states that, on appeal by the prosecution against the judgment of the Tribunal Judicial de Setubal - Vara Competência Mista (Setubal Criminal Court') in the Portuguese

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proceedings, the Supremo Tribunal (Supreme Court) found that the low-grade oil imported into Portugal originated on ten occasions in Tunisia and on one occasion in Turkey and that a lesser quantity than was actually imported was declared in Portugal. The defendants [in Portugal] were acquitted when it was found that prosecution of the offence was time-barred [pursuant to the Portuguese criminal code]'.

20. I should immediately make it clear that the accuracy of the referring court's description of the facts is hotly contested by the defendants in Spain. I discuss this issue in greater detail during my examination of admissibility. (11)

21. In Spain, criminal proceedings were also initiated in Malaga in 1997. The Juzgado de Instruccion (examining magistrate) made an order permitting summary criminal proceedings to go ahead. The defendants in Spain appealed against that order to the referring court.

22. Their case was essentially that the facts had already been adjudicated upon in Portugal. Therefore, by reason of the res judicata principle, those facts could not be adjudicated upon a second time in Spain. They also contended that all the defendants in Spain should benefit by extension from the principle of res judicata in criminal proceedings, irrespective of the fact that the actual decisions of the Portuguese courts concerned only two of the defendants in Spain. They also submitted that it had not been established in the Portuguese criminal proceedings that the goods originated outside the Community.

23. The prosecution contended that the Spanish criminal proceedings did not relate to the illegal importation of the oil (already adjudicated upon in Portugal) but to subsequent sales in Spain, which was conduct independent from the importation. The prosecution also submitted that the fact that the extra-Community nature of the goods had not been proved in Portugal did not prevent other Member States, in which the goods were subsequently sold, from broadening the criminal investigation in order to establish that the goods originated outside the Community and had been clandestinely imported, evading the common customs tariff.

24. The defendants replied that smuggling comprises a course of action and that, since the goods were imported specifically for the purpose of sale, importation and sale were inextricably linked and could not be appraised independently.

25. The referring court has therefore stayed proceedings and asked the following questions:

As regards res judicata in criminal proceedings , this court requests an interpretation of Article 54 of the [CISA]:

(1) Is a finding by the courts of one Member State that [prosecution of] an offence is time-barred binding on the courts of the other Member States?

(2) Does the acquittal of a defendant on account of the fact that prosecution of the offence is time-barred benefit, by extension, persons being prosecuted in another Member State where the facts are identical? In other words, can persons being prosecuted in another Member State on the basis of the same facts also benefit from a limitation period?

(3) If the criminal courts of one Member State declare that the extra-Community nature of goods has not been established for the purposes of an offence of smuggling and acquit the defendant, may the courts of another Member State broaden the investigation in order to prove that the introduction of goods without payment of customs duties was from a non-Member State?

As regards the notion of goods in free circulation , this court requests an interpretation of Article 24 EC as to whether:

(4) Where a criminal court in a Member State has declared either that it is not established that

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goods have been unlawfully introduced into the Community or that [prosecution of] the offence of smuggling is time-barred:

(a) can the goods be regarded as being in free circulation in the rest of the Community?

(b) can the sale of the goods in another Member State following their importation into the Member State where the acquittal was given be regarded as independent conduct which may therefore be punished or, instead, as conduct forming an integral part of the importation?'

26. Written observations were submitted on behalf of the defendants in Spain, with the exceptio n of José Hormiga Marrero and the Sindicatura Quiebra, and by the Commission, Spain, Italy, the Netherlands and Poland. At the hearing, those same parties, with the exception of Poland, and France presented oral observations.

Assessment

Admissibility

27. Pursuant to Article 35 EU, Spain has accepted the jurisdiction of the Court to give preliminary rulings on the validity and interpretation of acts adopted under Title VI of the EU Treaty. Spain selected the option, provided for in Article 35(3)(a) EU, whereby only a domestic court or tribunal against whose decisions there is no judicial remedy under national law may submit a request to the Court for a preliminary ruling.

28. At the hearing, Spain explained that the referring court falls within the scope of Article 35(3)(a) EU in the context of the present case, since its decision on the appeal lodged by the defendants (12) which gives rise to this request for a preliminary ruling is not open to further ordinary appeal under domestic law. Thus, in application of the case-law of the Court under Article 234 EC on the notion of what constitutes a court against whose decisions there is no judicial remedy under national law', the referring court is properly to be considered as a court of last instance within the meaning of Article 35(3)(a) EU. The request for a preliminary reference is therefore in principle admissible.

29. A more delicate issue of admissibility might arise from the way in which the order for reference is framed. Although none of the parties presenting observations has explicitly suggested that the preliminary questions should be held inadmissible for this reason, some of them have criticised the statements of fact made in the order for reference in fundamental respects.

30. The defendants in Spain submit that the description of the factual background made by the referring court, in particular its paraphrase of the findings of the Portuguese Supreme Court, is simply wrong.

31. The defendants transcribe paragraphs of that court's judgment in their written observations. They also referred extensively at the hearing to the judgment at first instance of the Setubal Criminal Court. They claim that in fact both courts, after examining the evidence submitted, declared that the prosecution failed to establish that there had been unlawful importation, which is the exact opposite of what is recorded in the order for reference.

32. Similarly, the Commission, and to a lesser extent the Netherlands Government, consider in their observations that the hypothesis on which the third and fourth questions referred appear to be based (that unlawful importation and the extra-Community nature of the goods had not been established for the purposes of an offence of smuggling) is in open contradiction with the statements of fact contained in the order for reference as set out above. (13)

33. Having examined the judgments of the Setubal Criminal Court and the Portuguese Supreme Court, (14) it is clear to me that the order for reference is confusing and summarises the facts in a way

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that is plainly at odds with those texts. It appears from those judgments that the defendants in Portugal were charged with four criminal offences arising from a single set of facts, namely the importation on various occasions of different types of oil into Portugal. Prosecution of two of those offences was declared to be time-barred at first instance by a separate order of the Setubal Criminal Court. It appears that the defendants in Portugal were acquitted of the other two charges at first instance on the grounds that the prosecution had failed to prove the necessary facts. Both those decisions were then confirmed on appeal by the Portuguese Supreme Court. It is, however, unclear from the file whether the two acquittals were the consequence of criminal law proceedings stricto sensu, or of the parallel civil law proceedings in which the potential civil liability of the defendants was considered by the same courts. (15)

34. Nevertheless, I do not consider that the questions should be declared inadmissible. Pursuant to settled case-law, it is for the national court alone to determine the subject-matter of the questions that it wishes to refer to the Court under Article 234 EC. (16) The national court has indicated that it requires assistance on the scope of particular aspects of the principle of ne bis in idem in Article 54 of the CISA (questions 1, 2 and 3) and on the notion of what constitutes goods in free circulation' within the meaning of Article 24 EC (question 4). It is evident that the first three questions are pertinent; and it cannot definitively be excluded that an answer to the fourth question may also be relevant to some part of the criminal proceedings before the referring court.

35. Accordingly I consider that all the questions are admissible and should be answered.

Substance

The Court's existing case-law on ne bis in idem

36. Thus far, the Court has interpreted the principle of ne bis in idem laid down in Article 54 of the CISA in three judgments: Gözütok and Brügge , (17) Miraglia , (18) and Van Esbroeck. (19)

37. In addition, the Court has interpreted the general principle of ne bis in idem in other areas of Community law. (20) The most extensive application of the principle has taken place in cases concerning the imposition of Community sanctions in EC competition law. (21) For present purposes, the most relevant of those cases are Vinyl Maatschappij (22) and Cement. (23)

Case-law on Article 54 of the CISA

38. In Gözütok and Brügge the Court was asked whether the ne bis in idem principle in Article 54 of the CISA applied to national procedures leading to out-of-court settlements' pursuant to which the prosecution may, without the intervention of any judicial authority, make an unilateral offer to discontinue criminal proceedings if the defendant fulfils certain conditions, in particular the payment of monetary fines. Acceptance of those conditions bars further prosecution for the same facts under national criminal law.

39. The Court answered that question in the affirmative. According to the Court, where, following such a procedure, further prosecution is definitively barred, the person concerned must be regarded as someone whose case has been finally disposed of for the purposes of Article 54 of the CISA in relation to the acts which he is alleged to have committed'. (24)

40. The Court justified its findings as follows.

41. First, it held that a procedure of this kind... penalises the unlawful conduct which the defendant is alleged to have committed'. (25)

42. Second, it considered that the fact that no court was involved does not cast doubt on that

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interpretation, since such matters of procedure and form do not impinge on the [barring] effects of the procedure, ... which, in the absence of an express indication to the contrary in Article 54 of the CISA, must be regarded as sufficient to allow the ne bis in idem principle laid down by that provision to apply'. (26)

43. Third, the Court pointed out that prior harmonisation of national criminal laws was not a requirement for Article 54 of the CISA to apply: nowhere in Title VI of the Treaty on European Union relating to police and judicial cooperation in criminal matters..., or in the Schengen Agreement or the CISA itself, is the application of Article 54 of the CISA made conditional upon harmonisation, or at the least approximation, of the criminal laws of the Member States relating to procedures whereby further prosecution is barred.' (27)

44. Fourth, the Court placed special emphasis on the principle of mutual trust underlying Article 54 of the CISA. That principle necessarily implied that the Member States have mutual trust in their criminal justice systems and that each of them recognises the criminal law in force in the other Member States even when the outcome would be different if its own national law were applied'. (28)

45. Fifth, the Court considered that the interpretation adopted was the only interpretation to give precedence to the object and purpose of [Article 54 of the CISA] rather than to procedural or purely formal matters, which, after all, vary as between the Member States concerned, and to ensure that the principle has proper effect'. (29)

46. Finally, the Court stressed the integration objectives of the EU Treaty. It recalled that the European Union set itself the objective of maintaining and developing the Union as an area of freedom, security and justice in which the free movement of persons is assured' and that the integration of the Schengen acquis (which includes Article 54 of the CISA) into the framework of the European Union is aimed at enhancing European integration and, in particular, at enabling the Union to become more rapidly the area of freedom, security and justice which it is its objective to maintain and develop'. (30) Against that background, Article 54 of the CISA, the objective of which is to ensure that no one is prosecuted on the same facts in several Member States on account of his having exercised his right to freedom of movement, cannot play a useful role in bringing about the full attainment of that objective unless it also applies to decisions definitively discontinuing prosecutions in a Member State, even where such decisions are adopted without the involvement of a court and do not take the form of a judicial decision'. (31)

47. I note that, in reaching its decision, the Court made a point of the fact that procedures such as those at issue were of limited application, and generally applied only to crimes that were not serious. (32) I also emphasise that the Court's starting point for its analysis was that the abbreviated procedures under consideration did indeed penalise the unlawful conduct in question. (33)

48. In Miraglia , the Court was asked to clarify a different aspect of Article 54 of the CISA. It held that a judicial decision... taken after the public prosecutor has decided not to pursue the prosecution on the sole ground that criminal proceedings have been initiated in another Member State against the same defendant and in respect of the same acts, but where no determination has been made as to the merits of the case, cannot constitute a decision finally disposing of the case against that person within the meaning of Article 54 of the CISA'. (34) Accordingly, the ne bis in idem principle did not apply.

49. The Court's reasoning in Miraglia was similar to that in Gözütok and Brügge , but led to the opposite conclusion. As in Gözütok and Brügge , the Court said that its interpretation was the only one that would give precedence to the object and purpose of [Article 54 of the CISA] rather than to procedural or purely formal matters, which, after all, vary as between the Member

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States concerned, and... ensure that that article has proper effect'. (35) However, in contrast to Gözütok and Brügge , in Miraglia the Court gave priority to the need to ensure penalisation of the crime, and placed less emphasis on promoting free movement of persons. It stated in terms that the consequence of applying [Article 54 of the CISA] to a decision to close criminal proceedings, such as that in question in the main proceedings, would be to make it more difficult, indeed impossible, actually to penalise in the Member States concerned the unlawful conduct with which the defendant is charged'. (36) The Court stressed that that decision to close proceedings was adopted by the judicial authorities of a Member State when there had been no assessment whatsoever of the unlawful conduct with which the defendant was charged'. (37) It went on, the bringing of criminal proceedings in another Member State in respect of the same facts would be jeopardised even when it was the very bringing of those proceedings that justified the discontinuance of the prosecution by the Public Prosecutor in the first Member State. Such a consequence would clearly run counter to the very purpose of the provisions of Title VI of the Treaty on European Union, as set out in the fourth indent of the first subparagraph of Article 2 EU, namely: to maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to ... prevention and combating of crime '. (38)

50. Finally, in Van Esbroeck , the Court was requested to clarify, inter alia, the scope of the notion of the same acts' in Article 54 of the CISA. The issue arose in the context of criminal proceeding brought in two different Contracting States (Norway and Belgium) (39) against the same person arising out of the same facts, namely the transport of unlawful drugs from Belgium into Norway. The defendant was prosecuted in Norway for the criminal act of importing unlawful substances and in Belgium for the criminal act of exporting them. The preliminary question was whether the same acts' required merely identity of material facts; or whether it required, in addition, that the facts should be categorised as the same crime in both national criminal systems. Put another way, did there need to be a unity of the legal interest protected' as the Court had required in respect of Community sanctions for breaches of EC competition law? (40)

51. The Court chose to interpret ne bis in idem more broadly than it had previously done in that area of EC law, and held that unity of the legal interest protected' is not required for the application of Article 54 of the CISA. According to the Court in Van Esbroeck , the only relevant criterion' for the purposes of Article 54 of the CISA is that there should be an identity of the material facts, understood in the sense of the existence of a set of concrete circumstances which are inextricably linked together'. (41)

52. In reaching that conclusion the Court applied the same reasoning as in Gözütok and Brügge.

53. First, it relied on the literal wording of Article 54 of the CISA, which refers only to the nature of the acts without specifying their legal classification. (42)

54. Second, the Court relied on the pro-free movement' and mutual trust' reasoning adopted in Gözütok and Brügge. It recalled that none of the relevant provisions subjected the application of the principle in Article 54 of the CISA to prior harmonisation or, at least, the approximation of national criminal laws. (43) Rather, the ne bis in idem principle necessarily implies the existence of mutual trust between the Contracting Parties in each others' criminal justice systems. (44) For that reason, the fact that different legal classifications may be applied to the same facts in two different Contracting Parties should not be an obstacle to the application of Article 54 of the CISA.

55. Third, the Court, referred to the aim of Article 54 of the CISA, stating that the right of free movement would be fully guaranteed only if the perpetrator of an act knew that, once he had been found guilty and served his sentence, or had been acquitted by a final judgment in a Member State, he could freely move within the Schengen area without fearing new criminal proceedings merely

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because the act in question was classified differently in the legal order of another Member State. (45)

56. The Court concluded that, owing to the absence of harmonisation of national criminal laws, applying a criterion based on the legal classification of the acts or on the protected legal interest might create as many barriers to freedom of movement in the Schengen territory as there are penal systems in the Contracting States'. (46)

Case-law on the fundamental principle of ne bis in idem in EC competition law

57. In Vinyl Maatschappij the Court stated that the principle of ne bis in idem is a fundamental principle of Community law also enshrined in Article 4(1) of Protocol No 7 to the ECHR'. (47) It went on to hold that that principle does not in itself preclude the resumption of proceedings in respect of the same anti-competitive conduct where the first decision was annulled for procedural reasons without any ruling having been given on the substance of the facts alleged , since the annulment decision cannot in such circumstances be regarded as an acquittal within the meaning given to that expression in penal matters '. (48)

58. In Cement , the Court made the application of the fundamental principle of ne bis in idem to the area of EC competition law subject to a threefold condition' of identity of the facts, unity of offender and unity of the legal interest protected'. (49)

Tensions in the present case-law

59. Examination of these cases reveals two areas of tension in the Court's existing case-law on ne bis in idem.

60. First, there is a degree of contradiction within the Court's case-law on Article 54 of the CISA.

61. In Gözütok and Brügge and in Van Esbroeck the Court appears to have chosen a broad interpretation of Article 54 of the CISA, giving priority to free movement of persons objectives over those relating to the repression of crime and the protection of public safety. In Miraglia, however, the Court applied a narrower interpretation; and gave priority to preventing and combating crime over free movement of persons.

62. Furthermore, in Gözütok and Brügge and Van Esbroeck the Court emphasised the principle of mutual trust' underlying Article 54 of the CISA and treated the absence of harmonisation of national criminal codes and procedures as no obstacle to applying the ne bis in idem principle. In consequence, in Gözütok and Brügge it applied that principle to a specific procedure resulting in the barring of further prosecution in the first' Member State. In Miraglia , however, the Court held that a decision on the merits was a precondition for the principle in Article 54 of the CISA to apply. Miraglia therefore suggests that discontinuance of a case on mere procedural grounds in the first' Member State is normally insufficient to trigger Article 54 of the CISA.

63. Second, there is an inconsistency between the case-law on Article 54 of the CISA, which does not (it seems) require unity of the legal interest protected' but is content to apply ne bis in idem provided that there is identity of the material facts' (50) and that the defendants are the same before both courts; (51) and the case-law on ne bis in idem as a fundamental principle of EC law', which requires a threefold condition' of identity of the facts, unity of offender and unity of the legal interest protected' before that principle is applicable. (52)

The first question

64. The first question asks for clarification as to whether the principle of ne bis in idem in Article 54 of the CISA should be interpreted as applying to a situation where a competent court

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of the first' Member State has reached a final decision (res judicata) prohibiting further prosecution of certain individuals on the ground that the proceedings are time-barred under that Member State's criminal law.

Preliminary observations

65. Before answering the first question, a number of preliminary observations appear to me to be necessary.

Time-limits

66. In most continental legal systems the State's right to initiate criminal proceedings is subject to time-limits. Once those time-limits have elapsed, the right to prosecute is time-barred by application of the relevant legislation. When a competent court at final instance declares the prosecution to be time-barred, the matter becomes res judicata '. Criminal proceedings against the alleged offender for the same acts can no longer be brought in that Member State.

67. Time-limits are set in relation to the seriousness of the criminal offence. There are, however, significant differences between Member States as to what the time-limits are for offences that are roughly similar. (53)

68. In contrast, in the English, Scottish and Irish systems, criminal proceedings are not, as a general rule, subject to time-limitations. (54)

69. There is therefore an absence of any universal recognition of time-bars as a general principle of all Member States' criminal law systems.

70. Several reasons are adduced to justify placing a time-bar on the State's right to prosecute. For example, it is argued that after a certain number of years have passed, it is better for the sake of social peace to let the past rest rather than to revive the social unrest caused by the alleged offence. If the State acts negligently in failing to bring the defendant to trial within the established time-limits, that may justify society losing its right to punish the individuals concerned. Finally, on a more practical level, the more time that has elapsed since the alleged offence, the more difficult it is likely to be to obtain reliable evidence and to hold a fair trial.

71. All those reasons relate to the effective administration of criminal justice and, more generally, to public interest considerations. (55)

Rationale underlying ne bis in idem

72. In contrast, the principle of ne bis in idem responds to a different rationale. That principle, whose origins in Western legal systems can be traced back to classical times, (56) is mainly (although not exclusively) (57) regarded as a means of protecting the individual against possible abuses by the State of its jus puniendi. (58) The State should not be allowed to make repeated attempts to convict an individual for an alleged offence. Once a trial has been carried out, surrounded by all the appropriate procedural guarantees, and the issue of the individual's possible debt to society has been assessed, the State should not subject him to the ordeal of a new trial (or, as Anglo-American legal systems describe it, to place him in double jeopardy' (59)). As Black J of the Supreme Court of the United States concisely put it, the underlying idea,... is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offence, thereby subjecting him to embarrassment, expense and ordeal, compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty'. (60)

73. The right not to be prosecuted twice for the same acts has thus evolved into a fundamental human right to be protected against the jus puniendi of the State, and has been codified in several

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international conventions. (61)

74. If that is the rationale behind ne bis in idem , the principle nevertheless presupposes that society has already had one full chance to settle its accounts with the individual it suspects of having committed an offence against it.

75. On one view, that can happen only if a substantive trial has taken place and the defendant's conduct has been examined by the appointed representatives of society. Such a view finds support in the wording of Article 4(2) of Protocol No 7 to the ECHR, which provides that a case may nevertheless be reopened in accordance with the law and penal procedure of the State concerned if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case. (62) Put another way, society is normally allowed a single chance to try the defendant, but is (exceptionally) entitled to have a second go' after an initial acquittal when either (a) there is (important) new material or (b) the defendant's conduct was not duly assessed during the course of the first criminal proceedings. In the EU context, Article 4 of Protocol No 7 may fairly be said to embody the highest legal expression of the principle of ne bis in idem as a fundamental human right.

76. The alternative view is that society's single chance to settle its accounts with the defendant is itself confined within society's own self-imposed time-limits for prosecution; and it does not matter if - for that very reason - there is never a trial on the substance'. Whilst I respect the intellectual coherence of that approach, it seems to me that it is likely to give rise to considerable disquiet in the multi-national, multi-societal world of the CISA. Within the context of a single society', it is indeed reasonable to say that society has itself surrendered the opportunity to have an accounting after X years have elapsed. The same argument seems less reasonable when it is applied across 17 societies, i.e., the 13 Member States that have so far fully implemented the Schengen acquis, with the addition of Iceland and Norway as Contracting Parties to the CISA and the UK (63) and Ireland (64) as regards, inter alia, Articles 54 to 58 of the CISA. (65)

77. It therefore seems to me that the jurisprudential heart of the present case is whether a decision to dismiss criminal proceedings on grounds that the prosecution is time-barred does involve placing the person concerned in jeopardy' for the purposes of Article 54 of the CISA, thus entitling him to exercise his fundamental right not to be placed bis ' in idem '. As I shall explain below, I take the view that that is not the case unless that decision is the outcome of proceedings which have involved consideration of the merits of the case. Only then has the person in question really been placed in jeopardy' so as to be entitled to rely on Article 54 of the CISA. (66)

Scope of the principle of ne bis in idem

78. Although the rationale for the principle of ne bis in idem is generally recognised, and some variant on such a principle is to be found (as one would expect) generally in the legal systems of the CISA Contracting States and indeed in most developed legal systems, it is apparent from a brief comparative survey that there is no single, truly common definition of what precisely that principle means, what exactly its scope is, when precisely it falls to be applied, and so on. (67)

79. In the EU context, the absence of an underlying common approach is evidenced by the failure of the various legislative measures and initiatives adopted by the Community institutions and Member States under Title VI of the EU Treaty to define the scope of the principle in Article 54 of the CISA. (68)

Ne bis in idem as a propriae naturae principle within Community law

80. For the purposes of EU law, it seems to me almost inevitable that, in consequence, the concept of ne bis in idem (which, as the Court noted in Vinyl Maatschappij , is a fundamental principle

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of Community law) is to be understood as a free-standing, or propriae naturae , principle. In the absence of further initiatives by way of Treaty amendment or secondary Community legislation, it is therefore to be refined and developed by the Court in the exercise of its hermeneutic monopoly' on such key concepts of EU law. (69) The specific application of the principle in particular areas (be these competition law or through Article 54 of the CISA) should form part of a core understanding of what that fundamental principle means (or ought to mean) within the Community legal order.

81. The proposition that ne bis in idem should be understood as a free-standing principle in the context of the EU is not, I venture to suggest, too adventurous. The EU constitutes a new legal order (70) and the European integration process a unique international construction. For its part, Article 54 of the CISA represents one of the first successful attempts to apply the ne bis in idem principle in a multilateral manner in a transnational context. (71) It therefore seems natural that the definition of the principle should be propriae naturae , adapted to the particular features of the supranational context in which it is to apply.

The balance between free movement of persons and the requirements of combating crime and providing a high level of safety within an area of freedom, security and justice'

82. Finally, it is necessary to place this discussion within the wider context of the appropriate balance to be struck between two equally fundamental and important concepts: free movement of persons, on the one hand, and the effective combat against crime and the provision of a high level of safety within an area of freedom, security and justice', on the other hand.

83. Here, I recall that pursuant to Article 29 EU (the first provision of Title VI Provisions on police and judicial cooperation in criminal matters', on which Articles 54 to 58 of the CISA are based), ... [t]he Union's objective shall be to provide citizens a high level of safety within an area of freedom, security and justice by developing common action amongst Member States in the fields of police and judicial cooperation in criminal matters'. Thus, whereas the realisation of the free movement of persons is important, the attainment of a high level of safety' is equally so. Article 2 EU similarly gives equal importance to the realisation of the free movement of persons and to the prevention and combating of crime. (72)

84. It seems to me that, ultimately, whilst free movement of persons is indubitably important, it is not an absolute. (73) What the CISA aims to achieve is free movement within an area of freedom, security and justice. An integral part of that process is finding a propriae naturae definition of ne bis in idem that allows free movement rights within an area of freedom, security and justice characterised by a high level of safety. It was (of course) necessary to include a provision incorporating ne bis in idem in the CISA - omission of such a fundamental concept would have been a grave lacuna. At the same time, the principle must not be distorted out of proportion. Put another way: it must be given appropriate scope, but not unlimited scope.

The answer to be given to the first question

85. In answering the first question referred, the Court is faced with a stark choice between holding that a procedural time-bar (whose application in principle does not necessitate any examination of the merits of the case against the defedant) is sufficient to trigger the application of ne bis in idem , and holding that, for that principle to apply, some examination of the merits within the context of the first prosecution is required (and, if so, to what degree). For convenience, I shall refer to the former as a procedure-based approach', and the latter as a substance-based approach'.

86. The position of the parties may briefly be summarised as follows.

87. The defendants in Spain argue in essence for a procedure-based approach.

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88. In contrast, all the Member States that have submitted observations adopt a substance-based approach. Spain, the Netherlands, Poland and France argue in essence that Article 54 of the CISA applies only where the competent court has, in a final decision, assessed the merits of the case and has passed a judgment on the criminal responsibility of the defendant. That is not the case where criminal proceedings are definitively discontinued on the sole ground that prosecution of the offences is time-barred. Italy argues in similar vein that Article 54 of the CISA applies only when the final decision to discontinue proceedings because the offence is time-barred is the result of proceedings involving consideration of the merits of the case and the criminal responsibility of the defendant.

89. The Commission adopts a procedure-based approach, on the basis of strictly practical considerations. It considers that, depending on circumstances at national level, acquittals' on procedural grounds may, or may not, involve an assessment of the merits. In order to avoid difficulties that may arise for national courts if they have to establish whether an earlier decision in another jurisdiction has in fact involved such an assessment, the Commission suggests that, as a general rule, any final decision barring future criminal proceedings for the same facts in one Member State is to be considered to be a final decision for the purposes of Article 54 of the CISA.

90. I agree with the Commission to this extent: it does indeed seem that national proceedings leading to decisions involving the application of a time-bar may or may not (depending on precisely how, when and by whom the time-bar issue is raised) involve an examination of the merits. (74) In my view, however, discontinuance of criminal proceedings through the application of a time-bar without any assessment of the merits should not be covered by the principle of ne bis in idem in Article 54 of the CISA.

91. I set out in the next section my reasons for considering the substance-based approach to be the better interpretation of Article 54 of the CISA. I then examine a number of objections, raised by those who support the procedure-based view, towards taking a substance-based approach.

Arguments in favour of a substance-based approach to ne bis in idem

92. First, the substance-based approach is more faithful to the rationale behind the principle of ne bis in idem. Pursuant to that principle, the State has one opportunity to assess and pass judgment on an individual's alleged criminal conduct. It is only after a substantive assessment that one can sensibly say that the person concerned has been placed in jeopardy' and that, save in exceptional circumstances, there should not be a second assessment (ne bis ') of the same matter (in idem ').

93. In contrast, as I have indicated, time-bars are based on a different rationale. Society is thereby passing a judgment not on the defendant, but on the importance it attaches to an offence objectively considered (75) - a judgment that varies greatly from one State to the other - and thus on how long it is appropriate for the State to retain its right to prosecute.

94. I recall that we are here operating in a supranational context where there is no common definition of the scope of the principle, and there is also no directly relevant external authority. (76) In such a context, it seems to me that different meanings can and should be attributed, for the purposes of ne bis in idem , to (a) the definitive discontinuance of criminal proceedings' due to the fact that prosecution of the offence is time-barred and (b) the impossibility of further criminal proceedings for the same facts after the definitive acquittal' of a individual following a full trial. That is so even if, in a purely domestic context, both procedures may lead to the same result (i.e. the barring of future criminal proceedings aga inst the same person for the same facts).

95. For the purposes of the application of the ne bis in idem principle in Article 54 of the CISA, the holding of a trial in which the defendant's conduct is considered on its legal merits by the criminal court and consequently his conduct is assessed, seems to me to be a necessary requirement.

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(77) That is obviously the case when a final verdict on the substance is returned. I would not, however, go so far to require a formal verdict of guilty' or not guilty' for the principle to apply. That would in my view subject the application of Article 54 of the CISA to unduly stringent conditions and reduce its practical relevance to an unacceptable degree.

96. I would therefore suggest that a defendant should also be able to invoke ne bis in idem where he has de facto been placed in jeopardy but his case has eventually been dismissed because prosecution is time-barred. (78) If the national criminal proceedings have involved any significant consideration of the merits of the case, it seems to me that the defendant has indeed been placed in a situation of jeopardy. (79) He must therefore benefit from ne bis in idem and any subsequent prosecution of the same defendant in another Member State for the same facts should be excluded under Article 54 of the CISA. (80) That accords with the rationale behind ne bis in idem . It follows that, if a decision that the prosecution is time-barred precedes any consideration of the merits, whilst there is to that extent a definitive discontinuance of criminal proceedings, it is a discontinuance that should fall outside the scope of the principle of ne bis in idem. (81)

97. Second, the substance-based approach seems to me to strike a more appropriate balance between the two desirable objectives of promoting free movement of persons, on the one hand, and ensuring that free movement rights are exercised within an area of freedom, security and justice' characterised by a high level of safety, in which crime is effectively controlled, on the other hand. As I have indicated, (82) neither Article 2 nor Article 29 EU gives priority to free movement of persons over the prevention and combating of crime and the attainment of a high level of safety. Indeed, the Court in Miraglia gave precedence to the latter objective over the former. In carrying out the necessary balancing act between those equally fundamental aims, I conclude that a person against whom criminal proceedings have been discontinued in one Member State because the prosecution is time-barred without consideration of the merits of the case should not benefit from the application of Article 54 of the CISA.

98. Third, the substance-based approach is in my view not only a logical application of the essence of the principle of ne bis in idem , but is also supported by the Court's case-law thus far.

99. Of the cases concerning Article 54 of the CISA, the Court in Miraglia explicitly required an assessment of the merits for the ne bis in idem principle to apply. In Van Esbroeck and Gözütok and Brügge the defendants had, respectively, either already been subject to a formal trial and served part of the sentence handed down or, in effect, admitted their guilt at a pre-trial stage. In both Van Esbroeck and Gözütok and Brügge they had therefore been punished for the offences in question. All three cases therefore in fact applied a substance-based approach.

100. The correctness of the substance-based interpretation is further borne out by the Court's case-law on ne bis in idem in competition law, in particular Vinyl Maatschappij. There, the Court expressly held that... acquittal within the meaning given to that expression in penal matters' only takes place, and the general principle of ne bis in idem only operates, when a ruling has been given on the substance of the facts alleged.' (83)

101. Fourth, the interpretation to be given to ne bis in idem should be the same in all areas of EU law. That conclusion follows from Article 6 EU, inserted in Title I Common provisions', which is applicable to all pillars under the EU Treaty. Article 6(1) states that the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States'. Article 6(2) further provides that the Union shall respect fundamental rights, as guaranteed by the European Convention of Human Rights and Fundamental Freedoms ... and as they result from the constitutional traditions common to the Member States, as general principles of Community law'. The fundamental principle of ne bis in idem thus constitutes a higher rule of law within the EU legal system. Its interpretation

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must therefore be consistent in all areas of activity that are subject to the EU Treaty, that is, including both the EC Treaty and the Schengen acquis. (84)

102. Thus, if under the EC Treaty competition rules the fundamental principle of ne bis in idem requires an assessment of the merits (as it does), the same must be true when the principle is applied under Article 54 of the CISA.

103. It may be suggested that ne bis in idem in competition law can and should be different from ne bis in idem under Article 54 of the CISA. I examine that argument later. (85) However, the question whether ne bis in idem requires there to have been an assessment of the merits goes to one of the core elements of the principle itself. That core element must remain constant regardless of the legal context in which the principle is then applied. I cannot see how a core element of a fundamental principle could vary substantially in its content depending on whether ne bis in idem is being applied under Article 54 of the CISA or generally as a fundamental principle of Community law (for example, within competition law).

104. Fifth, the substance-based approach would in addition help to prevent the possibility, which I regard as undesirable, of criminal jurisdiction shopping'. An unrestricted application of the mutual trust principle could result in an individual deliberately courting prosecution in a Member State where he knew that proceedings would necessarily be declared to be time-barred; and then relying on ne bis in idem to move freely within the EU. (86)

Possible objections to the substance-based approach

105. The objections that I need to address appear to be three in number: the role of the mutual trust' principle underlying Article 54 of the CISA; the explicit rejection by the Court of prior harmonisation as a precondition for the application of Article 54 of the CISA; and the practical difficulties that may arise from applying a substance-based approach. I examine each in turn.

106. First, does a substance-based approach fall foul of the emphasis that the Court has placed thus far on the importance of mutual trust' between Member States?

107. In Gözütok and Brügge and Van Esbroeck the Court indeed placed considerable emphasis on the principle of mutual trust' (87) that underlies Article 54 of the CISA and Member States' cooperation in criminal matters under the Treaty of Amsterdam (88) (as expressly recognised by the Tampere Council). (89)

108. However, in my view the concept of mutual trust does not extend so far as to provide a sensible basis for applying ne bis in idem to all national decisions discontinuing criminal proceedings through application of a time-bar.

109. It seems to me that, on the contrary, a distinction can and should be drawn between trusting other Member States' criminal proceedings in general (including such matters as fair trial guarantees, the substantive delineation of offences and rules on production and admissibility of evidence), on the one hand, and trusting a decision that no substantive assessment of the offence can take place at all because the prosecution is time-barred, on the other hand. The first is a proper expression of respect, in a non-harmonised world, for the quality and validity of other sovereign States' criminal law. The second is tantamount to de facto harmonisation around the lowest common denominator. (90)

110. Here, one may perhaps draw a parallel with the case-law on the principle of mutual recognition applicable to the main freedoms under the EC Treaty. Although mutual recognition is important, there are exceptions to that principle both under specific EC Treaty provisions and under the mandatory requirements' case-law. For its full application, the principle requires in any event that the qualifications or features of the persons, goods or services seeking to rely upon the free

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movement provisions be comparable to those required in the host or importer State. (91)

111. A fortiori, similar exceptions and comparability' requirements must be possible in the context of the Schengen acquis (which, even though it is now part of EU law following the Treaty of Amsterdam, still falls short of the full integration aims and mechanisms of the EC Treaty). They must, moreover, be appropriate in the context of cooperation in the field of criminal law, a delicate area of national sovereignty in so far as it codifies the moral and social values of national societies. (92)

112. By way of illustration, let us take the age of criminal responsibility - clearly a deliberate choice by society, and one that varies significantly from one Member State to another. (93) In the absence of any harmonisation agreement between Member States, it seems to me that a vaguely defined principle of mutual trust' would not form an appropriate basis for treating the discontinuance of criminal proceedings in the first' Member State because the defendant was under the age of criminal responsibility as the trigger for applying ne bis in idem in another Member State where the age of criminal responsibility was lower. At the present stage of European integration in criminal matters, such a result does not seem consonant with the degree of competence still enjoyed by each Member State. (94)

113. Second, does the substance-based approach require, as a precondition for the application of ne bis in idem , some minimum level of harmonisation between the criminal law systems of the Member States? If so, it would clearly run counter to the approach adopted by the Court in both Gözütok and Brügge and Van Esbroeck.

114. It seems to me that the observations just advanced in respect of the principle of mutual trust are also of pertinence here. Just as with mutual recognition in the context of the free movement provisions of the EC Treaty, the principle of mutual trust cannot on its own effectively ensure that the aims sought by Title VI EU (Police and Judicial Cooperation in Criminal Matters) are attained. In order fully to guarantee free movement in a context where there is considerable diversity in national approaches to criminal matters, a certain degree of harmonisation or approximation of national criminal laws will in due course probably be necessary. (95) That applies fairly clearly to the issue of time-barring. Unless and until that happens, it seems to me that the mutual trust principle provides an unsatisfactory basis for extending the ne bis in idem principle so as to cover res judicata on pr ocedural grounds arising from application of a time-bar without assessment of the merits. If the result is to give priority in this instance to the maintenance of a high level of safety within an area of freedom, security and justice rather than to absolute rights of free movement, so be it.

115. Third, are there (as the Commission argues) serious practical difficulties in adopting a substance-based approach? The Commission has suggested two main problems that may arise. First, national courts will need to determine whether there has been any assessment of the merits in the first' Member State. Second, the Commission fears that there might as a consequence be instances of discriminatory treatment. Individuals acquitted' in a Member State where that decision involves an assessment of the merits of the case would be in a position to benefit from the principle of ne bis in idem , whereas individuals acquitted' for the same reasons in a Member State where no assessment of the merits is required would not.

116. I disagree with the Commission.

117. As to the argument based on practical difficulties, I cannot see how those difficulties are inherently different from the difficulties that national criminal courts necessarily face when cooperating with criminal courts of other Member States. In addition to the cooperation obligation imposed by Article 57 of the CISA, there are sufficient cooperation mechanisms already in place to ensure the (relatively) smooth resolution of any doubts that a national court may have as regards the scope

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of a criminal law decision adopted by a court of another Member State to which it is required to have regard. It would be sufficient for the criminal court in the second' Member State to ask the national court in the first' Member State to clarify, within the context of those cooperation procedures, whether an examination of the merits did, or did not, take place.

118. It also seems reasonable to assume that counsel for the defendant will raise the issue in the second proceedings; and will argue (as have counsel for the defendants in Spain in the present case) that the acquittal in the first Member State, though based in part on the time-bar on prosecution, nevertheless involved an assessment of the merits.

119. As to the discrimination argument, discrimination consists in treating two comparable situations differently. The situation of a defendant acquitted following an examination of the merits is not comparable to the situation of a defendant acquitted without any such assessment. I therefore do not consider that the substance-based approach is likely to give rise to any issue of discrimination.

120. In view of the foregoing, I suggest, in agreement with the position adopted by Spain, Italy, Poland, France and the Netherlands, that the first question should be answered in the sense that, at the present stage of development of European Union law, Article 54 of the CISA is to be interpreted as meaning that a national court is bound by a decision adopted in criminal proceedings by a court in another Member State that a prosecution is time-barred only if (a) that decision is final under national law, (b) the proceedings in the other Member State have involved consideration of the merits of the case; and (c) the material facts (96) and the defendant(s) are the same in the proceedings before both courts. (97) It is for the national court to decide whether those conditions are satisfied in a particular case. Where they are satisfied, further proceedings against the same defendant(s) on the basis of the same material facts are precluded.

The second question

121. By its second question the referring court essentially wishes to know whether the ne bis in idem principle laid down in Article 54 of the CISA is to be interpreted as preventing individuals from being prosecuted in Member State B by virtue of the fact that criminal proceedings arising out of the same facts, but involving different individuals, were discontinued in Member State A because prosecution for the alleged offence was time-barred.

122. I share the view of all the parties submitting observations - with the exception (unsurprisingly) of the defendants in the main proceedings - that this question is straightforward and should be answered in the negative.

123. Article 54 of the CISA explicitly states that a person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts'. It follows from a literal reading of that provision that it benefits only the specific individual or individuals who have been finally acquitted or convicted. On its face, that provision does not therefore cover other individuals who may have been involved in the same acts but who have not yet been tried. The Court has, indeed, already applied that literal construction of Article 54 in Gözütok and Brügge , when it held that the only effect of the ne bis in idem principle, as set out in that provision, is to ensure that a person whose case has been finally disposed of in a Member State is not prosecuted again on the same facts in another Member State'. (98)

124. That conclusion is reinforced by the judgment in Cement. In that case, the Court stated in respect of the EC competition rules that the application of the ne bis in idem principle is subject to, inter alia, the condition of unity of offender'. (99)

The third question

125. The third question asks whether, in the event that the criminal courts of one Member State

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declare that the extra-Community nature of goods has not been established for the purposes of an offence of smuggling and therefore acquit the defendant, the criminal courts of another Member State may broaden the investigation in order to prove that the introduction of goods without payment of customs duties was from a non-Member State.

126. As the Commission and the defendants in Spain have correctly pointed out, this question is based on a hypothesis that is at odds with the description of the facts in the order for reference. (100) Since there are indications that an answer to this question may be useful for the referring court, I shall nevertheless examine it.

127. I agree with most of the Member States submitting observations (101) that the answer to this question depends in essence on whether the decision in which the first findings of fact were made itself fulfils the conditions for the principle of ne bis in idem in Article 54 of the CISA to apply. I have already examined those conditions in my analysis of the first two questions; and refer back to the conclusions I reached.

128. I therefore suggest that the answer to the third question should be that, at the present stage of development of European Union law, Article 54 of the CISA is to be interpreted as meaning that criminal courts in one Member State are bound by a decision adopted in criminal proceedings by a court in another Member State only if (a) the decision is final under national law, (b) the proceedings in the other Member State have involved consideration of the merits of the case; and (c) the material facts and the defendant(s) are the same in the proceedings before both courts.

129. It is for the national court to decide whether those conditions are satisfied in a particular case. Where they are satisfied, further criminal proceedings against the same defendant(s) on the basis of the same material facts are precluded, and the national court may not, by broadening the scope of its examination, call in question any findings of fact in the first decision. (102)

130. On the other hand, if the conditions I have mentioned are not present, criminal courts in other Member State may start fresh criminal inquiries, where that is their function under national criminal law, in order to establish whether an offence of unlawful importation has occurred.

The fourth question

131. The wording of the fourth question implies that the Portuguese Supreme Court had already found that the goods at stake had not been unlawfully imported into Portugal, an implication which is contradicted by other parts in the order for reference. (103) Having regard, however, to the overall tenor of the order for reference, I will, as have the Commission and all Member States submitting observations, reformulate these questions with the aim of providing the national court with a useful answer.

132. The fourth question consists of two separate questions.

Question 4(a)

133. The first sub-question, which concerns the notion of goods in free circulation under Article 24 EC, consists in turn of two elements.

134. The first element raises the issue of whether a finding by a criminal court in one Member State that no unlawful importation has been established confers on the goods in question the irreversible status of goods in free circulation benefiting from Article 24 EC and binds the criminal courts in other Member States in criminal proceedings relating to the same goods.

135. The second element once again focuses on whether the final decision of a criminal court holding a prosecution based on unlawful importation to be time-barred and, on those grounds, also barring any further criminal proceedings for unlawful importation in that Member State, binds the criminal

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courts and competent authorities of all other Member States, which as a consequence, must accept that the goods in question are indeed in free circulation.

136. I have already developed, albeit in general terms, the necessary elements to reply to both those elements when examining the first three questions.

137. However, in order to provide a more useful reply, I think it necessary to distinguish between the administrative law status of goods in free circulation, on the one hand; and the criminal liability that may arise from unlawful importation into the Community of goods originating in third countries, on the other hand. The former is regulated by Community rules. In contrast, the latter falls under national criminal law.

138. According to Article 24 EC products coming from a third country shall be considered to be in free circulation in a Member State if the import formalities have been complied with and any customs duties or charges having equivalent effect which are payable have been levied in that Member State, and if they have not benefited from a total or partial drawback of such duties or charges'.

139. Further detailed rules are laid down by the Community Customs Code established by Council Regulation (EEC) No 2913/92 (104) (the Customs Code'), and by Commission Regulation (EEC) No 2454/93 implementing the Customs Code (the implementing Regulation'). (105)

140. Pursuant to Article 24 EC and the relevant provisions in the Customs Code and the implementing Regulation, (106) goods in free circulation are to be understood as meaning those products which, coming from third countries, have been duly imported into any one of the Member States in accordance with the requirements laid down by Article 24 EC. (107) Once goods imported from third countries have been released for free circulation, they acquire the status of Community goods. (108) Release for free circulation entails the completion of the... formalities laid down in respect of the importation of goods and the charging of any duties legally due'. (109) There is a presumption that goods moving within the Community enjoy the status of goods in free circulation until the contrary is proved. (110)

141. Under the applicable Community rules, customs authorities are still entitled, within the limits laid down by the case-law of the Court on the principle of proportionality and the free movement of goods, (111) to verify the authenticity of the documents establishing the status of the goods and to carry out inquiries with a view to ensuring that customs rules are complied with. (112) In the case of unlawfully imported goods or goods unlawfully released for free circulation, the Customs Code and the implementing Regulation provide that such goods give rise to a customs debt which must be satisfied by the responsible person. (113)

142. Thus, once import formalities have been completed, and any charges due paid, goods imported from third countries benefit from the status of goods in free circulation and enjoy all related rights under Community rules. National authorities are bound by those Community rules. The authorities of other Member States are to presume that a declaration by national customs authorities that goods are in free circulation is valid until the contrary is proven. If the latter is the case, the resulting customs debt must be satisfied. It is at this point that the remit of Community customs law ends.

143. Community rules thus deal only with the administrative law aspects of unlawful importation. They do not seek to harmonise the legal treatment of customs offences under national criminal laws. Member States have retained the power to penalise customs offences against the Customs Code, (114) subject to the conditions laid down by the Court in particular as regards proportionality. Therefore, the question whether unlawful importation gives rise to a custom offence (in addition to the customs debt under administrative law) subject to criminal liability is to be determined in accordance with the applicable national criminal laws.

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144. Clearly, the elements of such an offence that relate to whether there has been, on the facts, unlawful importation into the Community are regulated by the relevant Community rules. To that extent, the Community rules do play a role in determining whether a customs offence has been committed under national criminal law. Whether or not such findings of fact have been made in particular criminal proceedings will turn on how and when any question of time-bar was raised in those proceedings.

145. It follows that, as I have already pointed out in my reply to the third question, at the present stage of development of European Union law, where all the conditions necessary for the ne bis in idem principle in Article 54 of the CISA to apply are met, further criminal proceedings against the same defendant(s) on the basis of the same material facts are precluded, and a national criminal court may not call in question any findings of fact in the first decision. (115)

146. If that is not the case, however, criminal courts in other Member States are not bound by previous findings made by the criminal courts in another Member State.

147. The assessment of whether particular goods enjoy the status of Community goods' or whether their importation into the Community constitutes a customs offence subject to criminal liability is a matter for the national court which must apply, in determining the issue whether the goods are in free circulation', the relevant Community law provisions (that is, Article 28 EC, the Customs Code and its implementing regulation); and, as regards criminal liability, the relevant national rules relating to customs offences.

Question 4(b)

148. The second sub-question asks in essence whether, for the purposes of applying Article 54 of the CISA, the importation and the subsequent sale of goods must be considered as a single act, or as two separate acts.

149. The notion of same acts' for the purposes of Article 54 of the CISA has been interpreted by the Court in Van Esbroeck. It held that the only relevant criterion' for the purposes of that provision is that there should be an identity of the material facts, understood in the sense of the existence of a set of concrete circumstances which are inextricably linked together'. (116) The Court suggested that material facts would qualify as the same acts' if they constituted a set of facts which are inextricably linked together in time, in space and by their subject-matter'. (117)

150. The facts in Van Esbroeck (export and import of the same drugs from and to different Contracting States) were deemed by the Court to be in principle the same acts' for the purposes of Article 54 of the CISA. (118) However, since the issue arose as a question of fact in the context of a request for a preliminary ruling, it fell to be resolved by the national court.

151. Does the importation and marketing of goods constitute an identity of material facts', understood as a set of facts which are inextricably linked together in time, in space and by their subject-matter'?

152. I do not think that that is necessarily the case. The act of unlawfully importing goods, understood as bringing goods within the customs territory of the EU without satisfying the relevant customs duties or import obligations, does not necessarily or automatically also comprise the act of selling those goods in that territory to third parties. One can, for example, readily conceive of unlawful importation of goods for one's own consumption, in which case no sale takes place at all. It is likewise possible to envisage unlawful importation by one person and subsequent sale by another person in a different Member State. In such a case, there would be two distinct sets of material facts, involving two different persons, at two different places and at two different times.

153. It therefore seems to me that the unlawful importation and the sale of the same goods are

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not always a set of facts which are inextricably linked together in time, in space and by their subject-matter'. As a result, they are not necessarily the same acts' for the purposes of Article 54 of the CISA as interpreted by the Court in Van Esbroeck. Or, to use the words of the referring court, the sale of unlawfully imported goods does not necessarily form an integral part of the importation.

154. Of course there may be circumstances in which unlawful importation and subsequent sale of the smuggled goods are indeed so inextricably linked (119) that they may be considered to be the same facts within the meaning of Van Esbroeck. That will be for the national court to decide.

155. I should draw attention here to a divergence of approach between Van Esbroeck and Cement. In Cement , in the context of applying ne bis in idem as a fundamental principle of EC law to competition law, the Court made its application subject to the threefold condition' of identity of the facts, unity of offender and unity of the legal interest protected'. (120) In contrast, in Van Esbroeck the Court explicitly stated that the existence of a unity of the legal interest protected' is not a condition under Article 54 of the CISA. A mere identity of material facts is sufficient.

156. If one accepts, as I do, (121) that as a matter of logic the principle of ne bis in idem should not be substantially different depending on whether it applies under Article 54 of the CISA or as a fundamental principle of Community law, it is necessary to reconcile these two cases.

157. It seems to me that the distinguishing element is that in Cement the Court was applying the principle of ne bis in idem to the powers of Community institutions to sanction undertakings under the EC competition rules - that is, in a strictly supranational context and with respect to a single legal order governed by one uniform set of rules. In such circumstances, the legal interest protected is, by definition, already established by the EC competition rules; and is one and the same for the whole Community. It is therefore reasonable for the Court to require, in that unitary' context, that there should be unity of the legal interest protected' as one of the conditions for the application of the ne bis in idem principle.

158. The expression of ne bis in idem in Article 54 of the CISA is, on the contrary, expressly not meant to apply in the context of a single uniform legal system. Rather, it is intended to govern certain aspects of Member States' cooperation in criminal matters within the framework of the Schengen agreement. In that context, the different domestic legal orders may be expected to seek to protect very varied legal interests through the medium of their criminal laws. As both the Advocate General (122) and the Court (123) pointed out in Van Esbroeck , to require unity of the legal interest' for the ne bis in idem principle in Article 54 of the CISA to apply would have emptied the principle of any substance and effectiveness in achieving its aim of furthering free movement of persons.

159. It is, finally, important to note that the difference in approach between Cement and Van Esbroeck may be of considerable significance in defining the scope of Article 54 of the CISA. Thus, under the broad approach adopted in Van Esbroeck , whenever an individual has been charged with several offences arising from the same nexus of facts in national criminal proceedings, final acquittal in respect of one charge suffices to trigger ne bis in idem under Article 54 of the CISA. (124)

Conclusion

160. In view of the foregoing, I am of the opinion that the Court should give the following answers to the questions referred by the Audiencia Provincial de Malaga:

(1) At the present stage of development of European Union law, Article 54 of the Convention implementing the Schengen Agreement is to be interpreted as meaning that a national court is bound by a decision

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adopted in criminal proceedings by a court in another Member State that a prosecution is time-barred only if (a) that decision is final under national law, (b) the proceedings in the other Member State have involved consideration of the merits of the case; and (c) the material facts and the defendant(s) are the same in the proceedings before both courts. It is for the national court to decide whether those conditions are satisfied in a particular case. Where they are satisfied, further proceedings against the same defendant(s) on the basis of the same material facts are precluded.

(2) Since Article 54 of the Convention implementing the Schengen Agreement applies only where the same defendant is concerned, it does not prevent individuals from being prosecuted in one Member State by virtue of the fact that criminal proceedings arising out of the same facts, but involving different individuals, were discontinued in another Member State because prosecution for the alleged offence was time-barred.

(3) At the present stage of development of European Union law, Article 54 of the Convention implementing the Schengen Agreement is to be interpreted as meaning that criminal courts in one Member State are bound by a decision adopted in criminal proceedings by a court in another Member State only if (a) the decision is final under national law, (b) the proceedings in the other Member State have involved consideration of the merits of the case; and (c) the material facts and the defendant(s) are the same in the proceedings before both courts. It is for the national court to decide whether those conditions are satisfied in a particular case. Where they are satisfied, further proceedings against the same defendant(s) on the basis of the same material facts are precluded, and the national court may not, by broadening the scope of its examination, call in question any findings of fact in the first decision.

(4)(a) The answer to question 3 is applicable irrespective of whether the criminal court in the first Member State has decided that alleged facts have not been proved or whether it has declared prosecution for the offence(s) in question to be time-barred under its national criminal rules.

(4)(b) Unlawful importation and subsequent sale of the same goods are not the same acts' for the purposes of Article 54 of the Convention implementing the Schengen Agreement unless they are inextricably linked together in time, in space and by their subject-matter. It is for the national court to decide whether those conditions are satisfied in a particular case.

(1) .

(2) - OJ 2000 L 239, p. 19.

(3) - Annexed by the Treaty of Amsterdam to the Treaty on the European Union (TEU') and to the Treaty establishing the European Community.

(4) - OJ 2000 L 239, p. 13.

(5) - Second paragraph of the preamble to the CISA.

(6) - First paragraph of the preamble to the Schengen Agreement.

(7) - Of 20 May 1999, OJ 1999 L 176, p. 17.

(8) - The text of these provisions was inspired by the text in the Convention between the Member States of the European Communities on Double Jeopardy which was signed on 25 May 1987, but which has not entered into force owing to the absence of sufficient ratifications. Other Community measures in force which refer to the principle of ne bis in idem include Article 6 read with recital 10 of Council Regulation No 2988/95 of 18 December 1995 on the protection of the European Communities' financial interests (OJ 1995 L 312, p. 1); Article 7 of the Convention on the protection of the European Communities' financial interests (OJ 1995 C 316, p. 49); Article 10 of the Convention on the Fight against Corruption involving Officials of the European Communities or Officials

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of the Member States of the EU (OJ 1997 C 195, p. 1) and Articles 3(2), 4(3) and 4(5) of the Framework Decision on the European Arrest Warrant (OJ 2002 L 190, p. 1). Article II-110 of the draft European Constitution constitutionalised' the principle of ne bis in idem as one of the fundamental rights of the Union. That provision, entitled Right not to be tried or punished twice in criminal proceedings for the same criminal offence', read as follows: No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.'

(9) - At UN level, Article 14(7) of the 1966 International Covenant on Civil and Political Rights states that no one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country'. In the European context, Article 53 to 55 of the 1970 European Convention on the International Validity of Criminal Judgments and Articles 35 to 37 of the 1972 European Convention of the Transfer of Proceedings in Criminal Matters adopted in the framework of the Council of Europe dealt, in identical terms, with the issue of international ne bis in idem. Both those conventions have, however, received very few ratifications. For a comprehensive review of the international instruments relating to ne bis in idem adopted in the context of the Council of Europe, see J. Vervaele, The transnational ne bis in idem principle in the EU: Mutual Recognition and equivalent protection of human rights', (2005) Utrecht Law Review Vol. I, Issue 2, (December) 100, at 103 et seq.

(10) - Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C252/99 P and C-254/99 P Limburgse Vinyl Maatschappij and Others v Commission [2002] ECR I-8375. See point 57 below.

(11) - See points 29 to 33 below.

(12) - See point 21 above.

(13) - See points 17 to 19 above.

(14) - Both of which were duly lodged, as part of the national court's file, with the Court's Registry.

(15) - I should make clear at this stage that my reasoning is based on the premiss that Article 54 of the CISA applies only in the case of decisions arising from national criminal proceedings and does not extend to decisions arising from civil law proceedings.

(16) - See, inter alia, Case C-380/01 Gustav Schneider [2004] ECR I-1389, at paragraph 21 and the case-law cited therein.

(17) - Joined Cases C-187/01 and C-385/01 [2003] ECR I-1345.

(18) - Case C-469/03 [2005] ECR I-2009.

(19) - Case C-436/04 [2006] ECR I-0000. The judgment was delivered on 9 March 2006. In addition, on 8 June 2006 Advocate General Ruiz-Jarabo Colomer delivered his Opinion in Case C-150/05 Van Straaten which examines another aspect of the principle of ne bis in idem in Article 54 of the CISA.

(20) - The first application of the principle was in Joined Cases 18/65 and 35/65 Gutmann [1967] ECR 61 in the context of EC staff disciplinary procedures.

(21) - See, inter alia, Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01 Tokai Carbon and Others v Commission [2004] ECR II-1181, paragraph 130 et seq., which contains a summary of the case-law of the Court on the application of the principle to this area of EC law.

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(22) - Cited in footnote 10 above.

(23) - Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C219/00 P Aalborg Portland and Others v Commission [2004] ECR I-123 (Cement).

(24) - At paragraph 30.

(25) - At paragraph 29 (my emphasis).

(26) - At paragraph 31.

(27) - At paragraph 32.

(28) - At paragraph 33.

(29) - At paragraph 35.

(30) - At paragraphs 36 and 37.

(31) - At paragraph 38.

(32) - At paragraph 39.

(33) - See point 41 above.

(34) - At paragraph 30.

(35) - At paragraph 31.

(36) - At paragraph 33 (my emphasis).

(37) - At paragraph 34 (my emphasis).

(38) - Ibid., (my emphasis).

(39) - The term Contracting Party' rather than Member State' is used in the CISA. The Court has used Member State' when the case before it concerned Member States (as in Gözütok and Brügge and Miraglia) and Contracting State' when the case involves a party to the Schengen Agreement and the CISA which is not an EU Member State (as in Van Esbroeck , which involved Norway). I follow the Court's practice.

(40) - In Cement , cited in footnote 23 above, the Court held that the unity of the legal interest protected' is one of the threefold conditions that must be satisfied for the principle of ne bis in idem to apply in EC competition law. See points 58 and 155 to 158 below.

(41) - At paragraph 36. It is perhaps unfortunate that the neither the Court nor the Advocate General appear to have considered Cement in their examination of Van Esbroeck.

(42) - At paragraph 27.

(43) - At paragraph 29.

(44) - At paragraph 30.

(45) - At paragraph 34.

(46) - At paragraph 35.

(47) - Cited in footnote 10 above, at paragraph 59. See also Van Esbroeck , cited in footnote 19 above, at paragraph 40.

(48) - At paragraph 62 (my emphasis). To state the obvious: it may of course be that a distinction can and should be drawn between (a) the concept of acquittal borrowed from penal matters and applied to competition law and (b) the concept of acquittal in penal (criminal) law itself. The Court

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itself does not appear to have drawn that distinction explicitly. The present case is also concerned with a time-bar on further prosecution, rather than the procedural annulment of a decision already taken.

(49) - Cement , cited in footnote 23 above, at paragraph 338. The threefold condition' has since been applied consistently by the Court of First Instance in the competition law cases before it in which the principle of ne bis in idem has been alleged. See for instance, Tokai Carbon , cited in footnote 21 above, paragraph 130 et seq., or more recently Case T-38/02 Danone v Commission [2005] ECR II-0000, paragraph 134 et seq.

(50) - Van Esbroeck , cited in footnote 19 above

(51) - See reply to the second question below, points 121 to 124.

(52) - Cement , cited in footnote 23 above.

(53) - Thus, for instance, in France there is a 10 year time-bar for prosecuting serious crimes, 5 years for less serious crimes (délits') and only 1 year for minor offences (contraventions'). In Spain, depending on the seriousness of the sentence or sanction they may attract, prosecutions for criminal offences (using that term generically) are time-barred after 20, 15, 10, 5 or 3 years.

(54) - There are certain exceptions. Thus, for example, until its abolition by the 2003 Sexual Offences Act, a time-limit of 12 months applied to prosecutions for unlawful sexual intercourse with girls under the age of 16 (for a discussion of that time-limit, see the judgment of the House of Lords in Regina v J (Appellant) [2004] UKHL 42). Obviously, the general absence of time-bars does not exclude the possible application of principles such as abuse of process, which may limit the powers of the prosecuting authorities to bring proceedings in certain circumstances, thus arriving at the same practical result by a different intellectual route.

(55) - For a critical discussion of the principle and its rationale see generally, A. Merle and A. Vitu, Traité de Droit Criminel, Tome II, Procédure Pénale , 4 th edition, 1979, at paras. 46 et seq., and the bibliography cited therein.

(56) - Thus, references to the principle can be found as early as Demosthenes, who states that the laws forbid the same man to be tried twice on the same issue' (Speech Against Leptines' (355 BC), Demosthenes I, translated by J. H. Vince, Harvard University Press, 1962) and in Roman Law, where it appeared in Justinian's Corpus Juris Civilis (Dig.48.2.7.2 and Cj.9.2.9pr: 529-534 AD). The first recorded enunciation of an equivalent principle in the common law arguably arises from the 12 th century dispute between Archbishop Thomas à Becket and Henry II. Becket argued that clerks convicted in the ecclesiastical courts were exempt from further punishment in the King's courts since such further secular punishment would violate the ecclesiastical law prohibition on double punishment (itself based on St Jerome's comment (AD 391) For God judges not twice for the same offence'). The King's judges, possibly influenced by the popular veneration (and subsequent canonisation) of Becket after his murder by the King's knights in Canterbury cathedral and by Henry II's ultimate public penance before Becket's tomb, started applying that maxim as a principle of law. On the history of the principle see generally, J.A. Sigler, A History of Double Jeopardy' (1963) 7 Am J of Legal History 283. On the history of the principle in English law see also M. Friedland, Double Jeopardy , 1969, OUP, at pp. 5 to 15, and P. McDermott, Res Judicata and Double Jeopardy , Butterworths, 1999, at pp. 199 to 201.

(57) - As Spain has argued in its observations, the principle also seeks to compel police forces and public prosecutors to prepare and make their cases as effectively as possible. In that respect, see W.P.J. Wils, The principle of ne bis in idem in EC antitrust enforcement: a legal and economic analysis', (2003) World Competition 26(2), 131, in particular at 138. The principle of finality

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of criminal proceedings also underlies the principle of ne bis in idem. The finality value is however closely related to the main rationale of the principle, namely the protection of the individual against the jus puniendi of the State. On this point see further the Law Commission's Report Double Jeopardy and Prosecution Appeals (March 2001), available at www.lawcom.gov.uk, at 37-38.

(58) - For a discussion of the rationale behind the principle of ne bis in idem both in the common and continental law traditions, see Friedland, cited in footnote 56 above, at pp. 3 to 5; McDermott, cited in footnote 56 above, at chapters 21 and 22. A recent in depth discussion can be found in the Law Commission's Report of March 2001 cited in footnote 57 above.

(59) - The concept is, for example, so described in the Fifth Amendment to the USA Constitution which states that no person shall be subject for the same offence to be twice put in jeopardy of life or limb'.

(60) - In Green v United States (1957) 355 U.S. 184, at pp. 187-8, cited by Friedland, footnote 56 above, at p. 4.

(61) - See point 13 above and related footnote.

(62) - Similar exceptions apply in the legal systems of most Member States.

(63) - Article 1 of Council Decision 2000/365/EC of 29 May 2000 concerning the request of the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen acquis (OJ 2000 L 131, p. 43) and Council Decision 2004/926/EC of 22 December 2004 on the putting into effect of parts of the Schengen acquis by the United Kingdom of Great Britain and Northern Ireland (OJ 2004 L 395, p. 70).

(64) - Article 1 of Council Decision 2002/192/EC of 28 February 2002 concerning Ireland's request to take part in some of the provisions of the Schengen acquis (OJ 2002 L 64, p. 20). The relevant provisions have, however, still to be put into effect by a second Council decision.

(65) - Once Switzerland and the Member States which joined the EU in 2004 fully implement the Schengen acquis, the divergences in approaches to criminal law will obviously increase. See further points 108 to 114 below.

(66) - See points 92 to 96 below. In his Opinion in Van Straaten , cited in footnote 19 above, Advocate General Ruiz-Jarabo Colomer also suggests that ne bis in idem is triggered provided that acquittal has involved an analysis of the merits (at points 65 and 67). The Commission's Green Paper On Conflicts of Jurisdiction and the Principle of ne bis in idem in Criminal Proceedings (COM(2005) 696 final) asks this very question at pp. 54 to 56.

(67) - Even the case-law of the European Court of Human Rights is contradictory as to the exact scope of the principle in Article 4(1) of Protocol No 7, in particular as to whether it merely requires identity of material facts or also requires identity of the legal interest protected. On this point see the dissenting Opinion of Judge Repki in Oliveira v Switzerland, No 25711/94, judgment of 30 July 1998, ECHR Reports of Judgments and Decisions 1998V. On the difficulties in applying the principle in a transnational context, see generally Vervaele, cited in footnote 9 above, and C. Van den Wyngaert and G. Stessens, The international non bis in idem principle: resolving the unanswered questions', 1999, International and Comparative Law Quarterly , Vol. 48, p. 779. The Commission's Green Paper, cited in footnote 66 above, deals extensively with the difficulties arising from the application of the principle of ne bis idem in the EU context.

(68) - Thus, the 1987 Convention on Double Jeopardy, cited in footnote 8 above, never entered into force owing to the absence of sufficient ratifications. More recently, in 1999 the European Council of Tampere asked the Council and the Commission to adopt, by December 2000, a programme of measures to implement the principle of mutual recognition of judicial decisions in both civil

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and criminal matters. That programme proposed 24 vaguely defined measures ranked by priority. No actual implementation of the suggested measures as regards the principle of ne bis in idem has taken place. In 2003, in the wake of the Court's decision in Gözütok and Brügge , the Greek Presidency submitted an initiative with a view to adopting a Council Framework Decision concerning the application of the ne bis in idem' principle (OJ 2003 C 100, p. 24). Its aim was to provide the Member States with common legal rules relating to ne bis in idem in order to ensure uniformity both in the interpretation of those rules and in their practical implementation. As yet, the Member States have not agreed the Council Framework Decision.

(69) - The formulation employed by the late Judge Mancini in The free movement of workers in the case-law of the ECJ', in Constitutional Adjudication in EC and National Law , D. Curtin, and D. O'Keefe (eds.), 1992, Butterworths, p. 67. From the outset, the Court has given a Community definition to key concepts of the EC Treaty. See for instance the case-law concerning the definition of worker' or employment' (respectively commencing with Case 75/63 Hoekstra (née Unger) [1964] ECR 177 at p. 184, and Case 53/81 Levin [1982] ECR 1035, at paragraph 11). It is now settled case-law that the need for uniform application of Community law and the principle of equality require that the terms of a provision of Community law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the Community; that interpretation must take into account the context of the provision and the purpose of the legislation in question' (see, inter alia, Case C-373/00 Adolf Truley [2003] ECR I-1931 at paragraph 35 and the case-law cited therein).

(70) - Case 26/62 Van Gend en Loos [1963] ECR 3, at 12.

(71) - Those international conventions which regulate the application of the principle in a transnational context have been remarkably unsuccessful in obtaining ratification. See footnote 9 above.

(72) - As explicitly recognised in Miraglia , see point 49 above

(73) - It is not, indeed, an absolute in traditional EC Treaty terms. Articles 39(3) EC (workers), Article 46 EC (establishment) and Article 55 EC (services) all explicitly allow for derogations from the principle of free movement of persons on grounds of public policy, public security and public health. Those derogations have been further expanded by the Court's case-law on mandatory requirements'. See further points 110 to 112 below.

(74) - See footnote 78 below.

(75) - Thus, for example, the crime of genocide is not subject to any time-bar in several Member States which apply limitation periods to other offences.

(76) - Unfortunately, the scope of Article 4 of Protocol No 7 to the ECHR is explicitly restricted to a domestic context (i.e., that of each State signatory to the Protocol): see the Explanatory Report to Protocol No 7 at paragraph 27. For that reason, neither its actual text nor the interpretation given to it by the European Court of Human Rights is ultimately helpful as a guide to the proper interpretation of Article 54 of the CISA. The same is true of Article 14(7) of the 1966 International Covenant on Civil and Political Rights, which is also intended to apply to the domestic context of each individual State signatory.

(77) - The present case concerns decisions by a court and this discussion is therefore framed in those terms. In Gözütok and Brügge society had likewise had, and used, the opportunity to settle its account with the defendant (there, through pre-trial administrative bargains offered to, and accepted by, both defendants involving admission of guilt and acceptance of lesser punishments than if their cases had proceeded to full trial). This part of the underlying analysis is not dependent upon whether, formally, a court is involved.

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(78) - A brief comparative survey shows that, even though the question of whether the prosecution is time-barred is normally decided ex officio by the competent court at the start of the trial (if, indeed, the prosecution has not already realised this before the defendant is ever charged), the point can also be raised at any stage of the criminal proceedings by any party, even after the hearing has taken place and the evidence presented. It seems to me that in the latter event the merits of the case have been examined, even if no formal judgment on the substance is in fact passed upon them. A defendant who has sat through criminal proceedings up to that point has clearly been placed at jeopardy by the State. The principle of ne bis in idem should therefore apply.

(79) - I do realise that what this means in practice may vary from one Member State to another; and that the national court in the second' Member State may have to make additional enquiries. However, as I discuss at points 117 and 118 below, those practical difficulties can be reduced by invoking existing mechanisms for cooperation between national criminal courts. It may also be that national criminal law itself defines the point at which the defendant is placed in jeopardy'. That is, for example, also the case in the US, where jeopardy attaches in a jury trial when the jury is selected and sworn. Such a rule is considered to be part of the core of the double jeopardy principle enshrined in the Fifth Amendment. See Crist v Bretz (1978) 437 U.S. 28. For a discussion of this issue in the context of common law systems, see Friedland, cited in footnote 56 above, chapters 2 and 3.

(80) - My analysis in the present case is deliberately confined to the issue of time-bars. Without engaging here in detailed consideration of the hypotheses that Advocate General Ruiz-Jarabo Colomer sets out briefly at point 65 of his Opinion in Van Straaten (cited in footnote 19 above), I do not share his view that all the illustrations he gives necessarily involve an analysis of the merits and therefore entitle a defendant to invoke ne bis in idem.

(81) - That is also the meaning which in my view it is appropriate to ascribe to the words finally acquitted' in Article II-110 of the draft European Constitution. See footnote 8 above.

(82) - See point 83 above.

(83) - See point 57 above.

(84) - This reasoning finds support in the case-law of the Court applying Article 6 EU. See for instance Case C-109/01 Akrich [2003] ECR I-9607, at paragraph 58 and Joined Cases C-465/00, C-138/01 and C-139/01, Osterreichischer Rundfunk [2003] ECR I-4989, at paragraphs 68 and 69. Indeed, in Van Esbroeck , cited in footnote 19 above, the Court seems to have implicitly accepted this point, inasmuch as it referred (at paragraph 40) to Vinyl Maatschappij when stating that the principle in Article 54 of the CISA has been recognised as a fundamental principle of Community law.

(85) - See points 155 to 158 below.

(86) - This is far from a theoretical issue. By way of illustration, it appears that because of their lenient treatment of offences relating to trade in stolen works of art, both Belgium and the Netherlands have long been the preferred location for dealers in such items.

(87) - This concept clearly has close affinities with the mutual recognition' that forms a traditional part of the four freedoms under the EC Treaty. The Court in its judgments speaks of mutual trust' rather than mutual recognition', which is the term used by the European Council, the Council and the Commission (see footnote 89 below). I assume, however, that these are different names for the same principle.

(88) - See points 44 and 54.

(89) - The principle of mutual recognition' in criminal matters was endorsed, at the suggestion

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of the UK, by the European Council of Tampere in 1999. That Council's conclusions state that, the European Council ... endorses the principle of mutual recognition which, in its view, should become the cornerstone of judicial co-operation in both civil and criminal matters within the Union. The principle should apply both to judgments and to other decisions of judicial authorities'. (at point 33 of the Presidency Conclusions). According to the introduction to the Programme of measures to implement the principle of mutual recognition of decisions in criminal matters adopted subsequently by the Council and the Commission (OJ 2001 C 12, p. 10), implementation of that principle presupposes that Member States have trust in each others' criminal justice systems. That trust is grounded, in particular, on their shared commitment to the principles of freedom, democracy and respect for human rights, fundamental freedoms and the rule of law'.

(90) - In this instance, it would moreover be the Court that acted as legislator, which serves to underscore the undesirability of such an approach.

(91) - See in this respect the analysis made by S. Peers, Mutual Recognition and Criminal Law in the EU: Has the Council got it Wrong?', (2004) Common Market Law Review 5.

(92) - Indeed, Le crime et la peine sont donc des phénomènes sociaux, soumis aux lois de la sociologie, et ainsi conditionnés par tous les changements apportés à l'organisation sociale, par exemple, par les variations du milieu économique et, plus encore, par l'état des croyances morales et du degré de culture de chaque époque et de chaque peuple'. (Emile Garçon, 1851-1922, Le droit pénal, origines, évolution, état actuel , Payot, 1922, p. 3). The Court has in the past avoided questioning under Community law the moral choices made by Member States as reflected in their legislation. Grogan (Case C-159/90 [1991] ECR I-4685) provides the classic example, albeit not the only one, in that context. See generally S. O'Leary and J.M. Fernandez-Martín, Judicially created exceptions to the free provision of services' in Services and Free movement in EU Law , M. Andenas, and R. Wulf-Henning (eds.), 2002, OUP, 163. It is interesting to note that, in the context of the avowedly federal system of the USA, the double jeopardy clause of the Fifth Amendment is not breached by successive State and/or federal prosecutions for the same underlying conduct. States are in respect of each other and in respect of the federal government considered as separate sovereigns for the purposes of the double jeopardy clause (Heath v Alabama (1985) 474 U.S. 82).

(93) - In the EU, depending on the Member States, the age of criminal responsibility is set at 7, 8, 13, 14, 16 and 18 years old.

(94) - In this respect, I differ from the view expressed in passing by Advocate General Ruiz-Jarabo Colomer in Van Straaten , cited in footnote 19 above, at point 65.

(95) - In the same vein, see H. Schermers, Non bis in idem' in Du Droit International au Droit de l'Intégration, Liber Amicorum Pierre Pescatore , F. Capotorti et al. (eds), Nomos, 601 at 611. See also van den Wyngaert and Stessens, cited in footnote 67 above, at p. 792.

(96) - See the reply to question 4(b), points 148 to 154 below.

(97) - See the reply to the second question, points 121 to 124 below.

(98) - At paragraph 47 (my emphasis).

(99) - Cement , cited in footnote 23 above, at paragraph 338.

(100) - See points 29 to 33 above. It is, however, perfectly consistent with the texts of the judgments of the Setubal Criminal Court and the Portuguese Supreme Court, see point 33 above.

(101) - All Member States (with the exception of France which did not comment on the third question in its oral observations), made the answer to the third question dependent on the answers to the first two questions.

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(102) - I should emphasise that the answer I propose should not be read as necessarily precluding the reopening of a case under Article 4(2) of Protocol No 7 to the ECHR (for example, should evidence emerge of new or newly discovered facts). Since the point is not raised in the present reference, I do not consider it further here.

(103) - See points 29 to 33 above.

(104) - Of 12 October 1992, OJ 1992 L 302, p. 1.

(105) - Of 2 July 1993, OJ 1993 L 253, p. 1. A consolidated version of this regulation is available at http:europa.eu.int/eur-lex/en/consleg/pdf/1993/en_1993R2454_do_001.pdf.

(106) - Articles 4(6) and (7) of the Community Customs Code and Article 313 of the implementing Regulation.

(107) - Case 41/76 Donckerwolcke [1976] ECR 1921; Case C-83/89 Houben [1990] ECR I-1161.

(108) - Article 4(6) and (7) and 79 of the Customs Code.

(109) - Article 79 of the Customs Code.

(110) - Article 313(1) of the implementing Regulation.

(111) - On the conditions applicable under Articles 28 and 30 EC to import controls and inspections after 1993, see P. Oliver, assisted by M. Jarvis, Free Movement of Goods in the European Community, 4th ed., 2003, Sweet & Maxwell, at 6.10, 7.04 and 12.12 to 12.20.

(112) - Article 250 of the Customs Code.

(113) - See Chapter 2, Incurrence of Custom Debt' of Title VII, entitled, Custom Debt', of the Customs Code.

(114) - See in particular Case 240/81 Einberger [1982] ECR 3699; see also Case 252/87 Kiwall [1988] ECR 4753, at paragraph 11.

(115) - Clearly, the same proviso made in footnote 102 above as regards Article 4(2) of Protocol No 7 of the ECHR also applies here.

(116) - At paragraph 36.

(117) - At paragraph 38.

(118) - Ibid. Indeed, goods which are transported over the border are by the same act both exported from the territory of one contacting authority and imported into the territory of another. Considering such course of action to be composed of two distinct acts would, as duly stressed by Advocate General Ruiz-Jarabo Colomer in Van Esbroeck , go against the aims and principles underlying the whole internal market ideals of the EC Treaty: see his Opinion in Van Esbroeck , cited in footnote 19 above, at point 52.

(119) - For example, when the importer has already agreed to the sale, or effects it shortly after the unlawful importation of the goods.

(120) - Cement , cited in footnote 23 above, at paragraph 338. See also Case 137/85 Maizena [1987] ECR 4587, in which the Court rejected the application of the principle of ne bis in idem because the two Community law provisions (imposing on the plaintiffs in the national proceedings the provision of two securities in connection with the same export licence) had different purposes. The Court thus implicitly applied the criterion of the unity of the legal interest protected as a pre-requisite for ne bis in idem. See in the same sense Case C-304/02 Commission v France [2005] ECR I6263, at paragraph 84; and see also the case-law cited in footnote 49 above.

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(121) - See points 101 to 103 above.

(122) - Opinion of Advocate General Ruiz-Jarabo Colomer in Van Esbroeck , cited in footnote 19 above, at points 45 to 48. As I have indicated above (see footnote 67 above), the case-law of the European Court of Human Rights is not consistent as to whether the unity of the legal interest protected is a pre-condition for ne bis in idem , or whether identity of the material facts is sufficient.

(123) - See point 56.

(124) - Suppose, by way of illustration, that a defendant is charged with three criminal offences arising from the same facts. The competent criminal court declares by order, without a review of the merits, that two of the prosecutions are time-barred. After trial, it acquits the defendant of the third charge by final judgment because there is insufficient evidence to support a conviction. Applying Van Esbroeck, only identity of the material facts and of the defendant is required; unity of the legal interest protected' is not. The defendant may thereafter rely on ne bis in idem under Article 54 of the CISA, even with regard to the first and second charges.

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Judgment of the Court (Second Chamber)
of 9 March 2006
Criminal proceedings against Leopold Henri Van Esbroeck. Reference for a preliminary ruling: Hof van Cassatie - Belgium. Convention implementing the Schengen Agreement - Articles 54 and 71 - Ne bis in idem principle - Application ratione temporis - Concept of "the same acts' - Import and export of narcotic drugs subject to legal proceedings in different Contracting States. Case C-436/04.

1. European Union - Police and judicial cooperation in criminal matters - Protocol integrating the Schengen acquis - Convention implementing the Schengen Agreement - Ne bis in idem principle

(Convention implementing the Schengen Agreement, Art. 54)

2. European Union - Police and judicial cooperation in criminal matters - Protocol integrating the Schengen acquis - Convention implementing the Schengen Agreement - Ne bis in idem principle

(Protocol No 7 to the European Convention for the Protection of Human Rights, Art. 4; International Covenant on Civil and Political Rights, Art. 14(7); Convention implementing the Schengen Agreement, Art. 54)

1. The ne bis in idem principle, enshrined in Article 54 of the Convention implementing the Schengen Agreement, must be applied to criminal proceedings brought in a Contracting State for acts for which a person has already been convicted in another Contracting State even though the Convention was not yet in force in the latter State at the time at which that person was convicted, in so far as the Convention was in force in the Contracting States in question at the time of the assessment, by the court before which the second proceedings were brought, of the conditions of applicability of the ne bis in idem principle.

(see para. 24, operative part 1)

2. Contrary to Article 14(7) of the International Covenant on Civil and Political Rights and Article 4 of Protocol No 7 to the European Convention of Human Rights, which enshrine the ne bis in idem principle by using the term offence', Article 54 of the Convention implementing the Schengen Agreement (CISA) must be interpreted as meaning that the relevant criterion for the purposes of the application of that article is identity of the material acts, understood as the existence of a set of facts which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected.

Nowhere in Title VI of the Treaty on European Union relating to police and judicial cooperation in criminal matters, or in the Schengen Agreement or the CISA itself, is the application of Article 54 of the CISA made conditional upon harmonisation, or at the least approximation, of the criminal laws of the Member States. The ne bis in idem principle thus necessarily implies that the Contracting States have mutual trust in their criminal justice systems and that, since there is no harmonisation of national criminal laws, each of them recognises the criminal law in force in the other Contracting States even when the outcome would be different if its own national law were applied.

The definitive assessment of the identity of the material acts belongs to the competent national courts which are charged with the task of determining whether the material acts at issue constitute a set of facts which are inextricably linked together in time, in space and by their subject-matter.

It follows that punishable acts consisting of exporting and importing the same narcotic drugs and which are prosecuted in different Contracting States to the CISA are, in principle, to be regarded as the same acts' for the purposes of Article 54, the definitive assessment in that respect being the task of the competent national courts.

(see paras 28-30, 35-36, 38, 42, operative part 2)

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In Case C-436/04,

REFERENCE for a preliminary ruling under Article 35 EU from the Hof van Cassatie (Belgium), made by decision of 5 October 2004, received at the Court on 13 October 2004, in the criminal proceedings against

Leopold Henri Van Esbroeck,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, R. Schintgen (Rapporteur), R. Silva de Lapuerta, G. Arestis and J. Kluka, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,

Registrar: K. Sztranc, Administrator,

having regard to the written procedure and further to the hearing on 22 September 2005,

after considering the observations submitted on behalf of:

- Mr Van Esbroeck, by T. Vrebos, advocaat,

- the Czech Government, by T. Boek, acting as Agent,

- the Netherlands Government, by H.G. Sevenster and C.M. Wissels, acting as Agents,

- the Austrian Government, by C. Pesendorfer, acting as Agent,

- the Polish Government, by T. Nowakowski, acting as Agent,

- the Slovak Government, by R. Prochazka, acting as Agent,

- the Commission of the European Communities, by W. Bogensberger and R. Troosters, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 20 October 2005,

gives the following

Judgment

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

1. The ne bis in idem principle, enshrined in Article 54 of the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, signed on 19 June 1990 in Schengen, must be applied to criminal proceedings brought in a Contracting State for acts for which a person has already been convicted in another Contracting State even though the Convention was not yet in force in the latter State at the time at which that person was convicted, in so far as the Convention was in force in the Contracting States in question at the time of the assessment, by the court before which the second proceedings were brought, of the conditions of applicability of the ne bis in idem principle.

2. Article 54 of the Convention must be interpreted as meaning that:

- the relevant criterion for the purposes of the application of that article is identity of the material acts, understood as the existence of a set of facts which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected;

- punishable acts consisting of exporting and importing the same narcotic drugs and which are prosecuted in different Contracting States to the Convention are, in principle, to be regarded as the same

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acts' for the purposes of Article 54, the definitive assessment in that respect being the task of the competent national courts.

1. The reference for a preliminary ruling concerns the interpretation of Articles 54 and 71 of the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (OJ 2000 L 239, p. 19; the CISA'), signed on 19 June 1990 in Schengen (Luxembourg).

2. The question was raised in the context of criminal proceedings initiated in Belgium against Mr Van Esbroeck for the trafficking of narcotic drugs.

Legal context

The Convention implementing the Schengen Agreement

3. Under Article 1 of the Protocol integrating the Schengen acquis into the framework of the European Union, annexed to the Treaty on European Union and to the Treaty establishing the European Community by the Treaty of Amsterdam (the Protocol'), 13 Member States of the European Union, including the Kingdom of Belgium, are authorised to establish closer cooperation among themselves within the scope of the Schengen acquis , as set out in the annex to the Protocol.

4. The Schengen acquis thus defined includes, inter alia, the Agreement, signed in Schengen on 14 June 1985, between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (OJ 2000 L 239, p. 13; the Schengen Agreement') and the CISA.

5. By virtue of the first paragraph of Article 2(1) of the Protocol, from the date of entry into force of the Treaty of Amsterdam, 1 May 1999, the Schengen acquis is to apply immediately to the 13 Member States referred to in Article 1 of the Protocol.

6. In accordance with the second sentence of the second paragraph of Article 2(1) of the Protocol, the Council of the European Union adopted, on 20 May 1999, Decision 1999/436/EC determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions or decisions which constitute the Schengen acquis (OJ 1999 L 176, p. 17). It is apparent from Article 2 of that decision, in conjunction with Annex A thereto, that the Council determined Articles 34 EU and 31 EU and Articles 34 EU, 30 EU and 31 EU, which form part of Title VI of the Treaty on European Union entitled Provisions on police and judicial cooperation in criminal matters', as the legal basis for Articles 54 and 71 of the CISA.

7. Under Article 54 of the CISA, which forms part of Chapter 3 (Application of the ne bis in idem principle') of Title III (Police and security'):

A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party.'

8. Article 71 of the CISA, which forms part of Chapter 6 (Narcotic drugs') of Title III, states:

1. The Contracting Parties undertake as regards the direct or indirect sale of narcotic drugs and psychotropic substances of whatever type, including cannabis, and the possession of such products and substances for sale or export, to adopt in accordance with the existing United Nations Conventions [Single Convention on Narcotic Drugs of 1961, as amended by the 1972 Protocol amending the 1961 Single Convention on Narcotic Drugs and the United Nations Convention against Illicit Traffic

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in Narcotic Drugs and Psychotropic Substances of 20 December 1988] all necessary measures to prevent and punish the illicit trafficking in narcotic drugs and psychotropic substances.

2. The Contracting Parties undertake to prevent and punish by administrative and penal measures the illegal export of narcotic drugs and psychotropic substances, including cannabis, as well as the sale, supply and handing over of such products and substances, without prejudice to the relevant provisions of Articles 74, 75 and 76.

3. To combat the illegal import of narcotic drugs and psychotropic substances, including cannabis, the Contracting Parties shall step up their checks on the movement of persons, goods and means of transport at their external borders. Such measures shall be drawn up by the working party provided for in Article 70. This working party shall consider, inter alia, transferring some of the police and customs staff released from internal border duty and the use of modern drug-detection methods and sniffer dogs.

4. To ensure compliance with this Article, the Contracting Parties shall specifically carry out surveillance of places known to be used for drug trafficking.

5. The Contracting Parties shall do their utmost to prevent and combat the negative effects arising from the illicit demand for narcotic drugs and psychotropic substances of whatever type, including cannabis. Each Contracting Party shall be responsible for the measures adopted to this end.'

The Agreement concluded by the Council of the European Union, the Republic of Iceland and the Kingdom of Norway concerning the latters' association with the implementation, application and development of the Schengen acquis

9. In accordance with the first subparagraph of Article 6 of the Protocol, an agreement was drawn up on 18 May 1999 by the Council of the European Union, the Republic of Iceland and the Kingdom of Norway concerning the latters' association with the implementation, application and development of the Schengen acquis (OJ 1999 L 176, p. 36; the Agreement').

10. Article 1(b) of Council Decision 2000/777/EC of 1 December 2000 on the application of the Schengen acquis in Denmark, Finland and Sweden, and in Iceland and Norway (OJ 2000 L 309, p. 24) provides that, in accordance with Article 15(4) of the Agreement, all the provisions referred to in Annexes A and B of that agreement are, from 25 March 2001, to apply to Iceland and Norway, in their relations between each other and with Belgium, Denmark, Germany, Greece, Spain, France, Italy, Luxembourg, Netherlands, Austria, Portugal, Finland and Sweden'. Articles 54 and 71 of the CISA form part of Annex A.

11. Consequently, Articles 54 and 71 of the CISA have been applicable since 25 March 2001 in relations between the Kingdom of Norway and the Kingdom of Belgium.

The United Nations Conventions on Narcotic Drugs and Psychotropic Substances

12. Under Article 36 of the 1961 Single Convention on Narcotic Drugs, as amended by the 1972 Protocol (the Single Convention'):

Penal provisions

1. (a) Subject to its constitutional limitations, each Party shall adopt such measures as will ensure that cultivation, production, manufacture, extraction, preparation, possession, offering, offering for sale, distribution, purchase, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation and exportation of drugs contrary to the provisions of this Convention, and any other action which in the opinion of such Party may be contrary to the provisions of this Convention, shall be punishable offences when committed intentionally, and that serious offences shall be liable to adequate punishment particularly by imprisonment or other

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penalties of deprivation of liberty.

(b) ...

2. Subject to the constitutional limitations of a Party, its legal system and domestic law,

(a)(i) Each of the offences enumerated in paragraph 1, if committed in different countries, shall be considered as a distinct offence;

...'

13. Article 22 of the 1971 Convention on Psychotropic Substances (the 1971 Convention') contains a provision which is, in substance, identical to Article 36(2)(a)(i) of the Single Convention.

The main proceedings and the questions referred for a preliminary ruling

14. Mr Van Esbroeck, a Belgian national, was sentenced, by judgment of 2 October 2000 of the Court of First Instance of Bergen (Norway), to five years' imprisonment for illegally importing, on 1 June 1999, narcotic drugs (amphetamines, cannabis, MDMA and diazepam) into Norway. After having served part of his sentence, Mr Van Esbroeck was released conditionally on 8 February 2002 and escorted back to Belgium.

15. On 27 November 2002, a prosecution was brought against Mr Van Esbroeck in Belgium, as a result of which he was sentenced, by judgment of 19 March 2003 of the Correctionele Rechtbank te Antwerpen (Antwerp Criminal Court, Belgium), to one year's imprisonment, in particular for illegally exporting the above listed products from Belgium on 31 May 1999. That judgment was upheld by judgment of 9 January 2004 of the Hof van Beroep te Antwerpen (Antwerp Court of Appeal). Both of those courts applied Article 36(2)(a) of the Single Convention, according to which each of the offences enumerated in that article, which include the import and export of narcotic drugs, are to be regarded as a distinct offence if committed in different countries.

16. The defendant lodged an appeal on a point of law against that judgment and pleaded infringement of the ne bis in idem principle, enshrined in Article 54 of the CISA.

17. In those circumstances, the Hof van Cassatie (Court of Cassation) decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

(1) Must Article 54 of the [CISA] be construed as meaning that it may apply in proceedings before a Belgian court with regard to a person against whom a prosecution is brought in Belgium after 25 March 2001 before a criminal court in respect of the same acts for which that person was convicted by judgment of a Norwegian criminal court of 2 October 2000, and where the sentence imposed has already been served, in a situation where, pursuant to Article 2(1) of [the Agreement], Article 54 of the [CISA] is to be implemented and applied by Norway only as from 25 March 2001?

If the reply to Question 1 is in the affirmative:

(2) Must Article 54 of the [CISA], read with Article 71 thereof, be construed as meaning that offences of possession for the purposes of export and import in respect of the same narcotic drugs and psychotropic substances of any kind, including cannabis, and which are prosecuted as exports and imports respectively in different countries which have signed the [CISA], or where the Schengen acquis is implemented and applied, are deemed to be the same acts for the purposes of Article 54?'

The questions

The first question

18. By the first question the national court is effectively asking whether the ne bis in idem principle, enshrined in Article 54 of the CISA, must be applied to criminal proceedings brought

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in a Contracting State for acts for which a person has already been convicted in another Contracting State even though the CISA was not yet in force in that State at the time at which that person was convicted.

19. In that regard, it must first be noted that the Schengen acquis has been applicable in Belgium since 1 May 1999 and in Norway since 25 March 2001. The acts which Mr Van Esbroeck was accused of took place on 31 May and 1 June 1999. In addition, on 2 October 2000, he was found guilty in Norway of illegally importing prohibited substances, while, on 19 March 2003, he was found guilty in Belgium of unlawfully exporting the same substances.

20. Second, it must be pointed out that the Schengen acquis contains no provision dealing specifically with the entry into force of Article 54 of the CISA or with its effects in time.

21. Third, it must be noted that, as the Commission of the European Communities rightly points out, the problem in respect of the application of the ne bis in idem principle arises only when criminal proceedings are brought for a second time against the same person in another Contracting State.

22. Since it is in the context of the latter proceedings that the competent court is entrusted with the task of assessing whether all the conditions for the application of the principle at issue are satisfied, it is necessary, for the purposes of the application of Article 54 of the CISA by the court before which the second proceedings are brought, that the CISA be in force at that time in the second Contracting State concerned.

23. Consequently, the fact that the CISA was not yet binding on the first Contracting State at the time when, within the meaning of Article 54 of the Convention, the trial of the person concerned had been finally disposed of in that State is not relevant.

24. In those circumstances, the answer to the first question must be that the ne bis in idem principle, enshrined in Article 54 of the CISA, must be applied to criminal proceedings brought in a Contracting State for acts for which a person has already been convicted in another Contracting State even though the CISA was not yet in force in the latter State at the time at which that person was convicted, in so far as the CISA was in force in the Contracting States in question at the time of the assessment, by the court before which the second proceedings were brought, of the conditions of applicability of the ne bis in idem principle.

The second question

25. By the second question the national court is effectively asking what the relevant criterion is for the purposes of the application of the concept of the same acts' within the meaning of Article 54 of the CISA and, more precisely, whether the unlawful acts of exporting from one Contracting State and importing into another the same narcotic drugs as those which gave rise to the criminal proceedings in the two States concerned are covered by that concept.

26. In that regard, the Czech Government submitted that identity of the acts means identity of their legal classification and of the protected legal interests.

27. In the first place, however, the wording of Article 54 of the CISA, the same acts', shows that that provision refers only to the nature of the acts in dispute and not to their legal classification.

28. It must also be noted that the terms used in that article differ from those used in other international treaties which enshrine the ne bis in idem principle. Unlike Article 54 of the CISA, Article 14(7) of the International Covenant on Civil and Political Rights and Article 4 of Protocol No 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms use the term offence', which implies that the criterion of the legal classification of the acts is relevant as a prerequisite for the applicability of the ne bis in idem principle which is enshrined

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in those treaties.

29. In the second place, it should be pointed out that, as the Court found in Joined Cases C-187/01 and C-385/01 Gözütok and Brügge [2003] ECR I-1345, paragraph 32, nowhere in Title VI of the Treaty on European Union relating to police and judicial cooperation in criminal matters (Articles 34 and 31 of which were stated to be the legal basis for Articles 54 to 58 of the CISA), or in the Schengen Agreement or the CISA itself, is the application of Article 54 of the CISA made conditional upon harmonisation, or at the least approximation, of the criminal laws of the Member States.

30. There is a necessary implication in the ne bis in idem principle, enshrined in that article, that the Contracting States have mutual trust in their criminal justice systems and that each of them recognises the criminal law in force in the other Contracting States even when the outcome would be different if its own national law were applied (Gözütok and Brügge , paragraph 33).

31. It follows that the possibility of divergent legal classifications of the same acts in two different Contracting States is no obstacle to the application of Article 54 of the CISA.

32. For the same reasons, the criterion of the identity of the protected legal interest cannot be applicable since that criterion is likely to vary from one Contracting State to another.

33. The above findings are further reinforced by the objective of Article 54 of the CISA, which is to ensure that no one is prosecuted for the same acts in several Contracting States on account of his having exercised his right to freedom of movement (Gözütok and Brügge , paragraph 38, and Case C-469/03 Miraglia [2005] ECR I-2009, paragraph 32).

34. As pointed out by the Advocate General in point 45 of his Opinion, that right to freedom of movement is effectively guaranteed only if the perpetrator of an act knows that, once he has been found guilty and served his sentence, or, where applicable, been acquitted by a final judgment in a Member State, he may travel within the Schengen territory without fear of prosecution in another Member State on the basis that the legal system of that Member State treats the act concerned as a separate offence.

35. Because there is no harmonisation of national criminal laws, a criterion based on the legal classification of the acts or on the protected legal interest might create as many barriers to freedom of movement within the Schengen territory as there are penal systems in the Contracting States.

36. In those circumstances, the only relevant criterion for the application of Article 54 of the CISA is identity of the material acts, understood in the sense of the existence of a set of concrete circumstances which are inextricably linked together.

37. As regards, more particularly, a situation such as that at issue in the main proceedings, it must be observed that such a situation may, in principle, constitute a set of facts which, by their very nature, are inextricably linked.

38. However, the definitive assessment in that regard belongs, as rightly pointed out by the Netherlands Government, to the competent national courts which are charged with the task of determining whether the material acts at issue constitute a set of facts which are inextricably linked together in time, in space and by their subject-matter.

39. Contrary to the submissions made by the Slovak Government, that interpretation can be reconciled with Article 71 of the CISA which provides for the adoption, by the Contracting States, of all the measures necessary to combat illegal trafficking of narcotic drugs.

40. As rightly submitted by the Netherlands Government, the CISA does not lay down an order of priority amongst the different provisions, and, in addition, Article 71 of the Convention does

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not contain any element which might restrict the scope of Article 54, which enshrines, within the Schengen territory, the ne bis in idem principle, which is recognised in the case-law as a fundamental principle of Community law (see, to that effect, Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P Limburgse Vinyl Maatschappij and Others v Commission [2002] ECR I-8375, paragraph 59).

41. It follows that the reference made in Article 71 of the CISA to existing United Nations Conventions cannot be understood as hindering the application of the ne bis in idem principle laid down in Article 54 of the CISA, which prevents only the plurality of proceedings against a person for the same acts and does not lead to decriminalisation within the Schengen territory.

42. In the light of the above, the answer to the second question must be that Article 54 of the CISA must be interpreted as meaning that:

- the relevant criterion for the purposes of the application of that article of the CISA is identity of the material acts, understood as the existence of a set of facts which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected;

- punishable acts consisting of exporting and importing the same narcotic drugs and which are prosecuted in different Contracting States to the CISA are, in principle, to be regarded as the same acts' for the purposes of Article 54 of the Convention, the definitive assessment in that respect being the task of the competent national courts.

Costs

43. 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.

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PROCEDU Reference for a preliminary ruling

ADVGEN Ruiz-Jarabo Colomer

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Opinion of Mr Advocate General Ruiz-Jarabo Colomer delivered on 20 October 2005. Criminal proceedings against Leopold Henri Van Esbroeck. Reference for a preliminary ruling: Hof van Cassatie - Belgium. Convention implementing the Schengen Agreement - Articles 54 and 71 - Ne bis in idem principle - Application ratione temporis - Concept of ''the same acts' - Import and export of narcotic drugs subject to legal proceedings in different Contracting States. Case C-436/04.

I - Introduction

1. The Schengen acquis comprises:

(a) the Agreement concluded on 14 June 1985, in the Luxembourg town from which it takes its name, by the three Member States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders; (2)

(b) the Convention implementing that Agreement which the same contracting parties entered into on 19 June 1990 (hereinafter the Convention'); (3)

(c) the protocols and instruments of accession of other Member States, the declarations and acts adopted by the Executive Committee created by the Convention, and the declarations adopted by the authorities on which the Executive Committee confers decision-making powers. (4)

2. The Protocol (No 2) annexed to the Treaty on European Union and the Treaty establishing the European Community (hereinafter the Protocol') integrates that body of law into the framework of the Union and, pursuant to the first subparagraph of Article 2(1) of the Protocol, makes it applicable in the 13 Member States referred to in Article 1, including, inter alia , the Kingdom of Belgium, (5) from the date of entry into force of the Treaty of Amsterdam (1 May 1999).

3. Under Article 6 of the Protocol, the Republic of Iceland and the Kingdom of Norway are required to implement and develop the acquis , which has been in force in those countries since 25 March 2001. (6)

4. The reference for a preliminary ruling from the Hof van Cassatie (Court of Cassation), Belgium, provides the Court of Justice with an opportunity to interpret, for the third time, (7) Article 54 of the Convention, which lays down the ne bis in idem principle, and also to analyse the application of that principle ratione temporis and define the concept of idem.

II - The legal framework

A - European Union law

5. The preamble to the Protocol states the Schengen acquis is aimed at enhancing European integration and, in particular, at enabling the European Union to develop more rapidly into an area of freedom, security and justice.

6. Pursuant to the second subparagraph of Article 2(1) of the Protocol, on 20 May 1999 the Council adopted Decisions 1999/435/EC and 1999/436/EC concerning the definition of the Schengen acquis for the purpose of determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions or decisions which constitute the acquis. (8)

7. Under Article 2 and Annex A of Decision 1999/436, the basis for Articles 54 to 58 of the Convention is Articles 34 EU and 31 EU, which are contained in Title VI headed Provisions on police and judicial cooperation in criminal matters'.

8. Those articles of the Convention form Chapter 3, which is entitled Application of the ne bis in idem principle' and comes under Title III: Police and security'.

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9. Article 54 provides:

A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party.'

10. Article 71, contained in Chapter 6 (Narcotic Drugs') of Title III, is based on Article 30 EU, in addition to Articles 34 EU and 31 EU. In accordance with the first two paragraphs of Article 71:

1. The Contracting Parties undertake as regards the direct or indirect sale of narcotic drugs and psychotropic substances of whatever type, including cannabis, and the possession of such products and substances for sale or export, to adopt in accordance with the existing United Nations Conventions, all necessary measures to prevent and punish the illicit trafficking in narcotic drugs and psychotropic substances.

2. The Contracting Parties undertake to prevent and punish by administrative and penal measures the illegal export of narcotic drugs and psychotropic substances, including cannabis, as well as the sale, supply and handing over of such products and substances, without prejudice to the relevant provisions of Articles 74, 75 and 76. (9)

...'

B - The United Nations conventions

11. Article 36 of the Single Convention on Narcotic Drugs, signed in New York on 30 March1961, provides that:

1. Subject to its constitutional limitations, each Party shall adopt such measures as will ensure that cultivation, production, manufacture, extraction, preparation, possession, offering, offering for sale, distribution, purchase, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation and exportation of drugs contrary to the provisions of this Convention, and any other action which in the opinion of such Party may be contrary to the provisions of this Convention, shall be punishable offences when committed intentionally, and that serious offences shall be liable to adequate punishment particularly by imprisonment or other penalties of deprivation of liberty.

2. Subject to the constitutional limitations of a Party, its legal system and domestic law,

(a) (i) Each of the offences enumerated in paragraph 1, if committed in different countries, shall be considered as a distinct offence;

...

3. The provisions of this article shall be subject to the provisions of the criminal law of the Party concerned on questions of jurisdiction.

4. Nothing contained in this article shall affect the principle that the offences to which it refers shall be defined, prosecuted and punished in conformity with the domestic law of a Party.'

12. The wording of Article 22 of the Convention on Psychotropic Substances, concluded in 1971, is virtually identical to that of Article 36 of the 1961 convention.

III - The facts of the main proceedings and the questions referred for a preliminary ruling

13. On 2 October 2000, Mr Van Esbroeck, a Belgian citizen, was sentenced by the Bergens Tingrett (Court of First Instance, Bergen) (Norway) to five years' imprisonment for illegally importing

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narcotic drugs, an offence which he committed on 1 June 1999.

14. After serving half his sentence and being released conditionally, Mr Van Esbroeck returned to his own country where, on 27 November 2002, a prosecution was opened in which he was charged with exporting, on 31 May 1999, the same substances which he had imported into Norway one day later. The Correctionele Rechtbank van Antwerpen (Criminal Court, Antwerp), Belgium, sentenced Mr Van Esbroeck to one year's imprisonment by judgment of 19 March 2003, which the Hof van Beroep te Antwerpen (Court of Appeal, Antwerp) upheld on appeal by judgment of 9 January 2004.

15. The defendant lodged an appeal on a point of law and pleaded infringement of the ne bis in idem principle enshrined in Article 54 of the Convention.

16. Prior to handing down its decision, the Hof van Cassatie submitted the following questions to the Court:

1. Must Article 54 of the [CISA] be construed as meaning that it may apply in proceedings before a Belgian court with regard to a person against whom a prosecution is brought in Belgium after 25 March 2001 before a criminal court in respect of the same acts for which that person was convicted by judgment of a Norwegian criminal court of 2 October 2000, and where the sentence imposed has already been served, in a situation where, pursuant to Article 2(1) of [the Agreement], Article 54 of the [CISA] is to be implemented and applied by Norway only as from 25 March 2001?

If the reply to Question 1 is in the affirmative:

2. Must Article 54 of the [CISA], read with Article 71 thereof, be construed as meaning that offences of possession for the purposes of export and import in respect of the same narcotic drugs and psychotropic substances of any kind, including cannabis, and which are prosecuted as exports and imports respectively in different countries which have signed the [CISA], or where the Schengen acquis is implemented and applied, are deemed to be the same acts for the purposes of Article 54?'

IV - The procedure before the Court of Justice

17. Written observations were submitted in these proceedings by Mr Van Esbroeck, the Commission, and the Netherlands, Czech, Austrian, Polish and Slovak Governments. At the hearing, held on 22 September 2005, oral argument was presented by the representatives of Mr Van Esbroeck, the Commission, and the Netherlands and Czech Governments.

V - Analysis of the questions referred

A - The nature and basis of the ne bis in idem principle

18. In the Opinion in Gözütok and Brügge (point 48 et seq.), I stated that Article 54 of the Convention is a genuine expression of the principle which, in respect of the same unlawful conduct, prevents a person from being subject to more than one penalising procedure and, possibly, being punished repeatedly, in so far as that involves the unacceptable repetition of the exercise of the ius puniendi.

19. I went on to state that the principle rests on two pillars found in every legal system: legal certainty and equity. The offender must know that, by paying the penalty, he has expiated his guilt and need not fear further sanction. If he is acquitted, he must have the certainty that he will not be prosecuted again in further proceedings.

20. Furthermore, it should not be forgotten that every penalty has a dual purpose: to punish and to deter. It is designed to punish misconduct and to discourage the perpetrators, as well as other possible offenders, from legally culpable behaviour. It therefore has to be proportionate to those purposes, keeping an appropriate balance to provide retribution for the conduct which is being penalised and, at the same time, serve as an example. The principle of equity, of which the proportionality

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rule is a tool, thus prevents multiple penalties.

21. The ne bis in idem principle therefore has two main bases. First, it is an expression of the legal protection of individuals vis-à-vis the ius puniendi, derived from the right to due process and a fair trial, (10) and as such it has the status of a constitutional provision in a number of the States that are parties to the Schengen Agreement. (11) Second, it is a structural requirement of the legal system and its lawfulness is founded on respect for res judicata. (12)

22. That duality must guide the reply to the questions from the Hof van Cassatie, but regard must also be had to the aim of Article 54 of the Convention.

B - The aim of the ne bis in idem principle in the Schengen framework

23. Article 54 of the Convention, (13) which confers international validity on the ne bis in idem principle, contains a rule designed to assist European integration by creating a common area of freedom, security and justice.

24. The gradual abolition of border checks is a necessary step towards that common area, although the removal of administrative obstacles is favourable to everyone, including those who take advantage of the reduction in security to expand their unlawful activities.

25. That is why, particularly with regard to policing and security, it is essential to increase cooperation between the Member States, which thus become protagonists in the fight against crime throughout the whole of European society by collaborating with one another to maintain order. However, that increased emphasis on the prosecution of offences must be achieved without erosion of the inalienable safeguards which exist in a democratic society based on the rule of law.

26. The attainment of that objective is assisted by Article 54 of the Convention, which, in accordance with the judgments in Gözütok and Brügge and Miraglia , ensures the free movement of persons within the Union (paragraphs 38 and 32 respectively), an aim enshrined in Article 2 EU, first paragraph, fourth indent.

C - The temporal scope of Article 54 of the Convention (the first question referred for a preliminary ruling)

27. The Schengen acquis has been applicable in Belgium since 1 May 1999 and in Norway since 25 March 2001. The acts which Mr Van Esbroeck was accused of took place on 31 May and 1 June 1999. On 2 October 2000, Mr Van Esbroeck was found guilty in Norway of the offence of illegally importing prohibited substances, while, on 19 March 2003, he was found guilty in Belgium of unlawfully exporting the same substances.

28. In the light of that chronology, the referring court asks whether the prohibition of double prosecution, laid down in Article 54 of the Convention, which was not in force in Norway when the first judgment was handed down, is capable of precluding the subsequent imposition of a penalty in Belgium.

29. It must be noted that the Schengen acquis contains no provision dealing specifically with the entry into force of Article 54 of the Convention or with its effects in time.

30. With the exception of the Slovak Government, all those who have participated in these proceedings agree that the solution to the question of interpretation submitted by the referring court is derived entirely from the essential nature and the foundations of the ne bis in idem principle.

31. The principle, classed as a fundamental individual right designed to ensure that no one who has committed an offence and served their sentence is prosecuted and punished again, takes full effect when those conditions are met, which is when, like the other side of the same coin, the obligation of the State to refrain completely from all punitive measures arises. The fact that a final judgment

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has already been delivered acts as a trigger for the principle to come into play.

32. The Belgian legal authorities prosecuted and sentenced Mr Van Esbroeck notwithstanding that he had already been convicted by judgment of a foreign court and even though Article 54 of the Convention was applicable in both States. That being the case, I propose that the Court advise the Hof van Cassatie that Article 54 of the Convention does apply to a situation such as the one in the main proceedings.

33. In the Opinion in Gözütok and Brügge , I argued (point 114) that the ne bis in idem principle is not a procedural rule but a fundamental safeguard for citizens in legal systems which, like those of the partners in the European Union, are based on the acknowledgment that the individual has a series of rights and freedoms in respect of the acts of public bodies. (14) In that connection, even if, for the purposes of the ne bis in idem principle, the legal framework of the second prosecution were deemed to be that which applied when the first took place, or, indeed, that which was applicable when the offence was committed, the current legal framework would have to be applied retroactively since it is the most favourable to the accused, pursuant to a basic principle of criminal law policy recognised in the legal systems concerned.

34. The same solution results from an interpretation of Article 54 of the Convention in its procedural context, since, unless there is express provision to the contrary, rules of that kind govern proceedings commenced after their entry into force, and the main proceedings were opened in Belgium after Article 54 entered into force in that country and in Norway.

D - The definition of idem (the second question referred for a preliminary ruling)

1. Preliminary observations

35. The referring court asks for an explanation of the scope of the term the same facts' contained in Article 54 of the Convention.

36. The task of ascertaining whether the acts on account of which a prosecution is opened are the same as those which were at issue in a previous prosecution is at the very heart of the role of administering justice and it is one for which only the court having direct knowledge of the situation to be the subject of its assessment is qualified, without prejudice to the right of review at second instance.

37. The Court of Justice must, therefore, resist the temptation to usurp the role of that court. The role of the Court is restricted to furnishing interpretative criteria which, having regard to the basis and the aim of the provision concerned, indicate the most suitable approach in the interests of ensuring uniform treatment throughout the whole territory of the European Union.

38. At this stage of the analysis, I must admit that a hasty reading of the second question submitted by the Hof van Cassatie led me to embark on the task of defining the limits of the indeterminate legal concept of the same acts'. My intention was to extract, in the context of Community law, a number of autonomous guidelines on the basis of which to put forward a general criterion to apply to cases which may arise in the future.

39. To carry out such a task is not merely presumptuous; it is also impossible. That is because the contingent nature of criminal law policies and the characteristics of criminal proceedings are not conducive to the creation of universally valid rules. Therefore, an approach which may be helpful with regard to certain types of offence or certain types of participation is liable to be inappropriate for others. (15)

40. It appears more sensible to adopt an intermediate approach and, rather than concentrating too closely on the facts of the main proceedings, to assess the particular circumstances of the case with a view to assisting the national court by furnishing rules designed to resolve the dispute

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in accordance with the spirit of the provision whose interpretation is sought in these proceedings.

2. The purely factual aspect of the concept

41. That eclectic approach underlies the question referred by the Hof van Cassatie in that it seeks to ascertain whether, for the purposes of Article 54, the illegal trafficking of narcotic drugs and psychotropic substances between two countries that are signatories to the Convention constitutes the same acts' or whether, conversely, each State is entitled to punish the trafficking as a separate offence.

42. The importance of that question is obvious, not simply because of its legal complexity but also because the type of offence concerned entails the frequent repetition of the same conduct. Legal writers predicted such difficulties (16) and reality has borne out that prediction. (17)

43. Therefore, it is necessary to define the concept comprised in the second element of the ne bis in idem principle. To that end, the concept must be examined from three angles: (1) by assessing the acts to the exclusion of all other considerations; (2) by focusing on the legal classification of the acts; and (3) by having regard to the interests protected by the classification of the offence.

44. A linguistic approach will suffice in relation to the first angle of assessment. There is no room for uncertainty in the Spanish version of the Convention, which contains the words por los mismos hechos'; nor do the German, French, English, Italian and Dutch versions (wegen derselben Tat', pour les mêmes faits', for the same acts', per i medesimi fatti' and wegens dezelfde feiten', respectively) give rise to any doubts, since they all refer to the notion of idem factum, that is, to all the acts which are being prosecuted, as a historical phenomenon which the court must assess and apply the consequences appropriate in law.

45. That approach is borne out by reference to the basis and the meaning of that basic safeguard afforded to individuals: freedom of movement within the Schengen area requires that the perpetrator of an act knows that once he has been found guilty and served his sentence, or, where applicable, been acquitted by a final judgment in a Member State, he may travel within the Schengen territory without fear of prosecution in another State on the basis that the legal system of that State treats the conduct concerned as a distinct offence. If the latter approach were upheld, the objective of Article 2 EU, first paragraph, fourth indent, would be deprived of effect and that would lead to the creation in the Schengen area of as many obstacles as there are penal systems. Furthermore, notwithstanding the harmonising aim of the framework decisions approved by the Council, those penal systems have strong national traits.

46. The criterion relating to legally protected interests must also be dismissed for the same reasons, because it is so closely linked to the legitimate options available under the criminal law policies of the Member States that it would enable the same conduct to be punished on more than one occasion, thereby frustrating the aim of Article 54 of the Convention.

47. If, instead of the acts alone, account were taken of the offences or of the rights protected by the prohibition of the said acts, the ne bis in idem principle would never function at international level. (18)

48. That situation probably explains why, unlike the International Covenant on Civil and Political Rights, which prohibits double punishment for the same offence' (Article 14(7)), and Protocol No 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms which, for the same purpose, also refers to offence' (Article 4) (19) (both the former documents refer to the principle at national level), other agreements (which refer to the international aspect of the principle) adopt a purely fact-based approach. (20) The Initiative of the Hellenic Republic with a view to adopting a Council Framework Decision concerning the application of the ne bis

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in idem principle (21) adopted a similar criterion and defined idem as a second criminal offence arising solely from the same, or substantially the same, facts, irrespective of its legal character' (Article 1(e)).

49. In connection with this case, it must also be noted that, on 10 December 1998, the Belgian Minister for the Interior and the Belgian Minister for Justice published a circular (22) which states that Article 54 of the Convention does not require identical legal classifications but only identical facts. (23) No Belgian court has followed that guideline. (24)

3. The particular facts of the main proceedings

50. The foregoing considerations are borne out by the result of applying them to the facts of the case before the Court.

51. There is no question that, from a material point of view, the act on account of which Mr Van Esbroeck was punished in Norway is the same as the act in respect of which he was prosecuted and convicted in Belgium, in other words the illegal trafficking from one country to the other of a quantity of drugs between 31 May and 1 June 1999. That conduct has a different legal classification in each State: export of the said illicit substances in Belgium and import of those substances in Norway. If the idem is deemed to be exclusively factual, Mr Van Esbroeck would be protected by Article 54 of the Convention, whereas, if the concept is afforded a legal aspect, double punishment would be possible.

52. I believe that the latter approach must be rejected on three grounds. First, it results in a restrictive solution which is incompatible with the broad impact inherent in the basic safeguards which protect the dignity of the individual. Second, it is in direct conflict with the declared objective of Article 54 of the Convention, which is to ensure freedom of movement for persons, by leaving the sword of Damocles of further punishment hanging over those who have served their sentence if they leave the boundaries of the legal system in which that sentence was served. Finally, it is ludicrous to refer to import and export in a territory governed by a legal system which, in essence, is designed to remove borders for both persons and goods. (25)

4. Article 71 of the Convention

53. Under this provision, the signatory States undertake to adopt all necessary measures to prevent the illicit trafficking in drugs in accordance with the United Nations conventions, in particular the Convention on narcotic drugs and the Convention on psychotropic substances which require that certain offences must be considered as a distinct offence if committed in different countries (Articles 36 and 22 respectively).

54. On the surface, the provisions cited contradict the arguments put forward earlier in this Opinion, but a careful analysis of their subject-matter reveals that, far from calling into question those arguments, the provisions concerned actually support them.

55. Article 71 seeks to ensure that, within the Schengen framework, the Member States do not relax their efforts in the battle against illicit drugs and, to that end, it reasserts the link with the United Nations sectoral conventions. Article 71 is general in scope and therefore it does not constitute a specific restriction on Article 54.

56. On that premiss, the aforementioned United Nations Conventions must be examined in their historical and legislative contexts, since the requirement in Articles 22 and 36 thereof that the contracting parties must adopt measures to punish the conduct involved in the illegal trade in drugs is not unconditional but is subject to the limitations laid down in the legal systems of the Contracting parties. Article 54 of the Convention forms part of the domestic law of the States which have ratified it, from which it follows that those provisions are not capable of restricting its effectiveness.

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57. Nor must it be forgotten that the United Nations conventions were conceived to combat on a global scale the illicit trafficking of drugs, narcotic drugs and psychotropic substances, in the absence of a strong response to the problem in all countries. It is that vision which endows Articles 22 and 36 with their true meaning, and the result is that where offences are perpetrated in a number of Contracting States they may be prosecuted and punished in any of those States so that, even if some countries fail in their duty, the perpetrators do not go unpunished. That approach has no sense in the Schengen area which, as I stated in the Opinion in Gözütok and Brügge (point 124) and as the Court confirmed in its judgment (paragraph 33), is founded on the mutual trust of the Member States in their criminal justice systems. (26)

58. In short, the articles in question are designed to prevent the substantive decriminalisation of misconduct while at the same time ensuring that, once such misconduct has been punished, further punishment is impossible in legal systems which, like the Schengen acquis , recognise the ne bis in idem principle. Accordingly, there is no conflict between the two bodies of law.

59. Therefore, under Article 54, in conjunction with Article 71, of the Convention, the trafficking of the same narcotic drugs and psychotropic substances of whatever type, including cannabis, between two States which are signatories to the Convention or in which the Schengen acquis is implemented and applied, constitutes the same acts' for the purposes of the former provision, irrespective of the legal classification of that conduct in the legal systems of the States concerned.

VI - Conclusion

60. In the light of the foregoing considerations, I propose that the Court state in reply to the questions referred by the Hof van Cassatie van Belgie that:

(1) Article 54 of the Convention implementing the Schengen Agreement applies ratione temporis when a prosecution is commenced after the entry into force of the said Convention on account of acts in respect of which a person's trial has already been finally disposed of. The date on which the first trial took place is immaterial.

(2) Under Article 54, in conjunction with Article 71, of the Convention, the trafficking of the same narcotic drugs and psychotropic substances of whatever type, including cannabis, between two States which are signatories to the Convention, or in which the Schengen acquis is implemented and applied, constitutes the same acts', irrespective of the legal classification of that conduct in the legal systems of the States concerned.

(1) .

(2) - OJ 2000 L 239, p. 13.

(3) - OJ 2000 L 239, p. 19.

(4) - OJ 2000 L 239, p. 63 et seq.

(5) - The others are the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Finland and the Kingdom of Sweden. The United Kingdom and Ireland have not acceded fully to this joint project, opting instead for partial participation (Council Decisions 2000/365/EC of 29 May 2000 (OJ 2000 L 131, p. 43) and 2002/192/EC of 28 February 2002 (OJ 2002 L 64, p. 20) deal respectively with the requests of those two Member States to take part in some of the provisions of the acquis). Denmark has special status which means that it is entitled not to apply decisions taken in the sphere of the acquis . That raft of provisions is applicable in the 10 new Member States from their entry into the European Union, although many of the provisions require action on the part of the Council (Article 3 of the Act concerning the conditions of accession

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of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic, and the adjustments to the Treaties on which the European Union is founded).

(6) - On 19 December 1996, the 13 Member Sates of the European Union which were signatories to the Schengen Agreement at that time and the Nordic countries concerned signed in Luxembourg an ad hoc agreement preceding the Agreement concluded on 18 May 1999 by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the latters' association with the implementation, application and development of the Schengen acquis (OJ 1999 L 176, p. 36). Article 15(4) of the latter agreement charged the Council with fixing the date of entry into force for the new parties, a task which the Council effected in Decision 2000/777/EC of 1 December 2000 (OJ 2000 L 309, p. 24), by setting 25 March 2001 as a general date (Article 1).

(7) - On the first two occasions, the Court examined the manner in which the ius puniendi is exercised in the Member States, declaring that the ne bis in idem rule also applies where further prosecution is barred once the accused has fulfilled certain obligations agreed with the Public Prosecutor (Joined Cases C-187/01 and C385/01 Gözutök and Brügge [2003] ECR I-1345, in which I delivered an Opinion on 19 September 2002), but that the rule is not applicable where a case is declared to be closed on the ground that the Public Prosecutor has decided not to pursue the prosecution because proceedings have been started against the accused in another Member State for the same acts (Case C-469/03 Miraglia [2005] ECR I-0000).

(8) - OJ 1999 L 176, pp. 1 and 17 respectively.

(9) - These provisions refer to legal trade and essential controls.

(10) - It could also be argued that the ne bis in idem principle protects the dignity of the individual vis-à-vis inhuman and degrading treatment, since that is a fitting description of the practice of repeatedly punishing the same offence.

(11) - The ne bis in idem principle, as a safeguard for the individual, is enshrined in international agreements, such as the International Covenant on Civil and Political Rights of 19 December 1966 (Article 14(7)), and Protocol No 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 4). However, those provisions deal with the principle in a domestic context, by guaranteeing its application within the jurisdiction of a State. The United Nations Human Rights Committee maintained that Article 14(7) of the International Covenant does not apply to decisions having the force of res judicata adopted in other States (UN Human Rights Committee, 2 November 1987).

(12) - Attention was drawn to those points by Vervaele, J.A.E., El principio ne bis in idem en Europa. El Tribunal de Justicia y los derechos fundamentales en el espacio judicial europeo', Revista General de Derecho Europeo, No 5, October 2004 (www.iustel.com).

(13) - Its precedent is contained in the Brussels Convention of 25 May 1987 on the application of the ne bis in idem principle, which, despite its limited success, had the distinction of inspiring Articles 54 to 58 of the Convention, as was noted by Blanco Cordero, I., El principio ne bis in idem en la Union Europea', Diario La Ley , No 6285, 30 June 2005.

(14) - Queralt Jiménez, A., La incidencia en la jurisprudencia constitucional de la autoridad interpretativa de las sentencias del Tribunal Europeo de Derechos Humanos. Especial referencia al caso español (doctoral thesis in preparation), states that an analysis of Judgment No 2/2003 of 16 January of the Spanish Constitutional Court (Boletín Oficial del Estado No 219, 2003) reveals that there are two aspects to the ne bis in idem principle : the substantive aspect which

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relates to the prohibition on punishing a person more than once for the same act, irrespective of whether the punishment is imposed in the same penal system and in a single set of proceedings, and the procedural aspect which precludes another trial in respect of an offence which has already been finally disposed of, either by a conviction or an acquittal, thereby protecting the force of res judicata in judgments. The writer also includes, as an autonomous right, the prohibition of double prosecution, which comes within the framework of the right to a fair trial but has an indirect bearing on the ne bis in idem principle.

(15) - Dannecker, G., La garantía del principio ne bis in idem en Europa', Dogmatica y ley penal. Libro homenaje a Enrique Bacigalupo, Volume I, Madrid, 2004, pp. 157 to 176, draws attention to the ways in which the principle must be adjusted when it is applied to acts relating to cooperation between criminal groups or certain continuous offences, such as the possession of illegal weapons (p. 168).

(16) - Vervaele, J.A.E., op. cit., pointed out that following the judgment in Gözütok and Brügge , crucial questions remained to be answered, such as the definition of idem. Van den Wyngaert, C. and Stessens, G., The international non bis in idem principle: resolving some of the unanswered questions', International and Comparative Law Quarterly, Vol. 48, October 1999, p. 789, consider whether an individual who illegally traffics drugs between two countries commits two offences, one involving export and the other involving import. Dannecker, G., op. cit., pp. 167 and 168, uses the same example.

(17) - In Case C-493/03 Hiebeler , the Cour d'appel (Court of Appeal), Bordeaux, asked whether for the purposes of the ne bis in idem principle, the cross-border transport of a consignment of narcotic drugs amounts to different acts which are punishable in both the Member States concerned. The Court did not deliver a ruling because the proceedings were discontinued by an order of 30 March 2004 on the grounds that the subject-matter of the main proceedings no longer existed. The Rechtbank (District Court), 's-Hertogenbosch (Case C150/05 Van Straaten) and the Hof van Beroep, Antwerp (Case C-272/05 Bouwens) referred similar questions to the Court, also in relation to the illegal international trade in drugs. Both those references for a preliminary ruling are currently before the Court.

(18) - That is the view of Dannecker, G., op. cit., p. 175.

(19) - The case-law of the European Court of Human Rights is contradictory in that regard. In the judgment of 23 October 1995, Gradinger v Austria (Case 33/1994/480/562; Series A, No 328-C), the European Court of Human Rights upheld the concept of the same act, irrespective of its legal classification, whereas, in the judgment of 30 July 1998, Oliveira v Switzerland (Case 84/1997/868/1080, Reports of Judgments and Decisions 1998-V), the Court of Human Rights took the other approach. The judgment of 29 May 2001 (Case 37950/97; Series A, No 312), Franz Fischer v Austria, appeared to reconcile those two precedents, taking as its basis the facts. However, the judgment of 2 July 2002, Göktan v France (Case 33402/96, Reports of Judgments and Decisions 2002-V), relied again on the legal definition of idem.

(20) - The Statutes of the International Tribunals for the Former Yugoslavia and Rwanda refer to acts constituting serious violations of international humanitarian law' (Articles 10(1) and 9(1) respectively). The Convention on the protection of the European Communities' financial interests (OJ 1995 C 316, p. 49) and the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union (OJ 1997 C 195, p. 2) use the words in respect of the same facts' (Articles 7(1) and 10(1) respectively). However, the Charter of fundamental rights of the European Union (OJ 2000 C 364, p. 1) adopts the criterion of the same criminal offence (No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or

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convicted within the Union in accordance with the law' - Article 50), which is also used in the Treaty establishing a constitution for Europe (Article II-110) (OJ 2004 C 310, p. 1).

(21) - OJ 2003 C 100, p. 24.

(22) - Circulaire interministérielle sur l'incidence de la convention de Schengen en matière de contrôle frontalier et de coopération policière et judiciaire,' Moniteur belge, No 20, 29 January 1999, p. 2714).

(23) - The conclusions of the Ninth International Congress on Criminal Law, adopted in the Hague on 29 August 1964, proposed a move towards the purely factual definition of idem (the text of the conclusions may be consulted in Zeitschrift für Strafrechtswissenschaften, 1965, pp. 184 to 193, in particular pp. 189 and 190). The highest courts of the Netherlands and France have upheld that approach (judgment of the Hoge Raad (Supreme Court) of 13 December 1994 (Ars Aequi 1995, p. 720) and judgment of the Cour de Cassation (Court of Cassation) of 13 December 1983 (Bulletin No 340)), cited by Weyembergh, A., Le principe ne bis in idem: pierre d'achoppement de l'espace pénal européen?', Cahiers de droit européen, 204, Nos 3 and 4, p. 349).

(24) - The Tribunal correctionnel, Eupen, in a judgment of 3 April 1995 (published in Revue de droit pénal et de criminologie, November 1996, p. 1159), argued that, even where participation by an individual in trafficking between Belgium and France could be broken down into two offences pursuant to Article 36 of the Single Convention on Narcotic Drugs done at New York on 30 March 1961, a prosecution brought before the Belgian courts on account of the offence committed in that country could not be admitted because the conduct concerned amounted to a single criminal act the perpetrator of which had already been tried in Germany. Brammertz, S., Trafic de stupefiants et valeur internationale des jugements répressifs à la lumière de Schengen', Revue de droit pénal et de criminologie, November 1996, pp. 1063 to 1081, describes how, prior to the entry into force of the Schengen arrangements, Belgian case-law conflicted with the ne bis in idem principle .

(25) - In the view of Brammertz, S., op. cit., pp. 1077 and 1078, since the entry into force of the Schengen acquis it is not appropriate to argue that the illicit trade in drugs between two Member countries amounts to distinct acts capable of double punishment, since the free movement of persons and goods entails a climate of confidence which must have a bearing on the analysis and assessment of a cross-border offence. Why regard trafficking between Eupen and Liège as a single criminal offence and divide trafficking between Eupen and Aix-la-Chapelle into two distinct acts on the basis of a border which is not physically represented on the ground?'

(26) - The Programme of measures to implement the principle of mutual recognition of decisions in criminal matters (OJ 2001 C 12, p. 10) refers to the ne bis in idem principle as one of the measures which is appropriate in that regard (p. 12). The Communication from the Commission to the Council and the European Parliament on the mutual recognition of judicial decisions in criminal matters and the strengthening of mutual trust between Member States (COM(2005) 195 final, p. 4) adopts a similar approach.

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Judgment of the Court (Grand Chamber)
of 27 February 2007
Segi, Araitz Zubimendi Izaga and Aritza Galarraga v Council of the European Union. Appeal - European Union - Police and judicial cooperation in criminal matters - Common Positions 2001/931/CFSP, 2002/340/CFSP and 2002/462/CFSP - Measures concerning persons, groups and entities involved in terrorist acts - Jurisdiction of the Court of Justice. Case C-355/04 P.

1. Appeals - Pleas in law - Admissibility - Conditions

(Art. 225 EC; Statute of the Court of Justice, Art. 58, first para.; Rules of Procedure of the Court, Art. 112(1)(c))

2. Appeals - Pleas in law - Plea put forward for the first time in an appeal - Inadmissibility

3. Actions for damages - Jurisdiction of the Community judicature - Action under Title VI of the EU Treaty - Not included

(Arts 235 EC and 288, second para., EC; Art. 35 EU, 41(1), EU and 46 EU)

4. European Union - Police and judicial cooperation in criminal matters - Right to effective judicial protection

(Arts 34 EU and 35(1) and (6) EU)

5. European Union - Acts of the European Union - Interpretation

1. It is clear from Article 225 EC, from the first paragraph of Article 58 of the Statute of the Court of Justice and from Article 112(1)(c) of its Rules of Procedure that an appeal must indicate precisely the contested elements of the judgment or order which the appellant seeks to have set aside, and also the legal arguments specifically advanced in support of the appeal.

(see para. 22)

2. 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 Court of First Instance would be to allow it to bring before the Court, whose jurisdiction in appeals is limited, a case of wider ambit than that which came before the Court of First Instance. In an appeal the Court's jurisdiction is confined to review of the findings of law on the pleas argued before the Court of First Instance.

(see para. 30)

3. It follows from Article 46 EU that the provisions of the EC and EAEC Treaties concerning the powers of the Court of Justice are applicable to Title VI of the EU Treaty only under the conditions provided for by Article 35 EU. However, Article 35 EU confers no jurisdiction on the Court of Justice to entertain any action for damages whatsoever. In addition, Article 41(1) EU does not include, among the articles of the EC Treaty applicable to the areas referred to in Title VI of the EU Treaty, the second paragraph of Article 288 EC, according to which the Community must, 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, or Article 235 EC, under which the Court has jurisdiction in disputes relating to compensation for damage provided for in the second paragraph of Article 288 EC.

It follows that no action for damages is provided for under Title VI of the EU Treaty. A Council declaration annexed to the minutes at the time of the adoption of an act of the European Union is insufficient to create a legal remedy not provided for by the applicable texts and cannot therefore be given any legal significance in this regard.

(see paras 44, 46-48, 60-61)

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4. As regards the Union, the treaties have established a system of legal remedies in which, by virtue of Article 35 EU, the jurisdiction of the Court is less extensive under Title VI of the Treaty on European Union than it is under the EC Treaty. While a system of legal remedies, in particular a body of rules governing non-contractual liability, other than that established by the treaties can indeed be envisaged, it is for the Member States, should the case arise, to reform the system currently in force in accordance with Article 48 EU.

Applicants wishing to challenge before the courts the lawfulness of a common position adopted on the basis of Article 34 EU are not, however, deprived of all judicial protection. Article 35(1) EU, in that it does not enable national courts to refer a question to the Court for a preliminary ruling on a common position but only a question concerning the acts listed in that provision, treats as acts capable of being the subject of such a reference for a preliminary ruling all measures adopted by the Council and intended to produce legal effects in relation to third parties. Given that the procedure enabling the Court to give preliminary rulings is designed to guarantee observance of the law in the interpretation and application of the Treaty, it would run counter to that objective to interpret Article 35(1) EU narrowly. The right to make a reference to the Court of Justice for a preliminary ruling must therefore exist in respect of all measures adopted by the Council, whatever their nature or form, which are intended to have legal effects in relation to third parties. As a result, it has to be possible to make subject to review by the Court a common position which, because of its content, has a scope going beyond that assigned by the EU Treaty to that kind of act. Therefore, a national court hearing a dispute which indirectly raises the issue of the validity or interpretation of a common position adopted on the basis of Article 34 EU and which has serious doubt whether that common position is really intended to produce legal effects in relation to third parties, would be able, subject to the conditions fixed by Article 35 EU, to ask the Court to give a preliminary ruling. It would then fall to the Court to find, where appropriate, that the common position is intended to produce legal effects in relation to third parties, to accord it its true classification and to give a preliminary ruling.

The Court would also have jurisdiction to review the lawfulness of such acts when an action has been brought by a Member State or the Commission under the conditions fixed by Article 35(6) EU.

Finally, it is for the Member States and, in particular, their courts and tribunals, to interpret and apply national procedural rules governing the exercise of rights of action in a way that enables natural and legal persons to challenge before the courts the lawfulness of any decision or other national measure relating to the drawing up of an act of the European Union or to its application to them and to seek compensation for any loss suffered.

(see paras 50-51, 53-56)

5. A Council declaration annexed to the minutes at the time of adoption of an act of the European Union cannot be given any legal significance or be used in the interpretation of law emanating from the EU Treaty where no reference is made to the content of the declaration in the wording of the provision in question.

(see para. 60)

In Case C-355/04 P,

APPEAL under Article 56 of the Statute of the Court of Justice lodged at the Court on 17 August 2004,

Segi, established at Bayonne (France) and Donostia (Spain),

Araitz Zubimendi Izaga, residing at Hernani (Spain),

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Aritza Galarraga, residing at Saint-Pée-sur-Nivelle (France),

represented by D. Rouget, avocat,

appellants,

the other parties to the proceedings being:

Council of the European Union, represented by E. Finnegan and M. Bauer, acting as Agents,

defendant at first instance,

Kingdom of Spain, represented by the Abogacía del Estado,

United Kingdom of Great Britain and Northern Ireland,

interveners at first instance,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas, K. Lenaerts and R. Schintgen, Presidents of Chambers, A. Tizzano, J.N. Cunha Rodrigues, R. Silva de Lapuerta, L. Bay Larsen, P. Lindh, J.C. Bonichot (Rapporteur) and T. von Danwitz, Judges,

Advocate General: P. Mengozzi,

Registrar: R. Grass,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 26 October 2006,

gives the following

Judgment

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

1. Dismisses the appeal;

2. Orders Segi, Ms Zubimendi Izaga and Mr Galarraga to pay the costs;

3. Orders the Kingdom of Spain to bear its own costs.

1. By their appeal Segi, Ms Zubimendi Izaga and Mr Galarraga request the Court to set aside the order of the Court of First Instance of the European Communities of 7 June 2004 in Case T-338/02 Segi and Others v Council [2004] ECR II1647, the order under appeal'), by which the Court of First Instance dismissed their action for damages for the harm allegedly sustained by the applicants at first instance due to the inclusion of Segi in the list of persons, groups or entities referred to in Article 1 of Council Common Position 2001/931/CFSP of 27 December 2001 on the application of specific measures to combat terrorism (OJ 2001 L 344, p. 93), in Article 1 of Council Common Position 2002/340/CFSP of 2 May 2002 updating Common Position 2001/931 (OJ 2002 L 116, p. 75), and in Article 1 of Council Common Position 2002/462/CFSP of 17 June 2002 updating Common Position 2001/931 and repealing Common Position 2002/340 (OJ 2002 L 160, p. 32).

Background to the dispute

2. The background to the dispute was set out as follows in paragraphs 1 to 11 of the order under appeal:

1. It is apparent from the documents before the Court that Segi is an organisation which has the

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aim of supporting the claims of Basque youth, and of Basque identity, culture and language. According to the applicants, this organisation was created on 16 June 2001 and is established in Bayonne (France) and in Donostia (Spain). Ms Araitz Zubimendi Izaga and Mr Aritza Galarraga have been appointed spokespersons. No official documentation has been provided in this respect.

2. On 28 September 2001, the United Nations Security Council adopted Resolution 1373 (2001), by which, in particular, it decided that all States should afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings.

3. On 27 December 2001, considering that action by the Community [and by the Member States] was necessary in order to implement Resolution 1373 (2001) of the United Nations Security Council, the Council [of the European Union] adopted Common Position 2001/931/CFSP on the application of specific measures to combat terrorism (OJ 2001 L 344, p. 93). That common position was adopted on the basis of Article 15 EU, which comes under Title V of the EU Treaty entitled Provisions on a common foreign and security policy (CFSP), and Article 34 EU, which comes under Title VI of the EU Treaty entitled Provisions on police and judicial cooperation in criminal matters...

4. Articles 1 and 4 of Common Position 2001/931 provide:

Article 1

1. This Common Position applies in accordance with the provisions of the following Articles to persons, groups and entities involved in terrorist acts and listed in the Annex.

...

6. The names of persons and entities on the list in the Annex shall be reviewed at regular intervals and at least once every six months to ensure that there are grounds for keeping them on the list.

Article 4

Member States shall, through police and judicial cooperation in criminal matters within the framework of Title VI of the [EU] Treaty, afford each other the widest possible assistance in preventing and combating terrorist acts. To that end they shall, with respect to enquiries and proceedings conducted by their authorities in respect of any of the persons, groups and entities listed in the Annex, fully exploit, upon request, their existing powers in accordance with acts of the European Union and other international agreements, arrangements and conventions which are binding upon Member States.

5. The annex to Common Position 2001/931 indicates in point 2 entitled Groups and entities:

* - Euskadi Ta Askatasuna/Tierra Vasca y Libertad/Basque Fatherland and Liberty (E.T.A.)

(The following organisations are part of the terrorist group E.T.A.: K.a.s., Xaki, Ekin, Jarrai-Haika-Segi, Gestoras pro-amnistía.)

6. The note at the bottom of this annex states that [p]ersons marked with an * shall be the subject of Article 4 only.

7. On 27 December 2001, the Council also adopted Common Position 2001/930/CFSP on combating

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terrorism (OJ 2001 L 344, p. 90), Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism (OJ 2001 L 344, p. 70) and Decision 2001/927/EC establishing the list provided for in Article 2(3) of Regulation (EC) No 2580/2001 (OJ 2001 L 344, p. 83). None of those texts mentions the applicants.

8. According to the Council declaration [of 18 December 2001] annexed to the minutes at the time of the adoption of Common Position 2001/931 and Regulation No 2580/2001 (the Council declaration concerning the right to compensation):

The Council recalls regarding Article 1(6) of Common Position [2001/931] that in the event of any error in respect of the persons, groups or entities referred to, the injured party shall have the right to seek judicial redress.

9. By orders of 5 February and 11 March 2002, the central investigating judge No 5 at the Audiencia Nacional (National High Court), Madrid (Spain), respectively declared Segi's activities illegal and ordered the imprisonment of certain of Segi's alleged leaders, on the ground that that organisation was an integral part of the Basque separatist organisation ETA.

10. By decision of 23 May 2002, the European Court of Human Rights dismissed as inadmissible the action brought by the applicants against the 15 Member States, concerning Common Position 2001/931, on the ground that the situation complained of did not entitle them to be regarded as victims of an infringement of the European Convention on Human Rights and Fundamental Freedoms [signed at Rome on 4 November 1950, ECHR] [Reports of Judgments and Decisions 2002-V].

11. On 2 May and 17 June 2002, the Council adopted, on the basis of Articles 15 EU and 34 EU, Common Positions 2002/340/CFSP and 2002/462/CFSP updating Common Position 2001/931 (OJ 2002 L 116, p. 75, and OJ 2002 L 160, p. 32). The annexes to these two common positions contain the name Segi, which appears in the same way as it does in Common Position 2001/931.'

3. In addition to that account of the background to the dispute, it is to be noted that, as provided in the first subparagraph of Article 1(4) of Common Position 2001/931:

The list in the Annex [of persons, groups and entities involved in terrorist acts] is to be drawn up on the basis of precise information or material in the relevant file which indicates that a decision has been taken by a competent authority in respect of [those] persons, groups and entities..., irrespective of whether it concerns the instigation of investigations or prosecution for a terrorist act, an attempt to perpetrate, participate in or facilitate such an act based on serious and credible evidence or clues, or condemnation [sic] for such deeds ...'.

4. Segi applied to the Council for access to the documents on which the Council relied in entering it in the list annexed to Common Position 2001/937. By letter of 13 March 2002 the Secretary-General of the Council communicated to Segi a series of documents relating to that Common Position. Taking the view that those documents did not concern it specifically or personally, the association addressed a fresh request to the Council which the latter rejected by letter of 21 May 2002, on the ground that the information necessary for the drawing up of that list had been returned to the national delegations concerned after it had been examined and the decision adopted.

The action before the Court of First Instance and the order under appeal

5. By application lodged at the Registry of the Court of First Instance on 13 November 2002, the appellants claimed that the Court should:

- order the defendant to pay the sum of EUR 1 000 000 to Segi and the sum of EUR 100 000 each to Ms Zubimendi Izaga and Mr Galarraga, as compensation for the damage allegedly suffered as a result of Segi's inclusion in the list of persons, groups and entities referred to in Article 1 of Common Positions 2001/931, 2002/340 and 2002/462 respectively;

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- order that those sums should bear default interest at the rate of 4.5% per annum from the date of the decision of the Court of First Instance until actual payment should have been effected, and

- order the Council to pay the costs.

6. By separate document lodged at the Registry of the Court of First Instance on 12 February 2003, the Council raised an objection of inadmissibility pursuant to Article 114 of the Rules of Procedure of the Court of First Instance, arguing that the action should be declared manifestly inadmissible and that the applicant' should be ordered to pay the costs.

7. By order of 5 June 2003 the President of the Second Chamber of the Court of First Instance granted the requests of the Kingdom of Spain and the United Kingdom of Great Britain and Northern Ireland for leave to intervene in support of the forms of order sought by the Council. Only the Kingdom of Spain submitted its observations on the objection of inadmissibility.

8. In their observations on the plea of inadmissibility, the appellants claimed that the Court of First Instance should:

- declare the action for damages admissible;

- alternatively, find that the Council had infringed general principles of Community law, and

- in any event, order the Council to pay the costs.

9. By the order under appeal, made pursuant to Article 111 of its Rules of Procedure, the Court of First Instance dismissed the action without opening the oral procedure.

10. First, it held that it clearly had no jurisdiction, in the legal system of the European Union, to hear and determine the appellants' claim for damages.

11. In reaching that conclusion the Court of First Instance noted that the appellants were affected only by Article 4 of Common Position 2001/931, by virtue of which the Member States are to afford one another the widest possible assistance through the police and judicial cooperation in criminal matters provided for by Title VI of the EU Treaty and, accordingly, that the measures which, it was claimed, gave rise to the alleged damage had as their sole relevant legal basis Article 34 EU. It found that the only legal remedies provided by Article 35(1), (6) and (7) EU, referred to by Article 46 EU, were the reference for a preliminary ruling, the action for annulment and the procedure for settling disputes between Member States. In consequence, it found that no judicial remedy allowing for an order for damages was available under Title VI of the EU Treaty.

12. Second, the Court of First Instance held that it did, nevertheless, have jurisdiction to rule on the action, but only in so far as the latter was based on infringement of the powers of the Community.

13. The Court of First Instance noted that the Community judicature did have jurisdiction to consider whether an act adopted under the EU Treaty does not affect the powers of the Community. So it investigated, in paragraphs 41 to 47 of the order under appeal, whether in adopting the contested measures the Council had not unlawfully encroached upon the powers of the Community.

14. That court considered, however, that the appellants had failed to cite any legal basis in the EC Treaty that had been disregarded. It held that the Council was fully entitled to rely on Title VI of the EU Treaty in order to adopt the acts at issue and that, therefore, in so far as the action was based on a failure to observe the powers of the Community, it had to be dismissed as manifestly unfounded.

Forms of order sought by the parties before the Court of Justice

15. The appellants claim that the Court should:

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- set aside the contested order;

- itself give a ruling on the action and grant the forms of order requested before the Court of First Instance by the appellants, and

- order the Council to pay the costs.

16. The Council contends that the Court should:

- dismiss the appeal as clearly inadmissible;

- in the alternative, dismiss it as unfounded;

- if necessary, refer the case back to the Court of First Instance, and

- order the appellants to pay the costs.

17. The Kingdom of Spain seeks forms of order identical to those of the Council.

Concerning the appeal

Admissibility of the appeal

Arguments of the parties

18. The Council and the Kingdom of Spain maintain that the arguments put forward by the appellants are in substance identical to those set out at first instance, and do not make specific reference to the error of law which they claim vitiates the order under appeal. The appeal should therefore be dismissed as clearly inadmissible.

Findings of the Court

- With regard to the part of the appeal challenging the order in so far as the latter rejects the plea alleging that the Council encroached upon the powers conferred on the Community

19. Before the Court of First Instance the appellants argued that the Council, in adopting Common Position 2001/931, confirmed by Common Positions 2002/340 and 2002/462, deliberately encroached on the powers conferred on the Community for the purpose of depriving the persons referred to in that common position of the right to an effective remedy.

20. In the order under appeal, the Court of First Instance held that it had jurisdiction to take cognisance of the action brought by the appellants only in so far as it was based on failure to have regard to the powers of the Community, referring in particular to Case C-170/96 Commission v Council [1998] ECR I-2763, paragraph 17. In paragraphs 45 and 46 of the order under appeal, the Court held that Article 34 EU was the relevant legal basis for the adoption of Article 4 of Common Position 2001/931 and that the appellants had failed to cite a legal basis in the EC Treaty that had been disregarded.

21. In their appeal before the Court of Justice, the appellants do no more than reaffirm that the Council adopted those common positions on the legal basis of Article 34 EU for the sole purpose of depriving them of the right to a remedy. They do not, however, put forward any argument in support of that claim.

22. It is clear from Article 225 EC, from the first paragraph of Article 58 of the Statute of the Court of Justice and from Article 112(1)(c) of its Rules of Procedure that an appeal must indicate precisely the contested elements of the judgment or order which the appellant seeks to have set aside, and also the legal arguments specifically advanced in support of the appeal (see, in particular, Case C352/98 P Bergaderm and Goupil v Commission [2000] ECR I5291, paragraph 34; Case C248/99 P France v Monsanto and Commission [2002] ECR I1, paragraph 68; and the

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order in Case C488/01 P Martínez v Parliament [2003] ECR I13355, paragraph 40).

23. In the present case, as the Council and the Kingdom of Spain maintain, the appeal does not state why the legal ground relied on by the Court of First Instance in paragraphs 45 and 46 of the order under appeal is incorrect. The appeal is therefore and to that extent inadmissible.

- With regard to the part of the appeal challenging the order in so far as the latter finds that the Court of First Instance has no jurisdiction to hear and determine the action for damages

24. As stated above, it is clear from Article 225 EC, from the first paragraph of Article 58 of the Statute of the Court of Justice and from Article 112(1)(c) of its Rules of Procedure that an appeal must indicate precisely the contested elements of the judgment or order which the appellant seeks to have set aside, and also the legal arguments specifically advanced in support of the appeal.

25. In this case, and contrary to the submissions of the Council and the Kingdom of Spain, the appeal, in so far as it concerns the refusal of the Court of First Instance to hold that it had jurisdiction to entertain the action for damages, is not confined to a reproduction of the pleas in law and arguments raised before the Court of First Instance, but does indicate the contested elements of the order under appeal and the legal arguments specifically advanced in support of the appeal.

26. It follows that the appeal is admissible in so far as it challenges that part of the order under appeal in which the Court of First Instance held that it had no jurisdiction to entertain the action for damages.

The admissibility of certain grounds of challenge put forward in support of the appeal

Arguments of the parties

27. With regard to the admissibility of certain grounds of appeal, the Council and the Kingdom of Spain maintain, moreover, that the ground relating to the examination of the two successive versions of the footnote in the Annex to Common Position 2001/931, which marks with an * the classes that are to be the subject of Article 4 only', was put forward for the first time in the reply and is therefore inadmissible. According to the appellants, that examination demonstrated that, before being amended by the Council's Common Position 2003/482/CFSP of 27 June 2003 (OJ 2003 L 160, p. 100), that footnote covered only persons', that is to say, natural persons to the exclusion of groups and entities' and that, in those circumstances, on 13 November 2002, the date on which it brought its action before the Court of First Instance, Segi did not belong to the class of persons [who are to] be the subject of Article 4 only' but to that of groups and entities subject to the actions of the Community mentioned in Articles 2 and 3 of Common Position 2001/931.

28. In addition, the Council maintains that two grounds of appeal raised by the appellants were not put before the Court of First Instance and are therefore inadmissible. The first is the plea claiming that the Member States are bound to perform their obligations under earlier agreements, in accordance with Article 30 of the Vienna Convention on the Law of Treaties of 23 May 1969 on the application of successive treaties relating to the same subject-matter and with Article 307 of the EC Treaty. Those obligations under earlier agreements guarantee effective observance of human rights and fundamental freedoms. The second ground which the Council regards as inadmissible is the claim that there exists in the Court's case-law a principle of interpretation called wider jurisdiction', by virtue of which the Court has already accepted jurisdiction outside the bounds of the Treaty.

Findings of the Court

29. Under Article 48(2) of the Rules of Procedure of the Court of First Instance, no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of

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fact which have come to light in the course of the procedure.

30. 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 Court of First Instance would be to allow it to bring before the Court, whose jurisdiction in appeals is limited, a case of wider ambit than that which came before the Court of First Instance. In an appeal the Court's jurisdiction is confined to review of the findings of law on the pleas argued before the Court of First Instance (see Case C-136/92 P Commission v Brazzelli Lualdi and Others [1994] ECR I-1981, paragraphs 58 and 59).

31. In the present case, the grounds of appeal relating to the altered wording of the footnote in the Annex to Common Position 2001/931, to the performance by the Member States of their obligations under earlier agreements or treaties and to the principle of general interpretation relating to a wider jurisdiction' of the Court were not raised by the appellants before the Court of First Instance.

32. Those grounds of appeal are, consequently, inadmissible.

Substance

Arguments of the parties

33. The appellants maintain that the Court of First Instance erred in declining jurisdiction to consider their action for damages.

34. The Union is a community governed by the rule of law, guaranteeing by virtue of Article 6(2) EU the right to an effective remedy laid down in Article 13 of the ECHR and the right to a tribunal provided by Article 6 of that convention.

35. Furthermore, by its declaration concerning the right to redress, the Council has, in the appellants' view, accepted that any error in drawing up the list annexed to Common Position 2001/931 amounts to fault on its part, which gives entitlement to redress. In that declaration, the Council stated that that right must be afforded to persons, groups and entities referred to, like the appellants, in Article 4 of Common Position 2001/931, on the same conditions as it is to the persons, groups and entities entered in the list annexed to Regulation No 2580/2001 or covered by Article 3 of that Common Position, who may apply to the Court of First Instance if they are mentioned in acts adopted under the EC Treaty. In this connection the appellants refer to the order of the President of the Court of First Instance of 15 May 2003 in Case T-47/03 R Sison v Council [2003] ECR II-2047.

36. Since the act giving rise to the alleged damage is an act of the Council, adopted jointly by all the Member States, an action for damages cannot be brought before the national courts, which would lack jurisdiction to entertain it, the liability of the Member States not being severable.

37. It is also pointed out that in the eighth recital in the preamble to Council Decision 2003/48/JHA of 19 December 2002 on the implementation of specific measures for police and judicial cooperation to combat terrorism in accordance with Article 4 of Common Position 2001/931 (OJ 2003 L 16, p. 68) it is stated that [t]his Decision respects the fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union. Nothing in this Decision may be interpreted as allowing infringement of the legal protection afforded under national law to the persons, groups and entities listed in the Annex to Common Position 2001/931/CFSP'.

38. The Council declaration concerning the right to redress, clarified by the eighth recital in the preamble to Decision 2003/48, constitutes, together with Article 6(2) EU, a firm legal base for the assertion of the jurisdiction of the Community judicature. It is argued that the Court of First Instance therefore vitiated the order under appeal by an error of law in declaring that it had no jurisdiction to rule on the appellants' claims for damages.

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39. In addition, the appellants claim that, with a view to combating terrorism, the Council adopted a number of measures on various legal bases for the purpose of depriving certain classes of persons, groups and entities of the right to an effective remedy.

40. The Council maintains that the appeal is unfounded. The Court of First Instance correctly considered that no claim for damages is provided for under Title VI of the EU Treaty. Since what was at issue was not an act adopted in the context of the European Community but an act adopted under the provisions governing the Union, an action for damages may not be brought on the basis of Article 288 EC. In support of its view the Council relies on the judgment in Case 99/74 Grands moulins des Antilles v Commission [1975] ECR 1531, paragraph 17.

41. The eighth recital in the preamble to Decision 2003/48 mentions only the legal protection afforded under national law', not under Community law. Neither that document nor the Council's declaration concerning the right to redress is such as to enable the Community judicature to give a ruling on the appellants' claim for damages, which is not provided for by the EU Treaty.

42. The Kingdom of Spain states that Segi's activities were declared illegal by order of 5 February 2002 of central investigating judge No 5 of the Audiencia Nacional de Madrid (National High Court, Madrid), on the ground that Segi formed an integral part of the terrorist organisation ETA-KAS-EKIN. Charges were brought against Ms Zabimendi Izaga as being answerable for Segi. Charges were also brought against Mr Galarraga as being answerable for Segi and an international search warrant for him, in force since 13 March 2002, was issued by that central investigating judge.

43. On the merits, the Kingdom of Spain supports the Council's views. There is nothing in the appeal capable of calling into question the legality of the order under appeal.

Findings of the Court

- The ground of appeal alleging disregard for the provisions of Title VI of the EU Treaty

44. It follows from Article 46 EU that the provisions of the EC and EAEC Treaties concerning the powers of the Court of Justice are applicable to Title VI of the EU Treaty only under the conditions provided for by Article 35 EU'.

45. That article provides that the Court of Justice has jurisdiction in three situations. First, by virtue of Article 35(1) EU, it has jurisdiction to give preliminary rulings on the validity and interpretation of framework decisions and decisions, on the interpretation of conventions established under Title VI of the EU Treaty and on the validity and interpretation of the measures implementing them. Second, Article 35(6) EU provides also for the Court of Justice to have jurisdiction to review the legality of framework decisions and decisions in actions brought by a Member State or the Commission of the European Communities on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the EU Treaty or of any rule of law relating to its application, or misuse of powers. Last, Article 35(7) EU provides for the Court of Justice to have jurisdiction to rule on any dispute between Member States regarding the interpretation or the application of acts adopted under Article 34(2) EU whenever such dispute cannot be settled by the Council within six months of its being referred to the latter by one of its members.

46. In contrast, Article 35 EU confers no jurisdiction on the Court of Justice to entertain any action for damages whatsoever.

47. In addition, Article 41(1) EU does not include, among the articles of the Treaty establishing the European Community applicable to the areas referred to in Title VI of the Treaty on European Union, the second paragraph of Article 288 EC, according to which the Community must, 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, or Article 235 EC,

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under which the Court has jurisdiction in disputes relating to compensation for damage provided for in the second paragraph of Article 288 EC (see, by analogy, Case C160/03 Spain v Eurojust [2005] ECR I2077, paragraph 38).

48. It follows from the foregoing that the Court of First Instance did not vitiate its order by any error of law in finding that no action for damages is provided for under Title VI of the EU Treaty. The ground of appeal must therefore be rejected.

- The ground of appeal alleging disregard for the right to effective judicial protection

49. The appellants also invoked before the Court of First Instance the observance of fundamental rights, in particular the right to effective judicial protection under Article 6(2) EU. In essence they argue that they have no means of challenging Segi's inclusion in the list annexed to Common Position 2001/931 and that the order under appeal prejudices their right to effective judicial protection.

50. It is true that, as regards the Union, the treaties have established a system of legal remedies in which, by virtue of Article 35 EU, the jurisdiction of the Court is less extensive under Title VI of the Treaty on European Union than it is under the EC Treaty (see, to this effect, Case C-105/03 Pupino [2005] ECR I5285, paragraph 35). It is even less extensive under Title V. While a system of legal remedies, in particular a body of rules governing non-contractual liability, other than that established by the treaties can indeed be envisaged, it is for the Member States, should the case arise, to reform the system currently in force in accordance with Article 48 EU.

51. Nevertheless, the appellants cannot validly argue that they are deprived of all judicial protection. As is clear from Article 6 EU, the Union is founded on the principle of the rule of law and it respects fundamental rights as general principles of Community law. It follows that the institutions are subject to review of the conformity of their acts with the treaties and the general principles of law, just like the Member States when they implement the law of the Union.

52. Here it is to be noted that Article 34 EU provides that the Council may adopt acts varying in nature and scope. Under Article 34(2)(a) EU the Council may adopt common positions defining the approach of the Union to a particular matter'. A common position requires the compliance of the Member States by virtue of the principle of the duty to cooperate in good faith, which means in particular that Member States are to take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under European Union law (see Pupino , paragraph 42). Article 37 EU thus provides that the Member States are to defend the common positions [w]ithin international organisations and at international conferences in which they take part'. However, a common position is not supposed to produce of itself legal effects in relation to third parties. That is why, in the system established by Title VI of the EU Treaty, only framework decisions and decisions may be the subject of an action for annulment before the Court of Justice. The Court's jurisdiction, as defined by Article 35(1) EU, to give preliminary rulings also does not extend to common positions but is limited to rulings on the validity and interpretation of framework decisions and decisions, on the interpretation of conventions established under Title VI and on the validity and interpretation of the measures implementing them.

53. Article 35(1) EU, in that it does not enable national courts to refer a question to the Court for a preliminary ruling on a common position but only a question concerning the acts listed in that provision, treats as acts capable of being the subject of such a reference for a preliminary ruling all measures adopted by the Council and intended to produce legal effects in relation to third parties. Given that the procedure enabling the Court to give preliminary rulings is designed to guarantee observance of the law in the interpretation and application of the Treaty, it would run counter to that objective to interpret Article 35(1) EU narrowly. The right to make a reference

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to the Court of Justice for a preliminary ruling must therefore exist in respect of all measures adopted by the Council, whatever their nature or form, which are intended to have legal effects in relation to third parties (see, by analogy, Case 22/70 Commission v Council (ERTA) [1971] ECR 263, paragraphs 38 to 42, and Case C-57/95 France v Commission [1997] ECR I1627, paragraph 7 et seq.).

54. As a result, it has to be possible to make subject to review by the Court a common position which, because of its content, has a scope going beyond that assigned by the EU Treaty to that kind of act. Therefore, a national court hearing a dispute which indirectly raises the issue of the validity or interpretation of a common position adopted on the basis of Article 34 EU, as is the case in this instance for part of Common Position 2001/931 and in any event for Article 4 thereof and the Annex thereto, and which has serious doubts whether that common position is really intended to produce legal effects in relation to third parties, would be able, subject to the conditions fixed by Article 35 EU, to ask the Court to give a preliminary ruling. It would then fall to the Court to find, where appropriate, that the common position is intended to produce legal effects in relation to third parties, to accord it its true classification and to give a preliminary ruling.

55. The Court would also have jurisdiction to review the lawfulness of such acts when an action has been brought by a Member State or the Commission under the conditions fixed by Article 35(6) EU.

56. Finally, it is to be borne in mind that it is for the Member States and, in particular, their courts and tribunals, to interpret and apply national procedural rules governing the exercise of rights of action in a way that enables natural and legal persons to challenge before the courts the lawfulness of any decision or other national measure relating to the drawing up of an act of the European Union or to its application to them and to seek compensation for any loss suffered.

57. It follows that the appellants are incorrect in maintaining that the contested common position leaves them without a remedy, contrary to the requirement of effective judicial protection, and that the order under appeal prejudices their right to such protection. That ground of appeal must, in consequence, be rejected.

- The ground of appeal alleging disregard for the declaration made by the Council in its decision 15453/01 of 18 December 2001

58. Before the Court of First Instance the appellants invoked the declaration made by the Council in its decision 15453/01 of 18 December 2001 according to which: The Council recalls regarding Article 1(6) of the Common Position on the application of specific measures to combat terrorism, and Article 2(3) of the regulation on specific restrictive measures directed against certain persons and entities with a view to combating terrorism that in the event of any error in respect of the persons, groups or entities referred to, the injured party shall have the right to seek judicial redress'.

59. According to the appellants, that declaration must be interpreted in the light of the eighth recital in the preamble to Council Decision 2003/48/JHA of 19 December 2002 on the implementation of specific measures for police and judicial cooperation to combat terrorism, which states that [t]his Decision respects the fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union. Nothing in this Decision may be interpreted as allowing infringement of the legal protection afforded under national law to the persons, groups and entities listed in the Annex to Common Position 2001/931/CFSP'.

60. It is, however, clear from the Court's settled case-law that such a declaration is insufficient to create a legal remedy not provided for by the applicable texts and that it cannot therefore be given any legal significance or be used in the interpretation of law emanating from the EU Treaty

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where, as in this case, no reference is made to the content of the declaration in the wording of the provision in question (see, to this effect, Case C-292/89 Antonissen [1991] ECR I-745, paragraph 18; Case C-329/95 VAG Sverige [1997] ECR I-2675, paragraph 23; and Case C-49/02 Heidelberger Bauchemie [2004] ECR I-6129, paragraph 17).

61. There was, therefore, no error of law in the Court of First Instance's finding in the order under appeal that the declaration made by the Council in its decision 15453/01 of 18 December 2001 could not suffice to confer jurisdiction on the Court to hear and determine an action for damages under Title VI of the EU Treaty.

62. It follows from all the foregoing that it was without vitiating its order by any error of law that the Court of First Instance declared that it manifestly had no jurisdiction to entertain the action for damages seeking compensation for any damage that might have been caused to the appellants by Segi's inclusion in the list annexed to Common Position 2001/931, as updated by Common Positions 2002/340 and 2002/462.

63. None of the grounds of appeal being well founded, the appeal must be dismissed.

Costs

64. Under Article 69(2) of the Rules of Procedure, which is applicable to the procedure on appeal pursuant to Article 118 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. Since the Council has applied for costs against the appellants and the latter have been unsuccessful, they must be ordered to pay the costs.

65. Pursuant to the first subparagraph of Article 69(4) of the Rules of Procedure, which also applies to appeals by virtue of Article 118 thereof, the Member States which have intervened in the proceedings are to bear their own costs. In accordance with that provision, it must therefore be ordered that the Kingdom of Spain is to bear its own costs.

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11997M035-P7 : N 45
11997M037 : N 52
11997M041-P1 : N 47
11997M046 : N 44
11997M048 : N 50
12001C/PRO/02-A58L1 : N 22 24
31991Q0530-A48P2 : N 29
31991Q0704(02)-A112P1LC : N 22 24
32001E0931 : N 57
32001E0931-A01 : N 1
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32002E0340 : N 62
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61995J0057 : N 53
61995J0329 : N 60
61998J0352 : N 22
61999J0248 : N 22
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NOTES Meisse, Eric: Compétence du juge communautaire et préjudice causé par une position commune, Europe 2007 Avril Comm. no 110 p.24-25 ; Garbagnati Ketvel, Maria Gisella: Almost, but not quite: The Court of Justice and

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PROCEDU Action for damages;Appeal - inadmissible;Appeal - unfounded

ADVGEN Mengozzi

JUDGRAP Bonichot

DATES of document: 27/02/2007
of application: 17/08/2004

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Judgment of the Court (Grand Chamber)
of 27 February 2007
Gestoras Pro Amnistía, Juan Mari Olano Olano and Julen Zelarain Errasti v Council of the European Union. Appeal - European Union - Police and judicial cooperation in criminal matters - Common Positions 2001/931/CFSP, 2002/340/CFSP and 2002/462/CFSP - Measures concerning persons, groups and entities involved in terrorist acts - Action for damages - Jurisdiction of the Court of Justice.
Case C-354/04 P.

1. Appeals - Pleas in law - Admissibility - Conditions

(Art. 225 EC; Statute of the Court of Justice, Art. 58, first para.; Rules of Procedure of the Court, Art. 112(1)(c))

2. Appeals - Pleas in law - Plea put forward for the first time in an appeal - Inadmissibility

3. Actions for damages - Jurisdiction of the Community judicature - Action under Title VI of the EU Treaty - Not included

(Arts 235 EC and 288, second para., EC; Arts 35 EU, 41(1) EU and 46 EU)

4. European Union - Police and judicial cooperation in criminal matters - Right to effective judicial protection

(Arts 34 EU and 35(1) and (6) EU)

5. European Union - Acts of the European Union - Interpretation

1. It is clear from Article 225 EC, from the first paragraph of Article 58 of the Statute of the Court of Justice and from Article 112(1)(c) of its Rules of Procedure that an appeal must indicate precisely the contested elements of the judgment or order which the appellant seeks to have set aside, and also the legal arguments specifically advanced in support of the appeal.

(see para. 22)

2. 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 Court of First Instance would be to allow it to bring before the Court, whose jurisdiction in appeals is limited, a case of wider ambit than that which came before the Court of First Instance. In an appeal the Court's jurisdiction is confined to review of the findings of law on the pleas argued before the Court of First Instance.

(see para. 30)

3. It follows from Article 46 EU that the provisions of the EC and EAEC Treaties concerning the powers of the Court of Justice are applicable to Title VI of the EU Treaty only under the conditions provided for by Article 35 EU. In contrast, Article 35 EU confers no jurisdiction on the Court of Justice to entertain any action for damages whatsoever. In addition, Article 41(1) EU does not include, among the articles of the EC Treaty establishing the European Community applicable to the areas referred to in Title VI of the EU Treaty, the second paragraph of Article 288 EC, according to which the Community must, 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, or Article 235 EC, under which the Court has jurisdiction in disputes relating to compensation for damage provided for in the second paragraph of Article 288 EC.

It follows that no action for damages is provided for under Title VI of the EU Treaty. A Council declaration concerning the right to compensation, annexed to the minutes at the time of the adoption of an action of the European Union, is insufficient to create a legal remedy not provided for by

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the applicable texts and therefore could not suffice to confer jurisdiction on the Court in this respect.

(see paras 44, 46-48, 60-61)

4. As regards the Union, the treaties have established a system of legal remedies in which, by virtue of Article 35 EU, the jurisdiction of the Court is less extensive under Title VI of the Treaty on European Union than it is under the EC Treaty. While a system of legal remedies, in particular a body of rules governing non-contractual liability, other than that established by the treaties can indeed be envisaged, it is for the Member States, should the case arise, to reform the system currently in force in accordance with Article 48 EU.

Applicants wishing to challenge before the courts the lawfulness of a common position adopted on the basis of Article 34 EU, are not, however, deprived of all judicial protection. Article 35(1) EU, in that it does not enable national courts to refer a question to the Court for a preliminary ruling on a common position but only a question concerning the acts listed in that provision, treats as acts capable of being the subject of such a reference for a preliminary ruling all measures adopted by the Council and intended to produce legal effects in relation to third parties. Given that the procedure enabling the Court to give preliminary rulings is designed to guarantee observance of the law in the interpretation and application of the Treaty, it would run counter to that objective to interpret Article 35(1) EU narrowly. The right to make a reference to the Court for a preliminary ruling must therefore exist in respect of all measures adopted by the Council, whatever their nature or form, which are intended to have legal effects in relation to third parties. As a result, it has to be possible to make subject to review by the Court a common position which, because of its content, has a scope going beyond that assigned by the EU Treaty to that kind of act. So, a national court hearing a dispute which, in an incidental plea, raises the issue of the validity or interpretation of a common position adopted on the basis of Article 34 EU, and which raises serious doubt whether that common position is really intended to produce legal effects in relation to third parties, would be able, subject to the conditions fixed by Article 35 EU, to ask the Court to give a preliminary ruling. It would then fall to the Court to find, where appropriate, that the common position is intended to produce legal effects in relation to third parties, to accord it its true classification and to give a preliminary ruling.

The Court would also have jurisdiction to review the lawfulness of such acts when an action has been brought by a Member State or the Commission on the conditions fixed by Article 35(6) EU.

Finally, it is for the Member States and, in particular, their courts and tribunals, to interpret and apply national procedural rules governing the exercise of rights of action in a way that enables natural and legal persons to challenge before the courts the lawfulness of any decision or other national measure relating to the drafting or the application to them of an act of the European Union and to seek compensation for the loss suffered, where appropriate.

(see paras 50-51, 53-56)

5. A Council declaration, annexed to the minutes at the time of adoption of an action of the European Union, cannot therefore be given any legal significance or be used in the interpretation of law emanating from the EU Treaty where no reference is made to the content of the declaration in the wording of the provision in question.

(see para. 60)

In Case C-354/04 P,

APPEAL under Article 56 of the Statute of the Court of Justice lodged at the Court on 17 August 2004,

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Gestoras Pro Amnistía, established at Hernani (Spain),

Juan Mari Olano Olano, residing in Madrid (Spain),

Julen Zelarain Errasti, residing in Madrid (Spain),

represented by D. Rouget, avocat,

appellants,

the other parties to the proceedings being:

Council of the European Union, represented by E. Finnegan and M. Bauer, acting as Agents,

defendant at first instance,

Kingdom of Spain, represented by the Abogacía del Estado,

United Kingdom of Great Britain and Northern Ireland ,

interveners at first instance,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas, K. Lenaerts and R. Schintgen, Presidents of Chambers, A. Tizzano, J.N. Cunha Rodrigues, R. Silva de Lapuerta, L. Bay Larsen, P. Lindh, J.C. Bonichot (Rapporteur) and T. von Danwitz, Judges,

Advocate General: P. Mengozzi,

Registrar: R. Grass,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 26 October 2006

gives the following

Judgment

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

1. Dismisses the appeal;

2. Orders Gestoras Pro Amnistía, Mr J.M. Olano Olano and Mr J. Zelarain Errasti to pay the costs;

3. Orders the Kingdom of Spain to bear its own costs.

1. By their appeal Gestoras Pro Amnistía, Mr Olano Olano and Mr Zelarain Errasti request the Court to set aside the order of the Court of First Instance of the European Communities of 7 June 2004 in Case T-333/02 Gestoras Pro Amnistía and Others v Council (not published in the European Court Reports, the order under appeal'), by which the Court of First Instance dismissed their action for damages for the harm allegedly sustained by the applicants at first instance due to the inclusion of Gestoras Pro Amnistía in the list of persons, groups or entities referred to in Article 1 of Council Common Position 2001/931/CFSP of 27 December 2001 on the application of specific measures to combat terrorism (OJ 2001 L 344, p. 93), in Article 1 of Council Common Position 2002/340/CFSP of 2 May 2002 updating Common Position 2001/931 (OJ 2002 L 116, p. 75), and in Article 1 of Council Common Position 2002/462/CFSP of 17 June 2002 updating Common Position 2001/931 and repealing Common Position 2002/340 (OJ 2002 L 160, p. 32).

Background to the dispute

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2. The background to the dispute was set out as follows in paragraphs 1 to 11 of the order under appeal:

1 It is apparent from the documents before the Court that Gestoras Pro Amnistía is an organisation whose object is the protection of human rights in the Basque country and, in particular, the protection of the rights of political prisoners and exiles. According to the applicants, this organisation was created in 1976 and is established in Hernani (Spain). It has appointed Mr J.M. Olano Olano and Mr J. Zelarain Errasti its spokespersons. No official documentation has been provided in this respect.

2 On 28 September 2001, the United Nations Security Council adopted Resolution 1373 (2001), by which, in particular, it decided that all States should afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings.

3 By orders of 2 and 19 November 2001 the central investigating judge No 5 at the Audiencia Nacional (National High Court), Madrid (Spain), ordered the imprisonment of the alleged leaders of Gestoras Pro Amnistía, including its two spokespersons, and declared its activities illegal, on the ground that that organisation was an integral part of the Basque separatist organisation ETA. Gestoras Pro Amnistía appealed against that decision.

4 On 27 December 2001, considering that action by the Community [and the Member States] was necessary in order to implement Resolution 1373 (2001) of the United Nations Security Council, the Council [of the European Union] adopted Common Position 2001/931.... That common position was adopted on the basis of Article 15 EU, which comes under Title V of the EU Treaty entitled Provisions on a common foreign and security policy (CFSP), and Article 34 EU, which comes under Title VI of the EU Treaty entitled Provisions on police and judicial cooperation in criminal matters.....

5 Articles 1 and 4 of Common Position 2001/931 provide:

Article 1

1. This Common Position applies in accordance with the provisions of the following Articles to persons, groups and entities involved in terrorist acts and listed in the Annex.

...

6. The names of persons and entities on the list in the Annex shall be reviewed at regular intervals and at least once every six months to ensure that there are grounds for keeping them on the list.

Article 4

Member States shall, through police and judicial cooperation in criminal matters within the framework of Title VI of the [EU] Treaty, afford each other the widest possible assistance in preventing and combating terrorist acts. To that end they shall, with respect to enquiries and proceedings conducted by their authorities in respect of any of the persons, groups and entities listed in the Annex, fully exploit, upon request, their existing powers in accordance with acts of the European Union and other international agreements, arrangements and conventions which are binding upon Member States.

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6 The annex to Common Position 2001/931 indicates in point 2 entitled Groups and entities:

* - Euskadi Ta Askatasuna/Tierra Vasca y Libertad/Basque Fatherland and Liberty (E.T.A.)

(The following organisations are part of the terrorist group E.T.A.: K.a.s., Xaki, Ekin, Jarrai-Haika-Segi, Gestoras pro amnistía.).

7 The note at the bottom of this annex states that [p]ersons marked with an * shall be the subject of Article 4 only.

8 On 27 December 2001, the Council also adopted Common Position 2001/930/CFSP on combating terrorism (OJ 2001 L 344, p. 90), Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism (OJ 2001 L 344, p. 70) and Decision 2001/927/EC establishing the list provided for in Article 2(3) of Regulation (EC) No 2580/2001 (OJ 2001 L 344, p. 83). None of those texts mentions the applicants.

9 According to the Council declaration [of 18 December 2001] annexed to the minutes at the time of the adoption of Common Position 2001/931 and Regulation No 2580/2001 (the Council declaration concerning the right to compensation):

The Council recalls regarding Article 1(6) of Common Position [2001/931] that in the event of any error in respect of the persons, groups or entities referred to, the injured party shall have the right to seek judicial redress.

10 By decision of 23 May 2002, the European Court of Human Rights dismissed as inadmissible the action brought by the applicants against the 15 Member States, concerning Common Position 2001/931, on the ground that the situation complained of did not entitle them to be regarded as victims of an infringement of the European Convention on Human Rights and Fundamental Freedoms [signed at Rome on 4 November 1950, ECHR] [Reports of Judgments and Decisions 2002-V].

11 On 2 May and 17 June 2002, the Council adopted, on the basis of Articles 15 EU and 34 EU, Common Positions 2002/340/CFSP and 2002/462/CFSP updating Common Position 2001/931 (OJ 2002 L 116, p. 75, and OJ 2002 L 160, p. 32). The annexes to these two common positions contain the name Gestoras Pro Amnistía, which appears in the same way as it does in Common Position 2001/931.'

3. In addition to that account of the background to the dispute, it is to be noted that, as provided in the first subparagraph of Article 1(4) of Common Position 2001/931:

The list in the Annex [of persons, groups and entities involved in terrorist acts] is to be drawn up on the basis of precise information or material in the relevant file which indicates that a decision has been taken by a competent authority in respect of [those] persons, groups and entities..., irrespective of whether it concerns the instigation of investigations or prosecution for a terrorist act, an attempt to perpetrate, participate in or facilitate such an act based on serious and credible evidence or clues, or condemnation [sic] for such deeds ...'

4. Gestoras Pro Amnistía applied to the Council for access to the documents on which the Council relied in entering it in the list annexed to Common Position 2001/931. By letter of 27 March 2002 the Secretary-General of the Council communicated to Gestoras Pro Amnistía a series of documents relating to that Common Position. Taking the view that those documents did not concern it specifically or personally, the association addressed a fresh request to the Council which the latter rejected by letter of 21 May 2002, on the ground that the information necessary for the drawing up of that list had been returned to the national delegations concerned after it had been examined and the decision adopted.

The action before the Court of First Instance and the order under appeal

5. By application lodged at the Registry of the Court of First Instance on 31 October 2002 the

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appellants claimed that the Court should:

- order the Council to pay the sum of EUR 1 000 000 to Gestoras Pro Amnistía and the sum of EUR 100 000 each to Mr Olano Olano and Mr Zelarain Errasti, as compensation for the damage allegedly suffered as a result of the inclusion of Gestoras Pro Amnistía in the list of persons, groups and entities referred to in Article 1 of Common Positions 2001/931, 2002/340 and 2002/462 respectively;

- order that those sums should bear default interest at the rate of 4.5% per annum from the date of the decision of the Court of First Instance until actual payment should have been effected; and

- order the Council to pay the costs.

6. By separate document lodged at the Registry of the Court of First Instance on 12 February 2003, the Council raised an objection of inadmissibility pursuant to Article 114 of the Rules of Procedure of the Court of First Instance, arguing that the action should be declared manifestly inadmissible and that the applicant' should be ordered to pay the costs.

7. By order of 5 June 2003 the President of the Second Chamber of the Court of First Instance granted the requests of the Kingdom of Spain and the United Kingdom of Great Britain and Northern Ireland for leave to intervene in support of the forms of order sought by the Council. Only the Kingdom of Spain submitted its observations on the objection of inadmissibility.

8. In their observations on the plea of inadmissibility, the appellants claimed that the Court of First Instance should:

- declare the action for damages admissible;

- alternatively, find that the Council had infringed general principles of Community law;

- in any event, order the Council to pay the costs.

9. By the order under appeal, made pursuant to Article 111 of its Rules of Procedure, the Court of First Instance dismissed the action without opening the oral procedure.

10. First, it held that it clearly had no jurisdiction, in the legal system of the European Union, to hear and determine the appellants' claim for damages.

11. In reaching that conclusion the Court of First Instance noted that the appellants were affected only by Article 4 of Common Position 2001/931, by virtue of which the Member States are to afford one another the widest possible assistance through the police and judicial cooperation in criminal matters provided for by Title VI of the EU Treaty and, accordingly, that the measures which, it was claimed, gave rise to the alleged damage had as their sole relevant legal basis Article 34 EU. It found that the only legal remedies provided by Article 35(1), (6) and (7) EU, referred to by Article 46 EU, were the reference for a preliminary ruling, the action for annulment and the procedure for settling disputes between Member States. In consequence, it found that no judicial remedy allowing for an order for damages was available under Title VI of the EU Treaty.

12. Second, the Court of First Instance held that it did, nevertheless, have jurisdiction to rule on the action, but only in so far as the latter was based on infringement of the powers of the Community.

13. The Court of First Instance noted that the Community judicature did have jurisdiction to consider whether an act adopted under the EU Treaty does not affect the powers of the Community. So it investigated, in paragraphs 41 to 47 of the order under appeal, whether in adopting the contested measures the Council had not unlawfully encroached upon the powers of the Community.

14. That court considered, however, that the appellants had failed to cite any legal basis in the

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EC Treaty that had been disregarded. It held that the Council was fully entitled to rely on Title VI of the EU Treaty in order to adopt the acts at issue and that, therefore, in so far as the action was based on a failure to observe the powers of the Community, it had to be dismissed as manifestly unfounded.

Forms of order sought by the parties before the Court of Justice

15. The appellants claim that the Court should:

- set aside the order under appeal;

- itself give a ruling on the action and grant the forms of order requested before the Court of First Instance by the appellants, and

- order the Council to pay the costs.

16. The Council contends that the Court should:

- dismiss the appeal as clearly inadmissible;

- in the alternative, dismiss it as unfounded;

- if necessary, refer the case back to the Court of First Instance, and

- order the appellants to pay the costs.

17. The Kingdom of Spain seeks forms of order identical to those of the Council.

Concerning the appeal

Admissibility of the appeal

Arguments of the parties

18. The Council and the Kingdom of Spain maintain that the arguments put forward by the appellants are in substance identical to those set out at first instance, and do not make specific reference to the error of law which they claim vitiates the order under appeal. The appeal should therefore be dismissed as clearly inadmissible.

Findings of the Court

- With regard to the part of the appeal challenging the order in so far as the latter rejects the plea alleging that the Council encroached upon the powers conferred on the Community

19. Before the Court of First Instance the appellants argued that the Council, in adopting Common Position 2001/931, confirmed by Common Positions 2002/340 and 2002/462, deliberately encroached on the powers conferred on the Community for the purpose of depriving the persons referred to in that common position of the right to an effective remedy

20. In the order under appeal, the Court of First Instance held that it had jurisdiction to take cognisance of the action brought by the appellants only in so far as it was based on failure to have regard to the powers of the Community, referring in particular to Case C-170/96 Commission v Council [1998] ECR I-2763, paragraph 17. In paragraphs 45 and 46 of the order under appeal, the Court held that Article 34 EU was the relevant legal basis for the adoption of Article 4 of Common Position 2001/931 and that the appellants had failed to cite a legal basis in the EC Treaty that had been disregarded.

21. In their appeal before the Court of Justice, the appellants do no more than reaffirm that the Council adopted those common positions on the legal basis of Article 34 EU for the sole purpose of depriving them of the right to a remedy. They do not, however, put forward any argument in support

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of that claim.

22. It is clear from Article 225 EC, from the first paragraph of Article 58 of the Statute of the Court of Justice and from Article 112(1)(c) of its Rules of Procedure that an appeal must indicate precisely the contested elements of the judgment or order which the appellant seeks to have set aside, and also the legal arguments specifically advanced in support of the appeal (see, in particular, Case C 352/98 P Bergaderm and Goupil v Commission [2000] ECR I5291, paragraph 34; Case C 248/99 P France v Monsanto and Commission [2002] ECR I1, paragraph 68; and the order in Case C488/01 P Martínez v Parliament [2003] ECR I13355, paragraph 40).

23. In the present case, as the Council and the Kingdom of Spain maintain, the appeal does not state why the legal ground relied on by the Court of First Instance in paragraphs 45 and 46 of the order under appeal is incorrect. The appeal is therefore and to that extent inadmissible.

- With regard to the part of the appeal challenging the order in so far as the latter finds that the Court of First Instance has no jurisdiction to hear and determine the action for damages

24. As stated above, it is clear from Article 225 EC, from the first paragraph of Article 58 of the Statute of the Court of Justice and from Article 112(1)(c) of its Rules of Procedure that an appeal must indicate precisely the contested elements of the judgment or order which the appellant seeks to have set aside, and also the legal arguments specifically advanced in support of the appeal.

25. In this case, and contrary to the submissions of the Council and the Kingdom of Spain, the appeal, in so far as it concerns the refusal of the Court of First Instance to hold that it had jurisdiction to entertain the action for damages, is not confined to a reproduction of the pleas in law and arguments raised before the Court of First Instance, but does indicate the contested elements of the order under appeal and the legal arguments specifically advanced in support of the appeal.

26. It follows that the appeal is admissible in so far as it challenges that part of the order under appeal in which the Court of First Instance held that it had no jurisdiction to entertain the action for damages.

The admissibility of certain grounds of challenge put forward in support of the appeal

Arguments of the parties

27. With regard to the admissibility of certain grounds of appeal, the Council and the Kingdom of Spain maintain, moreover, that the ground relating to the examination of the two successive versions of the footnote in the Annex to Common Position 2001/931, which marks with an * the classes that are to be the subject of Article 4 only', was put forward for the first time in the reply and is therefore inadmissible. According to the appellants, that examination demonstrated that, before being amended by the Council's Common Position 2003/482/CFSP of 27 June 2003 (OJ 2003 L 160, p. 100), that footnote covered only persons', that is to say, natural persons to the exclusion of groups and entities' and that, in those circumstances, on 31 October 2002, the date on which it brought its action before the Court of First Instance, Gestoras Pro Amnistía did not belong to the class of persons [who are to] be the subject of Article 4 only' but to that of groups and entities subject to the actions of the Community mentioned in Articles 2 and 3 of Common Position 2001/931.

28. In addition, the Council maintains that two grounds of appeal raised by the appellants were not put before the Court of First Instance and are therefore inadmissible. The first is the plea claiming that the Member States are bound to perform their obligations under earlier agreements, in accordance with Article 30 of the Vienna Convention on the Law of Treaties of 23 May 1969 on the application of successive treaties relating to the same subject-matter and with Article

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307 of the EC Treaty. Those obligations under earlier agreements guarantee effective observance of human rights and fundamental freedoms. The second ground which the Council regards as inadmissible is the claim that there exists in the Court's case-law a principle of interpretation called wider jurisdiction', by virtue of which the Court has already accepted jurisdiction outside the bounds of the Treaty.

Findings of the Court

29. Under Article 48(2) of the Rules of Procedure of the Court of First Instance, no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which have come to light in the course of the procedure.

30. 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 Court of First Instance would be to allow it to bring before the Court, whose jurisdiction in appeals is limited, a case of wider ambit than that which came before the Court of First Instance. In an appeal the Court's jurisdiction is confined to review of the findings of law on the pleas argued before the Court of First Instance (see Case C-136/92 P Commission v Brazzelli Lualdi and Others [1994] ECR I-1981, paragraphs 58 and 59).

31. In the present case, the grounds of appeal relating to the altered wording of the footnote in the Annex to Common Position 2001/931, to the performance by the Member States of their obligations under earlier agreements or treaties and to the principle of general interpretation relating to a wider jurisdiction' of the Court were not raised by the appellants before the Court of First Instance.

32. Those grounds of appeal are, consequently, inadmissible.

Substance

Arguments of the parties

33. The appellants maintain that the Court of First Instance erred in declining jurisdiction to consider their action for damages.

34. The Union is a community governed by the rule of law, guaranteeing by virtue of Article 6(2) EU the right to an effective remedy laid down in Article 13 of the ECHR and the right to a tribunal provided by Article 6 of that convention.

35. Furthermore, by its declaration concerning the right to redress, the Council has, in the appellants' view, accepted that any error in drawing up the list annexed to Common Position 2001/931 amounts to fault on its part, which gives entitlement to redress. In that declaration, the Council stated that that right must be afforded to persons, groups and entities referred to, like the appellants, in Article 4 of Common Position 2001/931, on the same conditions as it is to the persons, groups and entities entered in the list annexed to Regulation No 2580/2001 or covered by Article 3 of that Common Position, who may apply to the Court of First Instance if they are mentioned in acts adopted under the EC Treaty. In this connection the appellants refer to the order of the President of the Court of First Instance of 15 May 2003 in Case T-47/03 R Sison v Council [2003] ECR II-2047).

36. Since the act giving rise to the alleged damage is an act of the Council, adopted jointly by all the Member States, an action for damages cannot be brought before the national courts, which would lack jurisdiction to entertain it, the liability of the Member States not being severable.

37. It is also pointed out that in the eighth recital in the preamble to Council Decision 2003/48/JHA of 19 December 2002 on the implementation of specific measures for police and judicial cooperation to combat terrorism in accordance with Article 4 of Common Position 2001/931 (OJ 2003 L 16, p.

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68) it is stated that [t]his Decision respects the fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union. Nothing in this Decision may be interpreted as allowing infringement of the legal protection afforded under national law to the persons, groups and entities listed in the Annex to Common Position 2001/931/CFSP'.

38. The Council declaration concerning the right to redress, clarified by the eighth recital in the preamble to Decision 2003/48, constitutes, together with Article 6(2) EU, a firm legal base for the assertion of the jurisdiction of the Community judicature. It is argued that the Court of First Instance therefore vitiated the order under appeal by an error of law in declaring that it had no jurisdiction to rule on the appellants' claims for damages.

39. In addition, the appellants claim that, with a view to combating terrorism, the Council adopted a number of measures on various legal bases for the purpose of depriving certain classes of persons, groups and entities of the right to an effective remedy.

40. The Council maintains that the appeal is unfounded. The Court of First Instance correctly considered that no claim for damages is provided for under Title VI of the EU Treaty. Since what was at issue was not an act adopted in the context of the European Community but an act adopted under the provisions governing the Union, an action for damages may not be brought on the basis of Article 288 EC. In support of its view the Council relies on the judgment in Case 99/74 Grands moulins des Antilles v Commission [1975] ECR 1531, paragraph 17.

41. The eighth recital in the preamble to Decision 2003/48 mentions only the legal protection afforded under national law', not under Community law. Neither that document nor the Council's declaration concerning the right to redress is such as to enable the Community judicature to give a ruling on the appellants' claim for damages, which is not provided for by the EU Treaty.

42. The Kingdom of Spain states that Gestoras Pro Amnistía's activities were declared illegal by order of 19 December 2001 of central investigating judge No 5 of the Audiencia Nacional de Madrid. The same central investigating judge issued an international warrant for the arrest of Mr Olano Olano, who had several times been sentenced by Spanish courts for, inter alia, possession of arms, munitions or explosives. He was arrested by the French police on 3 December 2001, handed over to the Spanish authorities and then imprisoned in Madrid. Mr Zelarain Errasti was arrested on 31 October 2001 by reason of his responsibility within Gestoras Pro Amnistía and prosecuted before the Spanish courts in the proceedings brought against that association and in other proceedings on the ground that he belonged to a terrorist organisation.

43. On the merits, the Kingdom of Spain supports the Council's views. There is nothing in the appeal capable of calling into question the legality of the order under appeal.

Findings of the Court

- The ground of appeal alleging disregard for the provisions of Title VI of the EU Treaty

44. It follows from Article 46 EU that the provisions of the EC and EAEC Treaties concerning the powers of the Court of Justice are applicable to Title VI of the EU Treaty only under the conditions provided for by Article 35 EU'.

45. That article provides that the Court of Justice has jurisdiction in three situations. First, by virtue of Article 35(1) EU, it has jurisdiction to give preliminary rulings on the validity and interpretation of framework decisions and decisions, on the interpretation of conventions established under Title VI of the EU Treaty and on the validity and interpretation of the measures implementing them. Second, Article 35(6) EU provides also for the Court of Justice to have jurisdiction to review the legality of framework decisions and decisions in actions brought by a Member State or the Commission of the European Communities on grounds of lack of competence, infringement of an

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essential procedural requirement, infringement of the EU Treaty or of any rule of law relating to its application, or misuse of powers. Last, Article 35(7) EU provides for the Court of Justice to have jurisdiction to rule on any dispute between Member States regarding the interpretation or the application of acts adopted under Article 34(2) EU whenever such dispute cannot be settled by the Council within six months of its being referred to the latter by one of its members.

46. In contrast, Article 35 EU confers no jurisdiction on the Court of Justice to entertain any action for damages whatsoever.

47. In addition, Article 41(1) EU does not include, among the articles of the Treaty establishing the European Community applicable to the areas referred to in Title VI of the Treaty on European Union, the second paragraph of Article 288 EC, according to which the Community must, 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, or Article 235 EC, under which the Court has jurisdiction in disputes relating to compensation for damage provided for in the second paragraph of Article 288 EC (see, by analogy, Case C160/03 Spain v Eurojust [2005] ECR I2077, paragraph 38).

48. It follows from the foregoing that the Court of First Instance did not vitiate its order by any error of law in finding that no action for damages is provided for under Title VI of the EU Treaty. The ground of appeal must therefore be rejected.

- The ground of appeal alleging disregard for the right to effective judicial protection

49. The appellants also invoked before the Court of First Instance the observance of fundamental rights, in particular the right to effective judicial protection under Article 6(2) EU. In essence they argue that they have no means of challenging Gestoras Pro Amnistía's inclusion in the list annexed to Common Position 2001/931 and that the order under appeal prejudices their right to effective judicial protection.

50. It is true that, as regards the Union, the treaties have established a system of legal remedies in which, by virtue of Article 35 EU, the jurisdiction of the Court is less extensive under Title VI of the Treaty on European Union than it is under the EC Treaty (see, to this effect, Case C-105/03 Pupino [2005] ECR I5285, paragraph 35). It is even less extensive under Title V. While a system of legal remedies, in particular a body of rules governi ng non-contractual liability, other than that established by the treaties can indeed be envisaged, it is for the Member States, should the case arise, to reform the system currently in force in accordance with Article 48 EU.

51. Nevertheless, the appellants cannot validly argue that they are deprived of all judicial protection. As is clear from Article 6 EU, the Union is founded on the principle of the rule of law and it respects fundamental rights as general principles of Community law. It follows that the institutions are subject to review of the conformity of their acts with the treaties and the general principles of law, just like the Member States when they implement the law of the Union.

52. Here it is to be noted that Article 34 EU provides that the Council may adopt acts varying in nature and scope. Under Article 34(2)(a) EU the Council may adopt common positions defining the approach of the Union to a particular matter'. A common position requires the compliance of the Member States by virtue of the principle of the duty to cooperate in good faith, which means in particular that Member States are to take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under European Union law (see Pupino , paragraph 42). Article 37 EU thus provides that the Member States are to defend the common positions [w]ithin international organisations and at international conferences in which they take part'. However, a common position is not supposed to produce of itself legal effects in relation to third parties. That is why, in the system established by Title VI of the EU Treaty, only framework decisions

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and decisions may be the subject of an action for annulment before the Court of Justice. The Court's jurisdiction, as defined by Article 35(1) EU, to give preliminary rulings also does not extend to common positions but is limited to rulings on the validity and interpretation of framework decisions and decisions, on the interpretation of conventions established under Title VI and on the validity and interpretation of the measures implementing them.

53. Article 35(1) EU, in that it does not enable national courts to refer a question to the Court for a preliminary ruling on a common position but only a question concerning the acts listed in that provision, treats as acts capable of being the subject of such a reference for a preliminary ruling all measures adopted by the Council and intended to produce legal effects in relation to third parties. Given that the procedure enabling the Court to give preliminary rulings is designed to guarantee observance of the law in the interpretation and application of the Treaty, it would run counter to that objective to interpret Article 35(1) EU narrowly. The right to make a reference to the Court for a preliminary ruling must therefore exist in respect of all measures adopted by the Council, whatever their nature or form, which are intended to have legal effects in relation to third parties (see, by analogy, Case 22/70 Commission v Council (ERTA) [1971] ECR 263, paragraphs 38 to 42, and Case C-57/95 France v Commission [1997] ECR I1627, paragraph 7 et seq.).

54. As a result, it has to be possible to make subject to review by the Court a common position which, because of its content, has a scope going beyond that assigned by the EU Treaty to that kind of act. Therefore, a national court hearing a dispute which indirectly raises the issue of the validity or interpretation of a common position adopted on the basis of Article 34 EU, as is the case in this instance for part of Common Position 2001/931 and in any event for Article 4 thereof and the Annex thereto, and which has serious doubts whether that common position is really intended to produce legal effects in relation to third parties, would be able, subject to the conditions fixed by Article 35 EU, to ask the Court to give a preliminary ruling. It would then fall to the Court to find, where appropriate, that the common position is intended to produce legal effects in relation to third parties, to accord it its true classification and to give a preliminary ruling.

55. The Court would also have jurisdiction to review the lawfulness of such acts when an action has been brought by a Member State or the Commission on the conditions fixed by Article 35(6) EU.

56. Finally, it is to be borne in mind that it is for the Member States and, in particular, their courts and tribunals, to interpret and apply national procedural rules governing the exercise of rights of action in a way that enables natural and legal persons to challenge before the courts the lawfulness of any decision or other national measure relating to the drawing up of an act of the European Union or to its application to them and to seek compensation for any loss suffered.

57. It follows that the appellants are incorrect in maintaining that the contested common position leaves them without a remedy, contrary to the requirement of effective judicial protection, and that the order under appeal prejudices their right to such protection. That ground of appeal must, in consequence, be rejected.

- The ground of appeal alleging disregard for the declaration made by the Council in its decision 15453/01 of 18 December 2001

58. Before the Court of First Instance the appellants invoked the declaration made by the Council in its decision 15453/01 of 18 December 2001 according to which: The Council recalls regarding Article 1(6) of the Common Position on the application of specific measures to combat terrorism, and Article 2(3) of the regulation on specific restrictive measures directed against certain persons and entities with a view to combating terrorism that in the event of any error in respect of the

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persons, groups or entities referred to, the injured party shall have the right to seek judicial redress'.

59. According to the appellants, that declaration must be interpreted in the light of the eighth recital in the preamble to Council Decision 2003/48/JHA of 19 December 2002 on the implementation of specific measures for police and judicial cooperation to combat terrorism, which states that [t]his Decision respects the fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union. Nothing in this Decision may be interpreted as allowing infringement of the legal protection afforded under national law to the persons, groups and entities listed in the Annex to Common Position 2001/931/CFSP'.

60. It is, however, clear from the Court's settled case-law that such a declaration is insufficient to create a legal remedy not provided for by the applicable texts and that it cannot therefore be given any legal significance or be used in the interpretation of law emanating from the EU Treaty where, as in this case, no reference is made to the content of the declaration in the wording of the provision in question (see, to this effect, Case C-292/89 Antonissen [1991] ECR I-745, paragraph 18; Case C-329/95 VAG Sverige [1997] ECR I-2675, paragraph 23; and Case C-49/02 Heidelberger Bauchemie [2004] ECR I-6129, paragraph 17).

61. There was, therefore, no error of law in the Court of First Instance's finding in the order under appeal that the declaration made by the Council in its decision 15453/01 of 18 December 2001 could not suffice to confer jurisdiction on the Court to hear and determine an action for damages under Title VI of the EU Treaty.

62. It follows from all the foregoing that it was without vitiating its order by any error of law that the Court of First Instance declared that it manifestly had no jurisdiction to entertain the action for damages seeking compensation for any damage that might have been caused to the appellants by the inclusion of Gestoras Pro Amnistía in the list annexed to Common Position 2001/931, as updated by Common Positions 2002/340 and 2002/462.

63. None of the grounds of appeal being well founded, the appeal must be dismissed.

Costs

64. Under Article 69(2) of the Rules of Procedure, which is applicable to the procedure on appeal pursuant to Article 118 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. Since the Council has applied for costs against the appellants and the latter have been unsuccessful, they must be ordered to pay the costs.

65. Pursuant to the first subparagraph of Article 69(4) of the Rules of Procedure, which also applies to appeals by virtue of Article 118 thereof, the Member States which have intervened in the proceedings are to bear their own costs. In accordance with that provision, it must therefore be ordered that the Kingdom of Spain is to bear its own costs.

DOCNUM	62004J0354
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community

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JURCIT
11997E225 : N 22 24
11997E235 : N 47
11997E288-L2 : N 47
11997M006 : N 51
11997M006-P2 : N 49
11997M034 : N 52 54
11997M034-P2 : N 45
11997M034-P2LA : N 52
11997M035 : N 46 50 54
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11997M035-P6 : N 45 55
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61998J0352 : N 22
61999J0248 : N 22
62001J0488 : N 22
62002J0049 : N 60
62002B0333 : N 1 - 63
62003J0105 : N 50 52
62003J0160 : N 47

CONCERNS Confirms 62002B0333 -

SUB Common foreign and security policy ; Justice and home affairs ; Liability

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AUTLANG	French
APPLICA	Person
DEFENDA	Council ; Institutions
NATIONA	Spain
NOTES	losarík, Ivo: Kauza Gestoras Pro Amnistía: Dalí díl euro-skladaky unijního prava boje proti terorismu, Jurisprudence : specialista na komentovaní judikatury 2007 p.36-40 ; Armone, G.: Il Foro italiano 2007 IV Col.189-193 ; Conti, Roberto ; Foglia, Raffaele: Terzo pilastro: posizione comune e diritti dei terzi, Il Corriere giuridico 2007 p.569-572 ; Meisse, Eric: Compétence du juge communautaire et préjudice causé par une position commune, Europe 2007 Avril Comm. no 110 p.24-25 ; Garbagnati Ketvel, Maria Gisella: Almost, but not quite: The Court of Justice and Judicial Protection of Individuals in the Third Pillar, European Law Reporter 2007 p.223-238 ; Haltern, Ulrich: Rechtsschutz in der dritten Säule der EU, Juristenzeitung 2007 p.772-779 ; Berramdane, Abdelkhaleq: Les limites de la protection juridictionnelle dans le cadre du titre VI du traité sur l'Union européenne, Revue du droit de l'Union européenne 2007 no 2 p.433-446 ; Marciali, Sébastien: Le droit à un recours effectif en droit de l'Union européenne: quelques progrès, beaucoup d'ambiguïtés, Revue trimestrielle des droits de l'homme 2007 p.1153-1170 ; Santamaría Dacal, Ana Isabel: Las sentencias Segi y Gestoras del TJCE: un sermon sin mayores consecuencias o un primer toque de atencion?, Revista de Derecho Comunitario Europeo 2007 p.313-322 ; Balsamo, Antonio: Misure contro il terrorismo: Risarcimento del danno per erronea inclusione nelle liste dei soggetti coinvolti in atti terroristici, Cassazione penale 2007 p.3089-3091 ; Donnat, Francis: Régime des actes des titres V et VI du traité sur l'Union et lutte contre le terrorisme, Revue française de droit administratif 2007 p.1100-1104 ; Salminen, Janne: Euroopan unionin kolmannen pilarin oikeussuoja koetuksella, Lakimies 2007 p.1133-1148
PROCEDU	Action for damages;Appeal - inadmissible;Appeal - unfounded
ADVGEN	Mengozzi
JUDGRAP	Bonichot
DATES	of document: 27/02/2007 of application: 17/08/2004

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Opinion of Mr Advocate General Mengozzi delivered on 26 October 2006. Gestoras Pro Amnistía, Juan Mari Olano Olano and Julen Zelarain Errasti v Council of the European Union. Appeal - European Union - Police and judicial cooperation in criminal matters - Common Positions 2001/931/CFSP, 2002/340/CFSP and 2002/462/CFSP - Measures concerning persons, groups and entities involved in terrorist acts - Action for damages - Jurisdiction of the Court of Justice. Case C-354/04 P.

and Case C-355/04 P - see original front page

1. By orders of 7 June 2004 made in Case T333/02 Gestoras Pro Amnistía and Others v Council (not published in the ECR) and Case T338/02 Segi and Others v Council [2004] ECR II1647 (the contested orders'), the Court of First Instance dismissed the actions brought by the organisations Gestoras Pro Amnistía and Segi and their respective spokespersons against the Council of the European Union for compensation for damage allegedly suffered as a result of the inclusion of Gestoras Pro Amnistía and Segi on the list of persons, groups and entities to which Council Common Position 2001/931/CFSP of 27 December 2001 on the application of specific measures to terrorism applies. (2)

2. The Court is seised of two appeals against the aforesaid orders lodged by the same parties as brought the actions at first instance (Gestoras Pro Amnistía and Messrs J.M. Olano Olano and J. Zelarain Errasti in Case C354/04 P, and Segi and Messrs A. Zubimendi Izaga and A. Galarraga in Case C355/04 P).

I - Facts

3. The factual background to the disputes, which is described in broadly similar terms in the contested orders, can be set out as follows.

4. According to the allegations made by the applicants in Case T333/02, Gestoras Pro Amnistía is an organisation based in Hernani (Spain) whose purpose is to defend human rights in the Basque territory, in particular those of political prisoners and exiles, and whose spokespersons are Messrs Olano Olano and Zelarain Errasti.

5. According to the allegations made by the applicants in Case T338/02, Segi is an organisation established in Bayonne (France) and Donostia (Spain), which has the aim of supporting the claims of Basque youth and defending Basque identity, culture and language, and whose spokespersons are Messrs Zubimendi Izaga and Galarraga.

6. On 28 September 2001 the Security Council of the United Nations (the Security Council') adopted Resolution 1373 (2001), in which it decided, in particular, that all States are to afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings.

7. By orders of 2 and 19 November 2001, the central investigating judge No 5 at the Audiencia Nacional (National High Court), Madrid (Spain), ordered the arrest of the presumed leaders of Gestoras Pro Amnistía, including its two spokespersons, and declared the activities of Gestoras Pro Amnistía to be illegal on the ground that it was an integral part of the Basque separatist organisation ETA. Gestoras Pro Amnistía challenged the second of these orders.

8. On 27 December 2001 the Council of the European Union (the Council'), considering that it was necessary to adopt further measures in addition to those previously taken in order to implement the aforesaid Security Council resolution, adopted Common Position 2001/931 on the basis of Articles 15 EU and 34 EU, which had been inserted into Title V (Provisions on a common foreign and security policy') and Title VI (Provisions on police and judicial cooperation in criminal matters') respectively of the EU Treaty.

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9. Articles 1 and 4 of Common Position 2001/931 provide as follows:

Article 1

1. This Common Position applies in accordance with the provisions of the following articles to persons, groups and entities involved in terrorist acts and listed in the Annex.

...

4. The list in the Annex shall be drawn up on the basis of precise information or material in the relevant file which indicates that a decision has been taken by a competent authority in respect of the persons, groups and entities concerned, irrespective of whether it concerns the instigation of investigations or prosecution for a terrorist act, an attempt to perpetrate, participate in or facilitate such an act based on serious and credible evidence or clues, or condemnation for such deeds. Persons, groups and entities identified by the Security Council of the United Nations as being related to terrorism and against whom it has ordered sanctions may be included in the list.

...

6. The names of persons and entities on the list in the Annex shall be reviewed at regular intervals and at least once every six months to ensure that there are grounds for keeping them on the list.'

Article 4

Member States shall, through police and judicial cooperation in criminal matters within the framework of Title VI of the Treaty on European Union, afford each other the widest possible assistance in preventing and combating terrorist acts. To that end they shall, with respect to enquiries and proceedings conducted by their authorities in respect of any of the persons, groups and entities listed in the Annex, fully exploit, upon request, their existing powers in accordance with acts of the European Union and other international agreements, arrangements and conventions which are binding upon Member States.'

10. Point 2 of the Annex to Common Position 2001/931 lists, under groups and entities':

* - Euskadi Ta Askatasuna/Tierra Vasca y Libertad/Basque Fatherland and Liberty (E.T.A.)

(The following organisations are part of the terrorist group E.T.A.: K.a.s., Xaki; Ekin, Jarrai-Haika-Segi, Gestoras Pro Amnistía.)'.

11. The footnote to the Annex states that [p]ersons marked with an * shall be the subject of Article 4 only'.

12. The Council declaration annexed to the minutes on the adoption of Common Position 2001/931 (the Council declaration concerning the right to compensation') states:

The Council recalls regarding Article 1(6) of Common Position [2001/931] that in the event of any error in respect of the persons, groups or entities referred to, the injured party shall have the right to seek judicial redress.' (3)

13. By orders of 5 February and 11 March 2002, the central investigating judge No 5 at the Audiencia Nacional, Madrid, declared Segi's activities illegal on the ground that it was an integral part of the Basque separatist organisation ETA and ordered the arrest of certain of Segi's presumed

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leaders.

14. By a decision of 23 May 2002, (4) the European Court of Human Rights dismissed as inadmissible the actions brought by the appellants against the 15 States that were then members of the European Union with regard to Common Position 2001/931 on the ground that the situation complained of did not entitle them to be regarded as victims of an infringement of the European Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950 (the ECHR').

15. On 2 May and 17 June 2002 the Council adopted, under Articles 15 EU and 34 EU, Common Positions 2002/340/CFSP (5) and 2002/462/CFSP (6) updating Common Position 2001/931. The annexes to those two common positions contain the updated list of persons, groups and entities to which Common Position 2001/931 applies, and in which the names of Gestoras Pro Amnistía and Segi still appear, worded in the same way as in the list annexed to Common Position 2001/931.

16. It should be added that Gestoras Pro Amnistía and Segi applied to the Council for access to the documents on which it had based its decision to include them in the list annexed to Common Position 2001/931. The Secretary-General of the Council sent Gestoras Pro Amnistía and Segi a series of documents relating to that common position. As they considered that the documents in question did not relate to them specifically and personally, the two associations made a further request to the Council, which that institution rejected by letter of 21 May 2002, stating that the information needed to prepare the list annexed to the common position had been returned to the national delegations concerned after they had been examined and the resulting decisions taken.

17. In addition, the appellants in Case C-355/04 P alleged, in the course of the proceedings, that, by a judgment of 20 June 2005, the Fourth Criminal Division of the Audiencia Nacional, Madrid, before which the action relating to Segi was pending, had exonerated that association from the accusation that it was a terrorist group and part of ETA. The Kingdom of Spain has not contested the existence of that decision but has indicated that it had not become final and that an appeal had been made to the Tribunal Supremo (Supreme Court) by the Ministry of Finance (public prosecutor) and by the Association of Victims of Terrorism.

II - The proceedings before the Court of First Instance and the contested orders

18. By applications lodged at the Registry of the Court of First Instance on 31 October 2002 (Case T333/02) and 13 November 2002 (Case T338/02), the appellants brought two separate actions for damages against the Council.

19. The appellants claimed that the Court of First Instance should:

- order the Council to pay an amount of EUR 1 000 000 to each association and an amount of EUR 100 000 to each of their spokespersons by way of compensation for the damage allegedly suffered as a result of the inclusion of respectively Gestoras Pro Amnistía and Segi on the list of persons, groups and entities mentioned in Article 1 of Common Position 2001/931, as updated by Common Positions 2002/340 and 2002/462;

- declare that the said sums shall bear default interest at the rate of 4.5% per annum from the date of the Court's judgment until payment is made;

- order the Council to pay the costs.

20. By documents lodged at the Registry of the Court of First Instance on 12 February 2003, the Council raised in both cases an objection of inadmissibility pursuant to Article 114 of the Rules of Procedure of the Court of First Instance. In addition to claiming, in particular, that Gestoras Pro Amnistía and Segi did not have the capacity to bring legal proceedings, that the natural persons among the applicants who had used the organisations' names had no power to represent them, that the appointment of the lawyer on behalf of the two organisations was consequently invalid and that

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Mr Zelarain Errasti had not granted the lawyer a mandate, the Council objected that the Court of First Instance had no jurisdiction, first because Article 235 EC and the second paragraph of Article 288 EC were not applicable to the case in point and secondly because it was impossible for the Court of First Instance to rule on the legality of Common Position 2001/931.

21. In their observations with regard to that objection, the appellants asked the Court of First Instance to declare the applications admissible and, in the alternative, if the Court considered that it lacked jurisdiction to hear the action for damages, to declare in any case that the Council, by adopting the said common positions, had contravened the general principles of Community law stemming from the constitutional traditions common to the Member States and, in particular, from Articles 1, 6(1) and 13 of the ECHR.

22. By orders of 5 June 2003, the President of the Second Chamber of the Court of First Instance granted leave to the Kingdom of Spain and the United Kingdom of Great Britain and Northern Ireland to intervene in the two cases in support of the forms of order sought by the Council.

23. In the contested orders, which were adopted pursuant to Article 111 of its Rules of Procedure, the Court of First Instance dismissed the appellants' actions without opening the oral procedure.

24. The Court of First Instance first ruled that it patently lacked jurisdiction to hear the applications in that their purpose was to obtain compensation for damage allegedly caused by the inclusion of Gestoras Pro Amnistía and Segi in the list of persons, groups and entities mentioned in Article 1 of Common Position 2001/931, as updated by Common Positions 2002/340 and 2002/462.

25. Secondly, the Court of First Instance held that it was none the less competent, under Article 235 EC and the second paragraph of Article 288 EC, to rule on the applicants' actions for damages to the extent that they were based on the claimed infringement of the powers of the European Community by the Council as a result of the adoption of the said common positions. After having examined the actions as to their substance within the aforementioned limits, the Court of First Instance dismissed them as patently unfounded.

26. Thirdly, the Court of First Instance also dismissed the appellants' alternative claim on the ground of its own patent lack of jurisdiction, noting that [i]n proceedings before the Community judicature, there is no remedy whereby the Court can adopt a position by means of a general declaration on a matter which exceeds the scope of the main proceedings'. (7)

27. Finally, considering that there were exceptional circumstances within the meaning of Article 87(3) of its Rules of Procedure, the Court of First Instance divided the legal costs among the main parties.

III - The proceedings before the Court of Justice and the forms of order sought

28. By applications lodged at the Registry of the Court of Justice on 17 August 2004, registered under numbers C354/04 P and C355/04 P and drawn up in almost identical terms, the appellants appealed against the said orders.

29. In both cases, the appellants claim that the Court should:

- set aside the contested order;

- give a final ruling on the dispute and grant the forms of order sought by the appellants before the Court of First Instance;

- order the Council to pay the costs.

30. In both cases, the Council claims that the Court should:

- dismiss the appeal as patently inadmissible;

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- in the alternative, dismiss the appeal as unfounded;

- if necessary, refer the case back to the Court of First Instance;

- order the appellants to pay the costs.

31. In both cases, the Kingdom of Spain seeks the same forms of order as the Council.

IV - Analysis

A - The admissibility of the appeals

32. In their pleadings, both the Council and the Kingdom of Spain contend that the appeals are inadmissible in that they merely reproduce, almost literally, the pleas in law and arguments already put forward at first instance.

33. Under Article 225 EC, the first paragraph of Article 58 of the Statute of the Court of Justice and Article 112(1)(c) of the Rules of Procedure, an appeal against a judgment of the Court of First Instance must indicate precisely the contested elements of the judgment which the appellant seeks to have set aside, and also the legal arguments specifically advanced in support of the appeal. (8)

34. It is true, as the Council and the Kingdom of Spain observe, that the requirements resulting from those provisions are not satisfied by an appeal which, without even including an argument specifically identifying the error of law allegedly vitiating the judgment of the Court of First Instance, simply repeats the pleas in law and arguments already put forward before that Court. Such an appeal amounts in reality to no more than a request for re-examination of the application submitted to the Court of First Instance, which the Court of Justice does not have jurisdiction to undertake. (9)

35. Nevertheless, where the abovementioned requirements are met, an appeal against a judgment of the Court of First Instance can be based on arguments which have already been presented at first instance in order to show that, by dismissing the pleas in law and arguments presented to it by the appellant, the Court of First Instance infringed Community law. (10)

36. In the present case, it appears to me that in the actions before the Court the disputed elements of the contested orders are identified with sufficient clarity. As is evident, in particular, from paragraph 32 of the appeals, the appellants challenge the finding of the Court of First Instance in paragraph 40 of the contested orders that it lacked jurisdiction to rule on the actions for compensation for damage allegedly caused by the inclusion of Gestoras Pro Amnistía and Segi in the list of persons, groups and entities to whom Common Position 2001/931 applies (the list of persons involved in terrorist acts') on the ground that it is vitiated by an error in law.

37. Furthermore, where the appeals identify Article 6(2) EU, the Council declaration concerning the right to compensation and the eighth recital' of Council Decision 2003/48/JHA of 19 December 2002 on the implementation of specific measures for police and judicial cooperation to combat terrorism in accordance with Article 4 of Common Position 2001/931/CFSP (11) as the legal basis for the jurisdiction of the Community court (12) to hear the appellants' actions for damages, which allegedly the Court of First Instance wrongly disregarded, they also contain a statement of the pleas in law to support the applications to set aside the contested orders.

38. The mere fact that the appeals contain long passages from the documents produced by the appellants before the Court of First Instance does not therefore render the appeals inadmissible.

39. I therefore propose that the Court dismiss the objection of inadmissibility of the appeals raised by the Council and the Kingdom of Spain.

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B - The substance of the appeals

1. Preliminary considerations

40. It is true that the appellants' pleas and arguments are badly presented in the appeal submissions, being arranged in three sections entitled Jurisdiction of the Community court' (paragraphs 33 to 44), The existence of damage' (paragraphs 45 to 49) and The exploitation by the Council of the European Union of the division of the activities of the European Union into three pillars' (paragraphs 50 to 59). (13)

41. It is clear that the appellants' remarks in paragraphs 45 to 49 aimed at proving the alleged damage and the causal link between that and Common Position 2001/931 do not challenge any assessment by the Court of First Instance, which did not rule on those aspects. Hence, these remarks do not constitute a ground of appeal and can, at most, be of relevance in the event that the Court sets aside the contested orders and decides to give a final ruling on the disputes under the first paragraph of Article 61 of its Statute, as requested by the appellants.

42. By contrast, it is rather unclear what objective the appellants aim to achieve, on the procedural level, by means of the remarks made in paragraphs 50 to 59 of their appeals, which are rather confused and, it is true, slavishly reproduce an entire section of the observations presented to the Court of First Instance on the objection of inadmissibility raised by the Council.

43. In those remarks, the appellants complain of misuse of procedure by the Council. They appear, in the final analysis, to reproach the Council for having fraudulently deprived them of judicial protection by not using a Community instrument to adopt the list of persons involved in terrorist acts, including persons to whom only Article 4 of Common Position 2001/931 applies. According to the appellants, the use of a Community instrument would have permitted such persons, including the appellants themselves, to bring an action before the Community court to challenge their inclusion on the list and obtain compensation. In this regard, the appellants claim unlawful discrimination against themselves, given that persons affected by the measures laid down in Articles 2 and 3 of the aforementioned common position, (14) who are included in the same list, do have judicial protection in that those measures are adopted by means of a Community action open to review by the Community court. However, in their defences the appellants manage to contradict that argument, maintaining that Articles 2 and 3 of Common Position 2001/931 were also applicable to themselves.

44. Considerations of this kind raise arguments which the Court of First Instance, on the basis of the claimed assumption that it had jurisdiction under Articles 235 EC and the second paragraph of Article 288 EC , considered and dismissed, within the scope of the limited examination of the substance of the actions for compensation at first instance, concluding with a finding that the claims were patently unfounded on the ground that there was no unlawful conduct on the part of the Council. (15) However, the appeals and defences contain no passage that makes it possible to hold that the appellants have challenged the parts of the orders of the Court of First Instance relating to that finding. As I have already noted in point 36 above, the appeals appear to turn solely on the declaration of lack of jurisdiction in paragraph 40 of the contested orders. Moreover, the conclusion that the appellants appear to draw from these considerations is that the present dispute therefore comes within the jurisdiction of the Community courts pursuant to Article 235 EC and the second paragraph of Article 288 EC'. (16) This is precisely what the Court of First Instance stated in paragraph 42 of the contested orders.

45. I therefore consider that the considerations in paragraphs 50 to 59 of the appeals, complemented by those contained in paragraphs 12 to 16 of the statements of defence, should be considered to be inadmissible, first because they fail to meet the minimum requirements of clarity and precision and secondly because they do not identify precisely the contested elements of the orders against

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which the appeals have been brought.

46. In any case, even supposing that such considerations can legitimately be interpreted as being designed to substantiate a further ground of appeal against the declaration of lack of jurisdiction in paragraph 40 of the contested orders, a ground consisting in the presumed impossibility for the Council to rely on the lack of jurisdiction of the Community court with respect to the appellants, it would nevertheless appear to me to be unfounded.

47. It is quite obvious that, contrary to what is maintained in the statements of defence, the appellants were affected by only Articles 1 and 4 of Common Position 2001/931, and not also by Articles 2 and 3. The contrary argument adduced in the statements of defence, according to which the footnote to the Annex to Common Position 2001/931 referred only to the natural persons on the list and not also to the groups and entities named there, is very strange, given that in the list there was also an asterisk against the names of Gestoras Pro Amnistía and Segi and that the term persons' is sufficiently general to cover groups and entities as well.

48. As the Court of First Instance correctly found in the contested orders, (17) the mutual assistance between the Member States to prevent and combat terrorist acts, provided for in Article 4 of the aforementioned common position, falls within the scope of police and judicial cooperation in criminal matters under Title VI of the EU Treaty. The appellants have not in any way shown, either at first instance or before the Court of Justice, that such mutual assistance should have been ordered or at least implemented by means of Community instruments. (18) Moreover, they cannot seriously reproach the Council for not having made them subject also to the sanctions envisaged in Articles 2 and 3 of the common position. Hence, it has not been demonstrated in any way that the Council committed an abuse of procedure and infringed the competences of the Community in such a way that it might be argued, if only in the abstract, that the lack of jurisdiction of the Community courts cannot be used as an argument against the appellants.

49. I therefore consider that the Court should focus its attention on the ground of appeal set out in paragraphs 33 to 44 of the appeals - relating to the infringement by the Court of First Instance of Article 6(2) EU, of the Council declaration concerning the right to compensation and of the eighth recital' of Decision 2003/48 - and on the declaration of lack of jurisdiction to which it refers. Consequently, in the remainder of this Opinion I shall refrain from further consideration of the parts of the orders of the Court of First Instance that are not contested, which are summarised in points 25 and 26 above.

2. The grounds adopted by the Court of First Instance in support of the declaration of its own lack of jurisdiction

50. The reasoning followed by the Court of First Instance to conclude that it had no jurisdiction to hear the appellants' actions for damages (19) consists essentially of the following passages:

(1) The acts that allegedly caused the damage of which the appellants complain - in other words Common Position 2001/931 and the subsequent common positions updating it which kept the names of Gestoras Pro Amnistía and Segi on the list of persons involved in terrorist acts - are, as far as the part relating to the appellants is concerned, based on Article 34 EU and come within the scope of Title VI of the EU Treaty relating to police and judicial cooperation in criminal matters; (20)

(2) No judicial remedy for compensation is available in the context of Title VI of that Treaty and no jurisdiction of the Community court to hear such an action can be deduced from Article 46(d) EU; (21)

(3) The appellants probably' have no effective judicial remedy with regard to the inclusion of

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Gestoras Pro Amnistía and Segi on the list in question; (22)

(4) The last circumstance cannot, however, in itself give rise to Community jurisdiction to hear the appellants' claims for compensation, given that the legal system of the European Union (the Union') is based on the principle of conferred powers, as follows from Article 5 EU; (23)

(5) The Council declaration concerning the right to compensation is also incapable of forming a basis for the jurisdiction of the Community court in the present case. (24)

3. Analysis

51. According to the appellants, the Court of First Instance erred in law by declaring its lack of jurisdiction to hear actions for compensation for damage allegedly caused to them by the inclusion of Gestoras Pro Amnistía and Segi on the list of persons involved in terrorist acts. In their opinion, a legal basis for the jurisdiction of the Court of First Instance is to be found in Article 6(2) EU, read in conjunction with the Council declaration concerning the right to compensation and the eighth recital' of Decision 2003/48.

52. In that ground of appeal, the appellants do not appear to dispute the assessments of the Court of First Instance set out in (1), (2) and (3) of point 50 above. Their complaints appear to be directed essentially against the assessments of the Court of First Instance recalled in (4) and (5) of that point.

53. However, since the point at issue is the jurisdiction of the Community court, which is a matter of public policy to be examined in the light of all the relevant facts and not only those put forward by the parties, I consider it necessary to review not only the specific complaints brought by the appellants in their appeals but the entire reasoning that led the Court of First Instance to make the contested declaration of lack of jurisdiction, and hence also its assessments recalled in (1), (2) and (3) of point 50 above, which are not disputed by the appellants.

(a) The legal basis of the measures taken with regard to the appellants

54. As can be seen from the fifth recital' in its preamble, Common Position 2001/931 is a response to the perceived need to take additional measures in order to implement [Security Council]... Resolution 1373 (2001)', which required all States to take a series of actions to combat terrorism, including, in particular, to afford one another the greatest measure of assistance in connection with criminal investigations and other proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings.

55. In that sense, Common Position 2001/931 can be considered to be an act which, as far as its objectives are concerned , comes within the framework of the common foreign and security policy under Title V of the EU Treaty. However, some of the measures for which that act provides - those affecting the appellants Gestoras Pro Amnistía and Segi, which are laid down in Article 4 (that is to say, mutual assistance between Member States to prevent and combat terrorist acts and, in particular, in connection with investigations and criminal proceedings against the persons named on the annexed list) - are operational instruments and as such come within the scope of police and judicial cooperation in criminal matters under Title VI of the EU Treaty.

56. The inclusion and maintenance of Gestoras Pro Amnistía and Segi on the list of persons involved in terrorist acts was a means of applying only Article 4 of Common Position 2001/931 to those organisations. I therefore share the assessment of the Court of First Instance, referred to in (1) of point 50 above, that the legal basis of the acts which were allegedly detrimental to the legal position of the appellants is Article 34 EU, inserted into Title VI of the EU Treaty.

57. I also wish to emphasise, however, that, although in accordance with the second sentence of Article 1(4) of Common Position 2001/931 persons, groups and entities identified by the Security

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Council as being related to terrorism and against whom it has ordered sanctions may be included in the list in question, it is not alleged in the present cases that Gestoras Pro Amnistía and Segi were placed on the list as a consequence of their being identified by the Security Council. It must therefore be held that their inclusion was decided completely autonomously by the Council on the basis of information from one or more Member States in accordance with the criteria specified in the first sentence of Article 1(4) of Common Position 2001/931. More generally, I note that Article 1 of that act does not constitute the transposition of similar provisions in Resolution 1373 (2001), but is the result of an autonomous decision by the Council.

(b) The absence of provision in the EU Treaty for actions for damages and for jurisdiction of the Court of Justice over police and judicial cooperation in criminal matters

58. I also share the assessments of the Court of First Instance referred to in (2) of point 50 above, but subject to a number of appropriate clarifications.

59. I observe that Article 46 EU lists exhaustively (as shown by the use of the term only') the powers of the Court of Justice in the fields of activity of the Union governed by the EU Treaty. As regards the provisions of Title VI of the Treaty, Article 46(b) provides that [t]he provisions of the [EC] Treaty, the [ECSC] Treaty and the [Euratom] Treaty concerning the powers of the Court of Justice of the European Communities and the exercise of those powers shall apply' under the conditions provided for by Article 35 [EU]'.

60. Article 35 EU provides that:

1. The Court of Justice of the European Communities shall have jurisdiction, subject to the conditions laid down in this Article, to give preliminary rulings on the validity and interpretation of framework decisions and decisions, on the interpretation of conventions established under this Title and on the validity and interpretation of the measures implementing them.

2. By a declaration made at the time of signature of the Treaty of Amsterdam or at any time thereafter, any Member State shall be able to accept the jurisdiction of the Court of Justice to give preliminary rulings as specified in paragraph 1.

3. A Member State making a declaration pursuant to paragraph 2 shall specify that either:

(a) any court or tribunal of that State against whose decisions there is no judicial remedy under national law may request the Court of Justice to give a preliminary ruling on a question raised in a case pending before it and concerning the validity or interpretation of an act referred to in paragraph 1 if that court or tribunal considers that a decision on the question is necessary to enable it to give judgment, or

(b) any court or tribunal of that State may request the Court of Justice to give a preliminary ruling on a question raised in a case pending before it and concerning the validity or interpretation of an act referred to in paragraph 1 if that court or tribunal considers that a decision on the question is necessary to enable it to give judgment.

4. Any Member State, whether or not it has made a declaration pursuant to paragraph 2, shall be entitled to submit statements of case or written observations to the Court in cases which arise under paragraph 1.

5. The Court of Justice 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.

6. The Court of Justice shall have jurisdiction to review the legality of framework decisions

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and decisions in actions brought by a Member State or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers. The proceedings provided for in this paragraph shall be instituted within two months of the publication of the measure.

7. The Court of Justice shall have jurisdiction to rule on any dispute between Member States regarding the interpretation or the application of acts adopted under Article 34(2) whenever such dispute cannot be settled by the Council within six months of its being referred to the Council by one of its members. The Court shall also have jurisdiction to rule on any dispute between Member States and the Commission regarding the interpretation or the application of conventions established under Article 34(2)(d).'

61. Hence, Article 35 EU does not envisage an action to obtain compensation for damages caused by the activities of the Union in the field of police and judicial cooperation in criminal matters.

62. I nevertheless wish to point out immediately that, in my opinion, although Article 46(b) EU taken in conjunction with Article 35 EU excludes the jurisdiction of the Community court for actions for compensation for damage caused by the Union's activities in the field of police and judicial cooperation in criminal matters, it does not for that reason as a general rule preclude the bringing of such judicial actions. The EU Treaty does not mention such actions, but nor does it preclude them. I shall return to this point later.

63. I also share the assessment of the Court of First Instance that Article 46(d) EU does not give the Community court further competence. (25)

64. Indeed, in providing that [t]he provisions of the [EC] Treaty, the [ECSC] Treaty and the [Euratom] Treaty concerning the powers of the Court of Justice of the European Communities and the exercise of those powers shall apply' to [Article 6(2) EU] with regard to action of the institutions, in so far as the Court has jurisdiction under the Treaties establishing the European Communities and under this Treaty', Article 46(d) EU, which was inserted into the EU Treaty by means of the Treaty of Amsterdam, simply makes it clear that the Community court may verify that the acts of the institutions comply with the fundamental rights recognised by the Union to be general principles of Community law' in the contexts in which that court has jurisdiction to intervene on other grounds. Hence, that provision does not establish a specific jurisdiction of the Community court or a specific remedy for the infringement of fundamental rights comparable to the Verfassungsbeschwerde under German law or the recurso de amparo under Spanish law. (26)

65. I also observe, from a different angle, that under Article 46(f) EU the Community court has jurisdiction to interpret and apply Article 46 EU itself on the powers of the Court of Justice. Insofar as it thus has jurisdiction under the EU Treaty, and for the purposes of the exercise of that jurisdiction, the Community court is also authorised to interpret and apply Article 6(2) EU as regards the action of the institutions, in conformity with Article 46(d) EU.

66. I further consider that, in exercising those powers based on Article 46(f) EU, the Community court is not prevented from also taking into account other provisions of the EU Treaty, even though they are not mentioned in Article 46 EU. I note in this regard that, under Article 31(1) of the Vienna Convention on the Law of Treaties signed in Vienna on 23 May 1969 (the Vienna Convention'), when interpreting a treaty its terms must be considered in their context', which comprises, inter alia, the text' of the treaty, including its preamble and annexes'. Hence, in the context of these appeals and for the purpose of examining the jurisdiction of the Community court for the actions for damages brought by the appellants, there is nothing to prevent the Court of Justice from taking into account, in particular, the preamble to the EU Treaty and the Common provisions' in Title I thereof, such as Article 5 EU, which the Court of First Instance cited in the contested orders,

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or Article 6(1) EU.

(c) The inappropriateness of the Council declaration concerning the right to compensation as a basis for the jurisdiction of the Community court to hear the appellants' claims for damages

67. Moreover, the assessment of the Court of First Instance recalled in (5) of point 50 above regarding the inappropriateness of the Council declaration concerning the right to compensation as a basis for the jurisdiction of the Community court to hear the appellants' claims for damages seems unquestionably to be correct. (27)

68. First of all, that declaration does not in any way suggest that compensation for damages due to an error as to the persons, groups or entities included in the list of persons involved in terrorist acts may be claimed in an action before the Community court.

69. Furthermore, such an action before the Community court is precluded by the provisions of the EU Treaty, which can obviously not be waived or amended by a declaration annexed to the minutes recording approval of an act of secondary legislation such as a common position.

70. None the less, I shall indicate below the sense in which the declaration relied upon by the appellants is not, in my opinion, entirely without significance.

(d) The supposed lack of effective judicial protection of the appellants' rights

71. However, I consider that the assessment by the Court of First Instance that the appellants had no judicial remedy against the inclusion of Gestoras Pro Amnistía and Segi on the list of persons involved in terrorist acts, which moreover is expressed in curiously perplexed terms, (28) to be unjustified, but in some ways not surprising.

72. Before setting out the reasons that lead me to consider that assessment unjustified, I wish to demonstrate the seriousness of its consequences.

(i) The consequences of a finding of a lack of judicial protection of the appellants' rights

73. It must be remembered that, pursuant to Article 6(1) EU, as amended by the Treaty of Amsterdam, [t]he Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States'.

74. Article 6(2) EU, which enshrines in a rule of primary law a settled principle of the case-law of the Court on the application of the EC Treaty and extends it to all spheres of activity of the Union, states that [t]he Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law'.

75. The primary importance which the versions of the EU and EC Treaties resulting from the Treaty of Amsterdam give to the principle of the rule of law and the protection of fundamental rights (29) and which is widely and variously celebrated in the literature is also evident in other provisions of those Treaties: Article 7 EU, which provides for a procedure whereby the Council may determine the existence of a serious and persistent breach by a Member State of one or more of the principles mentioned in Article 6(1) EU, with the possibility of suspending certain of the rights deriving from the application of the EU Treaty to the Member State in question; Article 49 EU, which makes the entry of new States to the Union conditional on their respecting the principles set out in Article 6(1) EU; and Article 11(1) EU, which makes the develop[ment] and consolidat[ion of] democracy and the rule of law, and respect for human rights and fundamental freedoms' one of the objectives of the common foreign and security policy, an objective to which, under Articles 177(2) EC and 181a(1) EC, the Community policies in the fields of development cooperation and economic,

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financial and technical cooperation with third countries are required to contribute.

76. Mention should also be made of the Charter of Fundamental Rights of the European Union, which was solemnly proclaimed by the European Parliament, the Council and the Commission in Nice on 7 December 2000 after having been approved by the Heads of State or Government of the Member States (the Charter'). While the Charter is not a legally binding instrument, its principal aim, as is apparent from its preamble, is to reaffirm rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the [EU] Treaty, the Community Treaties, the [ECHR], the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court... and of the European Court of Human Rights'. (30)

77. As regards the principle of the rule of law, I would point out that the Court has already drawn from that the corollary, with reference to the European Community and in describing it as a Community based on the rule of law', that the Member States and the institutions are subject to judicial review of the compatibility of their acts with the EC Treaty and with the general principles of law, which include fundamental rights. (31) Similarly, it must be held that, if the Union is based on the principle of the rule of law (Article 6(1) EU), its institutions and the Member States of which it is composed cannot be exempted from judicial review of the compatibility of their acts with the Treaty, in particular Article 6(2) EU, even where they act on the basis of Titles V and VI of the EU Treaty.

78. As regards the protection of fundamental rights, which form an integral part of the general principles of law, in ensuring observance thereof the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories, in particular the ECHR, which the Court deems to have special significance' in that respect. As the Court has further stated, it follows that the Community cannot accept measures which are incompatible with observance of the human rights thus recognised and guaranteed, which therefore constitutes a precondition for the legality of Community acts. (32) Given the wording of Article 6(2) EU and its place among the Common provisions' in Title I of the EU Treaty, similar considerations must obviously be made with reference to measures expressing the action of the Union in the fields of the common foreign and security policy (the second pillar') and police and judicial cooperation in criminal matters (the third pillar').

79. Respect for human rights and fundamental freedoms and the principle of the rule of law are therefore an internal' dimension, being a foundation of the Union and a criterion for assessing the legality of the action of its institutions and of the Member States in the matters for which the Union has jurisdiction, and an external' dimension, as a value to be exported' beyond the borders of the Union by means of persuasion, incentives and negotiation.

80. The Court has already shown that entitlement to the effective judicial protection of rights invoked in this case by the appellants forms an integral part of the general principles of law deriving from the constitutional traditions common to the Member States and that it is also enshrined in Article 6(1) EU and Article 13 of the ECHR. (33) I would add that the right in question is also recognised by Articles 8 and 10 of the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations by means of Resolution 217A (III) on 10 December 1948 and by Articles 2(3) and 14(1) of the International Covenant on Civil and Political Rights, which was adopted on 16 December 1966 and came into force on 23 March 1976. (34) The Charter provides for it in Article 47.

81. It should be pointed out that the reliance in this case on the fundamental right to effective judicial protection assumes particular importance, in that such protection in turn affects fundamental

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rights recognised and protected by Union law. In their actions before the Court of First Instance, the appellants maintained, with arguments that are not indefensible, that the inclusion on the list of persons involved in terrorist acts, of which they complain, harmed the genuine fundamental rights of the organisations Gestoras Pro Amnistía and Segi and/or of their spokespersons, such as, in particular, the presumption of innocence (Article 6(2) of the ECHR and Article 48(1) of the Charter), freedom of expression (Article 10 of the ECHR and Article 11 of the Charter), freedom of association (Article 11 of the ECHR and Article 12 of the Charter) and the right to respect for private life (Article 8 of the ECHR and Article 7 of the Charter). (35)

82. Hence, to acknowledge, as the Court of First Instance felt it had to do in the contested orders, that the appellants are denied an effective judicial remedy against their inclusion means recognising that, in the sphere of police and judicial cooperation in criminal matters, situations may arise in which, where judicial remedy is absent, the action of the Union may in fact infringe with impunity all the other rights and fundamental freedoms which the Union professes to respect.

83. Although it is true that, according to the case-law of the European Court of Human Rights, the socalled right to a court' is not absolute, but may be subject to limitations, it must be remembered that according to that Court such limitations are permissible only where they pursue a legitimate aim and are proportionate to that aim and do not restrict the individual's access to a court in such a way that the very essence of the right is impaired. (36) I do not consider that those requirements are met where there is a total absence of judicial protection of the appellants' rights, as found by the Court of First Instance, which would be the result not of specific regulations designed to limit access to a court in pursuit of a particular aim but of the failure to establish adequate remedies in an entire sphere of activity of the Union.

84. Moreover, I wish to point out that the European Court of Human Rights has emphasised that Article 1 of the ECHR, under which the Contracting States secure to everyone within their jurisdiction the rights and freedoms defined in Section I' of the ECHR, makes no distinction as to the type of rule or measure concerned and does not exclude any part of those States' jurisdiction' from the application of the ECHR. (37)

85. If in a case such as that of the appellants there is genuinely no effective judicial remedy, this would not only be an extremely serious and flagrant inconsistency of the system within the Union, but also a situation which, from an external point of view, exposes the Member States of the Union to censure by the European Court of Human Rights and not only impairs the image and identity of the Union on the international plane (38) but also weakens its negotiating position vis-à-vis third countries, creating a theoretical risk that they will activate clauses on the respect of human rights (so-called conditionality clauses'), which the Union itself ever more frequently requires to be included in the international agreements it signs. (39)

86. In particular, from the point of view of observance of the obligations undertaken by the Member States when they signed the ECHR, it is entirely improbable that the European Court of Human Rights would extend to the third pillar of the Union the presumption of equivalence in the protection of the fundamental rights that it has established between the ECHR and Community law, or the first pillar' of the Union, and which leads that Court to carry out only a marginal' review of the compatibility of acts adopted by the Community institutions with the ECHR. (40) On the other hand, it is highly likely that, in the course of a full examination of the compatibility of acts adopted by the institutions under Title VI of the EU Treaty with the ECHR, the European Court of Human Rights will in future rule that the Member States of the Union have infringed the provisions of that Convention, or at least Articles 6(1) and/or 13.

87. I wish to explore two further points regarding relations with the ECHR.

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88. First, I consider that the decision taken by the European Court of Human Rights under Article 34 of the ECHR regarding the actions brought before that Court by the appellants (see point 14 above) neither gives reassurance from the point of view I have just set out nor, and even less, excludes the possibility of a breach of the appellants' right to effective judicial remedy in this case from the point of view of Union law. It is a decision not on the merits of the case but on admissibility, based on a denial that, in the light of the specific nature of the actual case , the appellants are victims' within the meaning of Article 34 of the ECHR, which is a purely procedural provision of the ECHR and hence cannot, in my view, be relevant to the protection of fundamental rights within the Union. (41)

89. Secondly, there would be little point in noting that, since it would in any case be possible to bring an action before the European Court of Human Rights for breach of fundamental rights against acts adopted by the institutions in the field of police and judicial cooperation in criminal matters, there is not a gap in the protection of such rights in that field. The review carried out by that Court is a subsidiary review outside the Union system and hence would not make good any lack of adequate guarantees within the system to protect fundamental rights or resolve the serious inconsistency that would ensue for the system itself, as I have shown above.

90. I would add, however, that were the Court to endorse the recognition of such a gap in the protection of fundamental rights in the field of police and judicial cooperation in criminal matters, the national courts of various Member States would feel entitled, if actions were brought before them, to verify whether the acts adopted by the Council on the basis of Article 34 EU (42) were compatible with the fundamental rights guaranteed by their respective national legal systems, but not necessarily in an identical manner. This would impair the equality of citizens of the Union before the law. The theory of so-called counter-checks' under domestic law, which have become established in the constitutional case-law of several Member States as a barrier to the institutions' exercise of the parts of sovereignty transferred to the Community, (43) would find scope for much more concrete application in the third pillar of the Union than it has had in relation to the action of the Community.

(ii) The appellants are not deprived of effective judicial protection of their rights

91. Having emphasised the serious consequences of a finding of a lack of judicial protection of (fundamental) rights invoked by the appellants, such as that made in paragraph 38 of the contested orders, it appears even more obvious that, if possible, the EU Treaty should be interpreted in a way that ensures such protection within the system established by that Treaty. (44)

- Inadequacy, for the purposes of providing judicial protection of the appellants' rights, of judicial remedies against national measures implementing Article 4 of Common Position 2001/931 and of the reference for a preliminary ruling on validity under Article 35(1) EU

92. It must be borne in mind, as the Court of First Instance has shown, (45) that in the present case the appellants are claiming compensation for an infringement of their (fundamental) rights that is due not so much to their being subject to the measures laid down in Article 4 of Common Position 2001/931 as directly to the inclusion of Gestoras Pro Amnistía and Segi on the list of persons involved in terrorist acts. The harm of which they complain therefore arises irrespective of whether national measures implementing the abovementioned article are actually adopted.

93. Hence, the Court of First Instance correctly stated that the protection of such rights cannot reside in the possibility of invoking the (non-contractual) liability of individual Member States for national measures enacted pursuant to Article 4 of Common Position 2001/931. (46)

94. The Court of First Instance then held that the Court of Justice's power to give preliminary rulings on validity under Article 35(1) EU was equally inappropriate as a means of ensuring such protection. I share that assessment, even beyond the reason given in the contested orders, namely

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that that power does not relate to common positions but only to framework decisions and decisions, (47) and beyond the possibility of reclassifying Common Position 2001/931 as a decision on the basis of the content of the act.

95. I note, rather, that a reference for a preliminary ruling, including one regarding validity, is not a remedy in the true sense but a means of cooperation between national courts and the Community court in the context of an action that can be brought before national courts. Typically, a reference for a preliminary ruling on validity is appended to an action for annulment brought at national level against national measures implementing the act whose validity is being challenged. In my view, it is rather difficult in a case such as the present one to invoke the Court's power to give a preliminary ruling on validity under Article 35(1) EU in the context of an action challenging possible measures implementing Article 4 of Common Position 2001/931. That article does not grant Member States and their authorities new powers but merely encourages or, at most, requires Member States and their authorities to use existing powers in accordance with acts of the European Union and other international agreements, arrangements and conventions which are binding upon Member States'. Those powers could and can be exercised in respect of the persons listed in the annex to Common Position 2001/931 even in the absence of that act. (48) Hence, I do not see how the question of the legality of the inclusion of a particular person on the abovementioned list can be relevant for the purposes of an examination, by a national court, of the legality of national measures such as those contemplated in the abovementioned Article 4.

96. In any case, exercise of the power to give a preliminary ruling on validity could, at most, lead to a declaration that Common Position 2001/931 or the contested listings are invalid, but not to compensation for the damage that may have ensued. The possibility of obtaining compensation for damage sustained as a result of infringement of a right, where a simple finding of infringement or a declaration of the invalidity of the detrimental act is not sufficient adequately to restore the infringed right, is, in my opinion, inherent in judicial protection of the right if such protection is intended to be effective. (49)

97. Compensation for damage allegedly sustained is precisely the subject-matter of the action brought by the appellants before the Court of First Instance.

- The judicial protection of the appellants' rights rests with the national courts

98. The fact that the EU Treaty makes no provision for an action for damages possibly caused by acts adopted by the Council on the basis of Article 34 EU and prevents the Community court from hearing such actions, which are not mentioned in Article 35 EU, does not however, in my opinion, mean that the appellants in the present case are without effective judicial protection of the (fundamental) rights that they invoke.

99. I consider instead that a correct interpretation of the EU Treaty testifies to the fact that such protection exists, but is entrusted, in the present state of Union law , not to the Community court but to the national courts.

100. It should be noted, however, that under the arrangements provided for in the Treaty establishing a Constitution for Europe, which has not yet been ratified by all Member States, in a case such as the present one an individual would be able to bring before the Community court an action against the Union either for annulment (Article III365, which is also applicable to acts of the Union adopted in the field of police and judicial cooperation in criminal matters) (50) or for damages (Article III370 and the second paragraph of Article III431).

101. As I have stated, the Union is based, inter alia, on the principle of the rule of law and respect for fundamental rights. The rule of law is based not so much on rules and the proclamation of rights as on mechanisms that make it possible to ensure respect for rules and rights (ubi ius

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ibi remedium). The right to challenge a measure before the courts is inherent in the rule of law', (51) it is the corollary' to it, and both a victory over and an instrument' of it. (52) In Article 6(2) EU, Union law now expressly grants the individual a range of fundamental rights, which, as is clear from Article 46(d) EU, can be relied on before a court as criteria for the legality of acts of the Union.

102. The point of departure must therefore be that, under Article 6(1) and (2) EU, the Union recognises the judicial review of the legality of the action of its institutions and guarantees the judicial protection of rights, especially those that can be classified as fundamental.

103. No provision of the EU Treaty to the contrary can be invoked to claim, in particular, that the authors of that Treaty intended to exclude such review and protection from the field of police and judicial cooperation in criminal matters, where moreover the action of the Union may impair individuals' fundamental rights and freedoms more easily than in other fields within the jurisdiction of the Union and where the involvement of the European Parliament is still very limited. (53)

104. Article 46 EU concerns only the jurisdiction of the Community court and defines its scope. Furthermore, no provision of the EU Treaty gives that court exclusive power to assess the legality of the acts by which the Union performs its activities. It follows from the principle of conferred powers - which finds expression, inter alia, in the EU Treaty (Article 5) - that the exercise of Member States' sovereign powers, including judicial power, is reserved to the Member States themselves, and hence to their authorities, where such powers have not been conferred on institutions of the Union.

105. The power of national courts to review the legality of acts adopted by the Council pursuant to Article 34 EU, which is obviously limited by respect for the powers conferred on the Court of Justice, is rooted not only in the principles of the rule of law and respect for fundamental rights on which the Union is based (Article 6(1) and (2) EU), including the right to effective judicial protection, but also in the principle of loyal cooperation.

106. The Court has already confirmed that the principle of loyal cooperation is also binding in the area of police and judicial cooperation in criminal matters, meaning that Member States should take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under Union law. (54)

107. It must be deduced from this, in particular, that in the context of the third pillar of the Union as well it is for the Member States to establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection (55) and for their courts to interpret and apply the national procedural rules governing the bringing of actions in such a way as to ensure such protection.

108. Important evidence confirming, albeit indirectly, that acts adopted by the Council under Article 34 EU are subject to judicial review by national courts on the initiative of individuals can also be deduced from the rules on the judicial powers conferred on the Court by Article 35 EU.

109. By providing, in paragraph 1, that the Court has jurisdiction to give preliminary rulings, in particular, on the validity of framework decisions and decisions, Article 35 EU first of all confirms that such acts are not exempt from judicial review that can be initiated by individuals.

110. Moreover, Article 35(1) EU shows that to some extent national courts also operate with respect to the third pillar of the Union, as with respect to the first pillar, as common law courts' of the Union. By asking the Court to clarify the interpretation to be given to framework decisions and decisions, they can better ensure, for example, a conforming interpretation of national law (56) in relation to such acts. By referring questions on the validity of such acts to the Court,

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national courts can better ensure that the fundamental rights recognised by Union law, which individuals can invoke directly before a court, are respected by the action of the Union in the field of police and judicial cooperation in criminal matters.

111. In the framework of the third pillar of the Union, as in that of the Communities, the Court of Justice operates in a context in which the institutions of the Union coexist not only with the Member States but also with the individual authorities of those States. Among these authorities, the courts also contribute to shaping Union law. Even within the framework of the third pillar, the judicial system of the Union therefore does not consist solely of actions that can be brought before the Court of Justice but also of those that can be brought before national courts.

112. In Article 35 EU, the authors of the Treaty of Amsterdam significantly extended the jurisdiction of the Court of Justice with regard to police and judicial cooperation in criminal matters by comparison with the situation resulting from the Treaty of Maastricht. However, the provisions of that article on the Court's power to give preliminary rulings are designed to limit that power significantly. Moreover, they are modelled essentially on those laid down as between the Member States, after difficult negotiations, for the Europol Convention (57) and implemented in the Protocol on the interpretation of that Convention by the Court by way of preliminary rulings, (58) which are a compromise solution in the face of the hostility of some Member States towards an extension of the Community court's involvement in this area.

113. Hence, the Court's power to give preliminary rulings under Article 35(1) EU is optional for Member States. Under Article 35(2) EU, they can accept it or not (opt-in' system). On the basis of a notice published by the Council in the Official Journal of the European Union on 14 December 2005, (59) at that date only 14 Member States had declared that they accepted such jurisdiction. Naturally, the lack of acceptance by the other Member States does not prevent the courts of accepting States from referring questions to the Court for preliminary rulings and the Court from ruling on such questions.

114. If it were held that persons affected by measures enacting framework decisions or decisions under Article 34 EU, adopted by States that have not accepted the jurisdiction of the Court to give preliminary rulings, were not able to challenge the validity of such Council acts before the courts of those States, we would be in a situation of intolerable inequality between persons affected by one and the same act under Article 34 EU, who would or would not enjoy judicial protection against that act, depending on the options chosen by the individual State pursuant to Article 35(2) EU.

115. A reading of Article 35(1) and (2) EU that respected not only the right to effective judicial protection but also the principles of equality before the law (see Article 20 of the Charter) and non-discrimination on grounds of nationality (see Article 21(2) of the Charter) without thereby betraying the literal meaning of the provisions in question requires it to be recognised that even in the States that have not accepted the jurisdiction of the Court to give preliminary rulings individuals can mount a legal challenge to the validity of the framework decisions and decisions underlying the national measures which they are asking the national court to annul. In this case, it must be possible for a decision as to the validity or invalidity of the Council act to be taken by the national court itself in the absence of the possibility of a reference for a preliminary ruling.

116. But there is more. It follows from Article 35(3) EU that the power of the Court to give preliminary rulings, including rulings on validity, is, from the point of view of Union law, purely optional for the courts of the States that have accepted it. Whether Member States specify, by making the declaration referred to in paragraph 2, that they wish only their courts of last instance to be able to make a reference to the Court for a preliminary ruling (Article 35(3)(a)) or wish

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to grant that possibility to all of their courts (Article 35(3)(b)), under Article 35(3) EU it remains an option and not an obligation (may request') for a court, of any level, where it considers it necessary to enable it to give judgment, to seek a decision on the validity or interpretation of a framework decision or decision. The optional nature of the reference even for courts of last instance can be explained partly by the need for speed in the resolution of the disputes that may arise in the matters in question.

117. It is true that on the basis of Declaration 10 on Article 35 EU annexed to the Final Act of the Intergovernmental Conference of Amsterdam Member States may, when making a declaration pursuant to Article 35(2) EU, reserve the right to make provisions in their national law requiring their courts of last instance to refer questions on validity or interpretation to the Court of Justice. Nevertheless, it remains a fact that such an obligation stems not from Union law but from the domestic law of the Member State.

118. Hence, if, from the point of view of Union law , reference for a preliminary ruling on validity is optional even for a court of last instance, and only when it deems it necessary to obtain a ruling on the validity of a framework decision or decision of the Council in order to resolve the dispute before it, it follows that under Union law such an assessment may also be made directly by that court, without prior reference to the Court of Justice.

119. Similarly, in my opinion, it must be held that the possibility for a Member State, on the basis of Article 35(3)(a) EU, to reserve to the courts of last instance alone the power to make a reference for a preliminary ruling means that if the lower courts consider an assessment of the validity of a framework decision or decision of the Council to be necessary they can make it themselves. It does not seem sensible to hold that individuals must work fruitlessly through one or more levels of jurisdiction before being able to raise a question of validity and have it resolved.

120. Naturally, an assessment of validity or invalidity made directly by the national court will have effect only in the domestic case and not erga omnes.

121. On the other hand, I see no imperative reason to preclude national courts from having the power to determine that framework decisions or decisions under Article 34 EU are invalid. It is true that, with reference to Article 234 EC, in the Foto-Frost judgment (60) the Court established the rule that the national courts have no jurisdiction themselves to declare that acts of Community institutions are invalid. In the context of Article 234 EC that rule (hereinafter also referred to as the Foto-Frost rule') also applies to lower courts - which under that article have an option and not an obligation to make a reference - but it does not appear to apply in the context of Title VI of the EU Treaty.

122. In this regard, I observe that the two assumptions on which the Court based its interpretation in the Foto-Frost judgment regarding the exclusive jurisdiction of the Community court to determine that acts of the Community institutions are invalid do not apply in the context of Title VI of the EU Treaty.

123. First, it cannot be said - as the Court was able to do with reference to Articles 230 EC and 241 EC on the one hand and Article 234 EC on the other and in relation to measures adopted by Community institutions (61) - that Title VI of the EU Treaty established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of the Council measures referred to in Article 34 EU. Indeed, it is clear that the jurisdiction conferred on the Court of Justice by Article 35 EU alone does not constitute a complete system of legal remedies and procedures such as to ensure review of the legality of such measures; as proof, one need only consider that a reference for a preliminary ruling on validity is not possible in the Member States that have not made a declaration in accordance with Article 35(2) EU, given

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the lack of provision for any direct recourse to the Court of Justice by individuals against such acts.

124. In paragraph 35 of the Pupino judgment, (62) the Court itself noted, on the other hand, that its jurisdiction by virtue of Article 35 EU ... is less extensive under Title VI of the [EU] Treaty than it is under the EC Treaty'.

125. For the sake of completeness, I would add that in paragraph 35 of that judgment the Court simultaneously noted that there is no complete system of actions and procedures designed to ensure the legality of the acts of the institutions in the context of Title VI'. That observation must, however, be read against the background of the reasoning that led the Court to make it. The Court was responding to arguments raised before it by a number of Member States that deduced from the lesser degree of integration in police and judicial cooperation in criminal matters than in the action of the Community that it was impossible to accord to a framework decision under Article 34 EU the so-called indirect effects (obligation for national courts to interpret national law in conformity with Community law) that are recognised in the case of Community directives. The Court therefore considered that the circumstances it described in paragraph 35 of that judgment confirmed the lesser degree of integration under Title VI of the EU Treaty than under the EC Treaty, and then nevertheless concluded that the degree of integration had no influence for the purposes of the question on which it had been called upon to rule. (63) In my opinion, the absence of a complete system of actions and procedures designed to ensure the legality of the acts of the institutions in the context of Title VI' can constitute a relevant indicator of weak integration in so far as it refers to the supranational level.

126. I therefore consider that the passage from the Pupino judgment reproduced in the preceding point should not be treated simply as an obiter dictum but should be construed as meaning, in the light of the context in which it appears, that Title VI does not confer on the Court of Justice sufficient jurisdiction to ensure a review of the legality of the acts of the institutions. That is precisely what I have observed in point 123 above.

127. Secondly, to invoke the second assumption on which the Court based the Foto-Frost rule - namely that the main purpose of the power to give preliminary rulings under Article 234 EC is to ensure that Community law is applied uniformly by national courts' (64) - in order to assert that a similar rule also existed in the context under examination would carry little conviction. In fact, the à la carte regime of the power to give preliminary rulings under Article 35 EU is patently an inappropriate means of ensuring the uniform application of Union law by national courts.

128. In this regard, I would point out that various Member States of the Union, as is their right under Article 35 EU, have not so far accepted that jurisdiction; as I have noted above, their courts must therefore consider themselves authorised to make their own assessment of both the scope and the validity of framework decisions and decisions under Article 34 EU when necessary to decide cases before them. For that reason alone, the uniform application of Union law in the area under examination is not guaranteed, even leaving aside doubts whether these courts are bound by the preliminary rulings delivered by the Court at the request of the courts in Member States that have accepted that jurisdiction.

129. Moreover, the fact that Article 35 EU allows Member States to preclude references for preliminary rulings by courts other than those of last instance heightens the risk of a lack of uniformity in the application of Union law by national courts under Title VI of the EU Treaty, since some national cases are concluded without reaching the court of last instance.

130. It must therefore be recognised that the uniform application of Union law by national courts in the context of the third pillar of the Union is not currently guaranteed (not even, it should

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be noted, if a rule such as the Foto-Frost rule were recognised in that sphere). The risk of inconsistency in the application of the Council acts referred to in Article 34 EU is certainly a drawback of the judicial system constructed by the Treaty of Amsterdam for that pillar. However, in my opinion, a far more serious problem would flow from a reading of the provisions of the EU Treaty that sacrificed the judicial protection of rights that is inherent in a Community based on the rule of law, even though assiduously pursuing the objective of the uniform application of Union law in the context of the third pillar.

131. I would add that an interpretation of Article 35 EU consistent with the principle of respect for the fundamental right to such protection means that the Court cannot be granted exclusive jurisdiction to rule that an act adopted by the Council under Article 34 EU is invalid where individuals are not only denied direct access to the Community court but, given the purely optional nature of references for preliminary rulings even by national courts of last instance, are also denied adequate guarantees that the question of validity they have raised will be referred to the Court by that mechanism even in the Member States that have accepted the jurisdiction of the Court to give preliminary rulings.

132. I have made this digression on the model of the Court's power to give preliminary rulings laid down in Article 35 EU to show that the Member States have defined a judicial system for the third pillar of the Union in which the involvement of the Court of Justice, the supranational court, is more limited than under the EC Treaty and in which as a consequence wider jurisdiction is left to the national courts. This should come as no surprise, however, given that, partly as a result of the amendments contained in the Treaty of Amsterdam, police and judicial cooperation in criminal matters does not yet have the pronounced supranational features that characterise the action of the Community and remains halfway between pure intergovernmental cooperation and the Community integrationist' model. Further evidence of the enhanced role of national courts in the matters of the third pillar is to be found in Declaration 7 on Article 30 EU annexed to the Final Act of the Intergovernmental Conference of Amsterdam, which states that [a]ction in the field of police cooperation under Article [30 EU], including activities of Europol, shall be subject to appropriate judicial review by the competent national authorities in accordance with rules applicable in each Member State'.

- Nature of the judicial remedy available before national courts

133. I have shown above that in the context of the third pillar of the Union as well it is for the Member States to establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection and for their courts to interpret and apply the national procedural rules governing the bringing of actions in such a way as to ensure such protection. This means that the judicial protection which individuals must be held to have, under Union law, in national courts in relation to the action of the Union in the context of the third pillar is not limited to the mere possibility, expressly provided for in Article 35(1) EU, of indirectly challenging the validity of framework decisions and decisions (objection of invalidity in the context of a direct action against national implementing measures). It also includes, in particular, the right to challenge directly the validity of such acts and of common positions mentioned in Article 34(a) EU, where, despite having no direct effects, they are nevertheless likely of themselves, irrespective of national implementing measures, to cause immediate harm to the legal position of individuals; the purpose of such a challenge is to obtain at least compensation for any damage they may have caused.

134. In the latter regard, I consider that recognition of the right to such compensation is prevented neither by the failure to insert a specific provision in the EU Treaty expressly creating that right or the associated liability nor by the absence of a reference in the provisions of that Treaty, in particular in Article 41 EU, to the second paragraph of Article 288 EC. Indeed, the right

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in question is, as I have already indicated in point 96 above, a component of the right to the effective judicial protection of rights, (65) and furthermore it can be deduced - if not from customary international law, as the appellants allege - at least from the general principles common to the legal systems of the Member States, recourse to which must be held to be available in order to close the gaps in Union law due to the absence of written rules.

135. As the Court has already had occasion to note in order to assert the principle of the State's liability for damage caused by breach of its obligations under Community law, the principle of the non-contractual liability of the Community expressly laid down in Article 288 EC is simply an expression of the general principle familiar to the legal systems of the Member States that an unlawful act or omission gives rise to an obligation to make good the damage caused'. (66) It can therefore be said that the principle of the public authorities' liability for damage caused to individuals as a result of breaches of Union law, in particular infringement of the fundamental rights accorded to them by that law, is inherent in the system of the EU Treaty. (67)

136. The existence of that liability, moreover, was essentially recognised by the Council in the declaration concerning the right to compensation, in which the institution recalls' that any error' as to persons, groups or entities involved gives the injured party that right.

137. In addition, the principle of the public authorities' liability for damage caused to individuals as a result of breaches of Union law is explicitly specified, in the context of police and judicial cooperation in criminal matters, in some of the provisions of the Europol Convention. On the premiss stated in the preamble to that Convention that, in the field of police cooperation, particular attention must be paid to the protection of the rights of individuals, and in particular to the protection of their personal data', Articles 38 and 39(2) of that Convention lay down respectively the principle of non-contractual liability of each Member State for any damage caused to an individual by unauthorised or incorrect data processing by Europol and that of the non-contractual liability of Europol for damage caused through the fault of its organs, of its deputy directors or of its employees in the performance of their duties.

138. It is appropriate to point out that the principle of loyal cooperation dictates that when national courts assess the legality of acts adopted by the Council under Article 34 EU, including an assessment made in an action for damages, they should do so in the light of the relevant provisions and general principles of Union law , especially the fundamental rights under Article 6(2) EU, namely those guaranteed by the ECHR and those stemming from the constitutional traditions common to the Member States. Reference by the national court to the constitutional provisions of its own legal system may not be sufficient to guarantee the standard of protection of fundamental rights deriving from Article 6(2) EU, to the extent that, as is repeatedly observed, that standard is not the lowest common denominator' of protection afforded to fundamental rights by the constitutional laws of the Member States but rather a high level of protection appropriate to the needs of Union law. Against that background, it will moreover be for national courts to assess any limitation on the exercise of fundamental rights that correspond to objectives of general interest, (68) taking account less of the needs of the State to which they belong than of the needs of the Union as a whole.

139. Application of the standard of protection required by Article 6(2) EU could undoubtedly pose some difficulties to the national court and involve it in clarifying the fundamental rights recognised by the Union, a task hitherto performed mainly by the Community court. Such difficulties should not, however, be exaggerated. National courts can rely for that purpose on the provisions of the Charter and on Community case-law, as well as on the provisions of the ECHR and the case-law of the European Court of Human Rights. In order to assess the legality of the Council acts described in Article 34 EU, at least those mentioned in Article 35(1) EU, national courts may naturally

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seek the assistance of the Court, to the extent that the choices made by the respective States under Article 35(2) and (3) EU allow, by making a reference for a preliminary ruling on validity. In any case, the difficulty in question cannot justify preferring the absence of judicial protection of fundamental rights, which result from Article 6(2) EU, in the context of Title VI of the EU Treaty.

140. Naturally, in the absence of rules of Union law, it is for the internal legal order of each Member State to designate the competent court and lay down the procedural rules for actions for damages intended to safeguard the fundamental rights which the Union grants to individuals against acts adopted by the Council under Article 34 EU. (69) The limits on the procedural autonomy of Member States represented by the principles of equivalence and effectiveness developed by the case-law of the Court on the EC Treaty (70) and likely to be transposed to the third pillar of the Union will apply in this regard.

- Practicability and effectiveness of compensation claims before national courts in relation to specific issues

141. In the contested orders, (71) the Court of First Instance considered that an action to establish the individual liability of each Member State before the national courts on account of their involvement in the adoption of Common Position 2001/931 and subsequent ones updating it was of little effect'.

142. I do not agree with that assessment, for which the Court of First Instance gave no reasons.

143. Undoubtedly, a number of questions arise for the purpose of assessing the practicability and effectiveness of a claim for redress for the infringement of the appellants' rights before national courts. I shall briefly list and describe those questions, solely to show that answers can be found and that such protection is therefore not merely a theoretical possibility, since the search for the most adequate answer is not necessary for the purpose of ruling on the present appeals and it will be for the national court seised.

144. First, there arises the question as to the identity of the person potentially liable to make good the alleged damage. In essence, against whom should the appellants bring an action before the national courts to obtain compensation for the damage allegedly caused by the inclusion of Gestoras Pro Amnistía and Segi on the list of persons involved in terrorist acts? Would non-contractual liability fall on the Union as such or, jointly and severally, on the individual Member States, which unanimously adopted Common Position 2001/931 and the subsequent positions updating it? The reply to that question will depend on the answer to the question of the legal personality of the Union, which has been extensively debated in the literature. In that regard, I note that for Europol, as for the European Community, the explicit Treaty provision establishing non-contractual liability is accompanied by the express attribution both of legal personality and, in each of the Member States, of the most extensive legal capacity available to legal persons under national law, including the capacity to be a party to legal proceedings. (72)

145. Secondly, there is the problem of identifying the national legal system competent to hear the hypothetical action for damages. That problem is to some extent linked to that of the capacity to be sued.

146. If non-contractual liability lies with the Union as an international organisation with legal personality, an action could be brought in the courts of the State (and place) where the harmful event occurred or may occur, in accordance with the criterion laid down in Article 5(3) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. (73) I note, moreover, that Article 39 of the Europol Convention makes reference to the relevant provisions of the Brussels Convention of 27 September 1968 (now replaced, as between Member States, by the abovementioned regulation) to determine the

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national courts competent to deal with disputes involving Europol's liability.

147. If, however, non-contractual liability rests with the individual Member States, it could be enforced against each State, essentially in the courts of that State, on the basis of the criterion of the jurisdiction of the defendant's domicile laid down in Article 2(1) of Regulation No 44/2001. Alternatively, in accordance with the criterion laid down in Article 5(3) of that regulation, the action could be brought in the courts of the State in which the harmful event occurred or may occur against that State.

148. Note should be taken, however, of the mechanism established by Article 38 of the Europol Convention to engage the liability of the Member States for damage caused as a result of unauthorised or incorrect data processing by Europol. In providing that each Member State' is liable for such damage, that article lays down that [o]nly the Member State in which the event which gave rise to the damage occurred may be the subject of an action for compensation on the part of the injured party, who shall apply to the courts having jurisdiction under the national law of the Member State involved'. It goes on to state that a Member State may not plead that another Member State [or Europol] had transmitted inaccurate data in order to avoid its liability... vis-à-vis an injured party'. Finally, it establishes a right for the State that had to pay compensation to be reimbursed if the conduct which caused the damage is attributable to Europol or to another State.

149. Thirdly, the problem of jurisdictional immunity of States and international organisations could prove a procedural obstacle to the effectiveness of a right to bring an action for compensation in the national court against Council acts adopted under Article 34 EU.

150. If it were held that non-contractual liability rested with Member States individually, the problem might arise only if the appellants intended to enforce the liability of a Member State in the courts of another Member State. It would obviously not arise in the more realistic hypothesis of an action brought against a Member State in its own courts. The States' jurisdictional immunity would therefore not be an absolute impediment to claiming the right to compensation in national courts.

151. On the other hand, if it were held that it was the Union as such, in other words in its capacity as an international organisation with legal personality, that bore liability for damages, besides the fact that the EU Treaty and the protocols annexed thereto do not confer jurisdictional immunity on the Union (just as the EC Treaty and its protocols do not confer it on the Community (74)), I believe it can be held that where such immunity is accorded to international organisations by the domestic law of the jurisdiction seised or is recognised by the latter as deriving from customary international law, the Council is obliged to waive it under Union law if invoking it would entail a denial of justice. In particular, in a case such as the present one, such immunity for the Union should be ruled out in that it is likely to impair the effectiveness of the principle of non-contractual liability for damage caused by unlawful acts adopted by the Council and is incompatible with the principle of the effective judicial protection of rights.

152. In any event, the Council declaration concerning the right to compensation, which was made when Common Position 2001/931 was adopted, could be interpreted as an at least implied waiving of jurisdictional immunity as regards possible damage resulting from an unlawful inclusion on the list of persons involved in terrorist acts, in that it refers to the right to seek legal compensation'.

153. I would also add that the literature has recently documented a trend in international and domestic judicial practices to limit the jurisdictional immunity of international organisations, removing the absolute immunity they had under the more traditional concept. That limitation is often applied not only according to the type of activity of the international organisation giving rise to the dispute (iure imperii or iure gestionis) but also, in order to ensure respect for the

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fundamental right of access to the courts, according to whether or not alternative and effective means of resolving disputes are available to the private party, such as procedures established within the organisation itself or recourse to arbitration tribunals approved by the organisation. (75)

154. Fourthly, taking as given the principle of the right to reparation of damage resulting from unlawful acts adopted by the Council under Article 34 EU as a principle inherent in the EU Treaty, there nevertheless arises the problem of identifying the actual conditions for such liability and hence the rules applicable in that regard. It seems to me that essentially the following options are available: (i) the national legislation of the jurisdiction seised is applied in toto , subject to respect for the principles of equivalence and effectiveness; (ii) where liability can be attributed to a single State, the minimum conditions establishing the right to reparation developed by Community case-law on the liability of Member States for breaches of Community law are applied, and otherwise national law applies, subject to respect for the principles of equivalence and effectiveness; (76) (iii) whether liability rests with the State or the Union, the conditions developed by Community case-law on the non-contractual liability of the Community, such as the general principles common to the laws of the Member States (second paragraph of Article 288 EC), are applied. (77) I note, however, that the Europol Convention provides that where liability for damage resulting from unauthorised or incorrect data processing by Europol rests with the Member State the competent national court should apply its national legislation (Article 38(1)), but it has nothing to say about the rules applicable in the case of Europol's non-contractual liability (Article 39).

155. In the light of the foregoing considerations, I do not believe that the scope for the appellants to obtain compensation in the national courts falls into a judicial void or encounters obstacles that render it purely illusory.

- Conclusion regarding judicial protection in the national courts

156. With regard to the issue examined hitherto, I therefore conclude that, contrary to what the Court of First Instance gave to understand in the contested orders (78) and what is maintained in the appeals, under Union law the appellants enjoy the right to compensation in the national courts for possible infringement of their (fundamental) rights caused by the abovementioned common positions.

157. The erroneous assessment in this regard by the Court of First Instance did not, however, affect the contested declaration of lack of jurisdiction, which is based essentially on the assessments to which I referred in (2) and (4) of point 50 above. In that sense, I do not consider that the conditions are met for setting aside the contested orders on account of that erroneous assessment.

158. Conversely, given that the appellants have an effective judicial remedy in the national courts, the Community court's declaration of lack of jurisdiction to hear their action for non-contractual liability does not entail, as they claim, an infringement of their right to such protection. In that sense, these appeals are based on a false premiss and for that reason alone I consider that they should be dismissed.

(e) Effective judicial protection of rights, principle of conferred powers and jurisdiction of the Community court

159. It is therefore solely to cover the possibility that, contrary to my recommendation, the Court does not recognise that the appellants have an effective judicial remedy before the national courts that I shall devote some remarks to the merit of the assessment by the Court of First Instance (see (4 of point 50 above), which the appellants dispute, that the lack of such a remedy could not of itself form the basis for the jurisdiction of the Community court in a legal system, such as that of the Union, based on the principle of conferred powers. (79)

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160. The appellants' line of argument hinges essentially on a combination of the following elements: their right to effective judicial protection within the meaning of Article 6(2) EU; the Council declaration concerning the right to compensation; the eighth recital' of Decision 2003/48; the duty of Member States, on the basis of Article 30(3) of the Vienna Convention and Article 307(1) EC, to honour the international obligations previously accepted by their accession to the Charter of the United Nations and the ECHR; and lastly the general interpretative principle' relating to the enlarged jurisdiction' of the Court of Justice.

161. The Council and the Kingdom of Spain maintain that the appellants' arguments are entirely unfounded. The Council also contends that those based on the last two items mentioned in the preceding point are inadmissible in that they were raised by the appellants only in their statements of defence.

162. I have already shown, in point 67 above, that the Council declaration concerning the right to compensation is incapable of affecting the powers of the Court of Justice laid down in the EU Treaty. It is obvious that the same assessment should be made with regard to the eighth recital' of Decision 2003/48, which states that [that] Decision respects the fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union' and none of its provisions may be interpreted as allowing infringement of the legal protection afforded under national law to the persons, groups and entities listed in the Annex to Common Position 2001/931/CFSP'.

163. The appellants' argument regarding Article 30(3) of the Vienna Convention and Article 307(1) EC is also irrelevant. This argument, like the one concerning an enlarged jurisdiction' of the Court of Justice, can be examined despite the fact that it was raised only in the appellants' statements of defence, since it is simply an argument in support of a ground already put forward in the appeals and the jurisdiction of the Community court is, as I have already pointed out, a public policy issue that the Court may in any event examine of its own motion in the light of each relevant element.

164. Article 30 of the Vienna Convention concerns the rights and obligations of States parties to successive treaties relating to the same subject-matter and is not applicable in the present case because, contrary to the appellants' assertion, it cannot be said that the EU Treaty deals with the same subject-matter as the Charter of the United Nations and the ECHR. Moreover, the third paragraph of the article provides that [w]hen all the parties to the earlier treaty are parties also to the later treaty..., the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty'. The appellants lose sight of the fact that it is the EU Treaty that is later than the Charter of the United Nations and the ECHR.

165. As regards Article 307(1) EC, pursuant to which [t]he rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of ... [the EC] Treaty', it is sufficient to note, as does the Council, that it is not applicable in the context of Titles V and VI of the EU Treaty.

166. It therefore remains for me to examine the appellants' reliance on their right to effective judicial protection within the meaning of Article 6(2) EU and the general interpretative principle' relating to an enlarged jurisdiction' of the Court of Justice that they deduce, in particular, from the judgments in Les Verts v Parliament and the Chernobyl ' case. (80) I shall deal with these two points together. In essence, according to the appellants, in a community based on the rule of law such as the Union the Court of Justice is authorised to close gaps in the treaties to assert its own jurisdiction if that jurisdiction is not expressly and unequivocally limited or excluded in the treaties and is necessary to ensure the judicial protection of individuals' rights.

167. The principle of conferred powers, which finds expression in Articles 5 EC (with regard to the Community), 7 EC (with regard to the Community institutions) and 5 EU (with regard to the

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institutions forming the single institutional framework of the Union), does not imply a necessarily explicit conferment of powers. Article 308 EC on the implied powers of the Community proves the point. Powers can also be implied and deduced by interpreting the provisions of the treaties, even in a broad sense, subject to respect for the letter and structure of the provisions.

168. In my opinion, in the judgments in Les Verts v Parliament and Chernobyl , on which the applicants rely - as also in the judgments in ERTA, (81) Greece v Council (82) and Simmenthal v Commission (83) - the Court simply defined the scope of the provisions of the EEC Treaty regarding actions for annulment and objections of invalidity by giving a systematic teleological interpretation or one conducted in such a way as to ensure an outcome consistent with general principles or requirements of Community law (such as observance of the institutional balance, the need for a complete and consistent review of the legality of an act, the judicial protection of rights), but without thereby offending against the letter and structure of the Treaty. In particular, where the provisions are silent' the Court has been able to interpret them in the light of the overriding requirement that the most suitable legal protection be provided'. (84)

169. Conversely, in the judgment in Union de Pequeños Agricultores v Council , (85) the Court held that an interpretation of the requirement to be individually concerned within the meaning of Article 173 of the EC Treaty, made in the light of the principle of effective judicial protection, could not have the effect of setting aside the condition in question, expressly laid down in the Treaty, without going beyond the jurisdiction conferred by the Treaty on the Community courts. The broad interpretation of that provision invoked by the appellant, in the name of that principle, was prevented by the letter of the Treaty.

170. Nor should it be overlooked that there are more stringent judgments than those cited in point 168 above in which the Court, despite claims that the provisions on the institution of actions for annulment needed to be interpreted widely in order to ensure individuals' legal protection, nevertheless interpreted the limits of its own jurisdiction by adhering strictly to the situations expressly contemplated by the relevant provision. (86)

171. It seems to me that in the present cases the situation is more akin to that prevailing in Union de Pequeños Agricultores v Council than to those obtaining in the cases resolved in the judgments mentioned in point 168 above. The combined provision of Articles 46 EU and 35 EU means that the list of the powers of the Court of Justice they contain is explicit, thus excluding, in particular, the jurisdiction of the Community court to hear actions for compensation for damage caused by acts adopted by the Council under Article 34 EU.

172. Moreover, in the judgments cited in point 168 above, the Court in essence only stated a number of the conditions (relating to the persons entitled to bring actions, the grounds of invalidity on which they may rely or the acts open to challenge under Article 173 or 184 of the EEC Treaty) for exercising one kind of jurisdiction which had clearly been conferred on it by those provisions, namely the power to annul acts of the institutions or to declare them inapplicable. In the case in point, by contrast, the appellants are asking the Community court to exercise a type of jurisdiction, namely the power to award compensation for damages, that is not to be found in Article 35 EU.

173. If the problem is therefore, to quote the words of Advocate General Jacobs, (87) how to ensure - within the limitations imposed by the wording and structure of the Treaty - that individual applicants are granted effective judicial protection', the reply in a case such as the present one is, as I have indicated, to recognise that an action for the compensation sought by the appellants is brought in the national court and not in the Community court. If, however, contrary to what I maintain, it were to be held that a remedy of this kind in the national court were not admissible, recognising as an alternative the jurisdiction of the Community court would constitute not a wide interpretation or an interpretation praeter legem but an interpretation contra legem of the combined provision

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of Articles 46 EU and 35 EU.

174. In this second hypothesis, there would be an insoluble conflict between the general principle of effective judicial protection of rights, which is recognised indirectly in Article 6(2) EU, and the principle of conferred powers enshrined in Article 5 EU and the combined provision of Articles 46 EU and 35 EU.

175. This conflict is similar to the one between the general principle of effective judicial protection of rights and the principle of conferred powers enshrined in Article 7 EC and Article 173 of the EC Treaty, which the Court implicitly took into account in paragraph 44 of the judgment in Union de Pequeños Agricultores v Council and which it resolved by granting priority to the principle of conferred powers and Article 173 of the EC Treaty, as correctly observed by the Court of First Instance in paragraph 38 of the contested orders.

176. I do not believe that on other occasions the Court has had to examine a situation involving a clear and insoluble conflict requiring a stark choice between provisions and primary principles. (88) I note, moreover, that the rules that would come into conflict in the present case are all in a sense constitutional', in that they relate on the one hand to the identification of the fundamental limits to the exercise of public power vis-à-vis the individual and, on the other, to the distribution of that power among the various institutions charged with exercising it.

177. To give priority to the fundamental right to effective judicial protection and to disapply for that purpose the relevant provisions of the EU Treaty on the powers of the Court of Justice would necessitate recognising that there was also a hierarchy among primary rules and a kind of supra-constitutional' value in the respect for fundamental rights. I consider that such an approach, while not in itself alien, is not permissible in the present state of Union law , not least because the current treaties do not explicitly list the fundamental rights guaranteed by the Union. The Charter cannot, in my opinion, make good the lack of such a list, since it is only a source of inspiration for the Community court and national courts in clarifying the fundamental rights protected by Union law as general principles and has no binding legal force. That limitation would obviously no longer apply if all the Member States ratified the Treaty establishing a Constitution for Europe, Part II of which lists the fundamental rights, among which is expressly enshrined, in Article II-107, the right to an effective remedy and to a fair trial'.

178. While repeating again that, in my opinion, the appellants are not denied effective judicial protection of the rights which they claim were infringed by the contested inclusion on the list of persons involved in terrorist acts but enjoy such protection in the national courts, I consider that, if the Court were to conclude otherwise, it could not in any case assert, in the present state of Union law , that the Community court has jurisdiction to hear the actions for damages brought by the appellants before the Court of First Instance. Hence, the Court of First Instance did not err in law in finding that the lack of provision for a judicial action to protect the appellants' rights did not of itself justify recognising its own jurisdiction to hear such actions.

4. Final observations

179. In proposing that the Court dismiss the appeals, I wish to make two concluding observations.

180. First, I consider it appropriate that the Court, in the judgment that it will deliver in the present cases, should recognise the jurisdiction of the national courts to hear actions of this kind, in the name of respect for fundamental rights and the judicial protection thereof. Recognition of the jurisdiction of the national courts would demonstrate, inter alia, just how unfounded is the suspicion often voiced that the jurisdiction of the Court with regard to respect for fundamental rights as general principles of Community law is inspired not so much by genuine concern for the protection of such rights as by a desire to defend the primacy of Community law and of the Community

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court in relation to the law and authorities of the Member States.

181. Secondly, I recognise that acknowledging the jurisdiction of the national courts for actions for damages such as those brought in the cases before the Court has disadvantages for the uniform application of Union law and hence for legal certainty. Those disadvantages should be eliminated by amending the treaties currently in force in order appropriately to widen the jurisdiction of the Court of Justice, along the lines of the overhaul carried out by the Treaty establishing a Constitution for Europe. In the meantime, with regard to those disadvantages I observe that a little legal uncertainty' is always preferable to the certainty of no law at all', especially when it comes to the protection of fundamental rights.

V - Costs

182. I consider that the arrangement adopted by the Court of First Instance, involving a division of the costs among the parties, can be endorsed wholeheartedly and is also valid for the proceedings before the Court of Justice. Going beyond the Council declaration concerning the right to compensation, it is entirely understandable that the appellants, to whom Union law affords the right to effective judicial protection, chose the Community court as a court competent to hear their claim for compensation, and their appeal as well.

183. In my opinion, there are therefore exceptional circumstances that justify sharing the cost among the main parties, in accordance with Article 69(3) of the Rules of Procedure.

184. Moreover, under Article 69(4), the Kingdom of Spain must bear its own costs.

VI - Conclusion

185. In the light of the foregoing considerations, I propose that the Court:

- dismiss the appeals;

- order each party to bear its own costs.

(1) .

(2) - OJ 2001 L 344, p. 93.

(3) - Unofficial translation of the French text placed in the file.

(4) - Not published, but available on the site www.echr.coe.int.

(5) - OJ 2002 L 116, p. 75.

(6) - OJ 2002 L 160, p. 32.

(7) - Paragraph 48 of the contested orders.

(8) - See, inter alia, Case C82/98 P Kögler v Court of Justice [2000] ECR I3855, paragraph 21.

(9) - See, inter alia, Joined Cases C204/00 P, C205/00 P, C211/00 P, C213/00 P, C217/00 P and C219/00 P Aalborg Portland and Others v Commission [2004] ECR I123, paragraphs 47 and 51.

(10) - Kögler v Court of Justice , paragraph 23.

(11) - OJ 2003 L 16, p. 68.

(12) - In the text, I use the expression Community court' (and occasionally also Court of Justice') to mean the Court of Justice and the Court of First Instance, even though the present cases relate to their involvement outside the ambit of the first pillar of the European Union, constituted by

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the Communities.

(13) - Unofficial translation of the appeal documents.

(14) - These provide for the freezing and prohibition on the making available of funds and other financial assets or economic resources.

(15) - Paragraphs 41 to 47 of the contested orders.

(16) - Paragraph 16 of the statements of defence (unofficial translation). See also paragraph 59 of the appeals.

(17) - Paragraph 45 of the contested orders.

(18) - See paragraph 46 of the contested orders.

(19) - Paragraph 40 of the contested orders.

(20) - Paragraphs 32 and 33 of the contested orders.

(21) - Paragraphs 34 to 37 of the contested orders.

(22) - Paragraph 38 of the contested orders.

(23) - Ibid.

(24) - Paragraph 39 of the contested orders.

(25) - Paragraph 37 of the contested orders.

(26) - The introduction of a specific action before the Community court into the legal system of the Union to protect fundamental rights had been raised, along with other proposals, at the Intergovernmental Conference to amend the Treaty of Maastricht, but it was not adopted when the Treaty of Amsterdam was approved.

(27) - Paragraph 39 of the contested orders.

(28) - I refer to the use of the adverb probably' in the first sentence of paragraph 38 of the contested orders after the emphatic expression it must be noted'. (Concerning the absence of an effective remedy invoked by the applicants, it must be noted that indeed probably no effective judicial remedy is available to them, whether before the Community Courts or national courts, with regard to the inclusion of [Gestoras Pro Amnistía and Segi] on the list of persons, groups or entities involved in terrorist acts.')

(29) - The preamble to the EU Treaty mentions the Member States' attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law'.

(30) - C540/03 Parliament v Council [2006] ECR I0000, paragraph 38.

(31) - Case 294/83 Les Verts v Parliament [1986] ECR 1339, paragraph 23, and Case C50/00 P Union de Pequeños Agricultores v Council [2002] ECR I6677, paragraph 38.

(32) - See, in particular, Case C260/89 ERT [1991] ECR I2925, paragraph 41; Opinion 2/94 [1996] ECR I1759, points 33 and 34; Case C299/95 Kremzow [1997] ECR I2629, paragraph 14; and Case C-540/03 Parliament v Council , paragraph 35.

(33) - See, in particular, Case 222/84 Johnston [1986] ECR 1651, paragraph 18; Case C424/99 Commission v Austria [2001] ECR I9285, paragraph 45; and Union de Pequeños Agricultores v Council , paragraph 39.

(34) - The Court has already had occasion to point out that the International Covenant on Civil and Political Rights is one of the international instruments for the protection of human rights

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of which it takes account in applying the general principles of Community law (see Case C-540/03 Parliament v Council , paragraph 37, and the case-law cited).

(35) - In paragraph 46 of the appeals, the appellants mention the freedom of expression and the right to the image and reputation of Gestoras Pro Amnistía and Segi, and the freedom of expression, freedom of association and right to respect of the private life and reputation of their spokespersons.

(36) - See Osman v. the United Kingdom, judgment of 28 October 1998, Reports of Judgments and Decisions 1998VIII, p. 3124, º 147, and Waite and Kennedy v. Germany, judgment of 18 February 1999, Reports of Judgments and Decisions 1999I, p. 393, º 59.

(37) - United Communist Party of Turkey and Others v. Turkey , judgment of 30 January 1998, Reports of Judgments and Decisions 1998I, p. 1, º 29, and Matthews v. the United Kingdom , judgment of 18 February 1999, Reports of Judgments and Decisions 1999-I, p. 251, º 29.

(38) - To assert its identity on the international scene, in particular through the implementation of a common foreign and security policy', constitutes one of the objectives of the Union under Article 2 EU.

(39) - Such clauses, which are deemed essential' in the context of the agreements, may authorise the contracting parties to suspend the agreements and even to withdraw from them if they are breached.

(40) - See Bosphorus v. Ireland , judgment of 30 June 2005, Reports of Judgments and Decisions 2005VI, which, as expressly stated in paragraph 72 of the judgment, concerns only the provisions of the first pillar' of the Union.

(41) - By contrast, it seems to me that no doubt can be cast on the appellants' interest in bringing an action in the present case.

(42) - Common positions (Article 34(2)(a) EU, framework decisions (Article 34(2)(b) EU), decisions and measures necessary to implement those decisions (Article 34(2)(c) EU) and measures implementing conventions (Article 34(2)(d) EU).

(43) - The theory is well enough known not to require explanation here. It is sufficient to cite, in particular, the judgments of the Bundesverfassungsgericht of 22 October 1986, known as Solange II, in BverfGE, 73, 339, and of the Italian Constitutional Court of 21 April 1989 No 232, Fragd, in Foro it., 1990, I, 1855.

(44) - I would point out that Article 13 of the ECHR shows that the existence of an external review of Contracting States' respect for rights and fundamental freedoms does not exempt those States from making arrangements for an internal review.

(45) - Paragraph 38 of the contested orders.

(46) - Ibid.

(47) - Ibid.

(48) - As the European Court of Human Rights observed in the decision dismissing the appellants' actions as inadmissible. That Court showed that, although Article 4 could serve as a legal basis for concrete measures that may concern the applicants, in particular in the context of police cooperation among States within Community bodies such as Europol', it does not add new powers that can be exercised in relation to the applicants' but contains only an obligation for the Member States to engage in judicial and police cooperation' (unofficial translation of the French text of the decision).

(49) - See, to that effect, Joined Cases C6/90 and C9/90 Francovich and Others v Italy [1991] ECR I5357, paragraph 33; Joined Cases C46/93 and C48/93 Brasserie du pêcheur and Factortame

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and Others [1996] ECR I1029, paragraph 22; and Case C224/01 Köbler [2003] ECR I10239, paragraph 33. See also European Court of Human Rights. Klass and Others v, Germany , judgment of 6 September 1978, Series A No 28, ° 64. and Soering v. the United Kingdom , judgment of 7 July 1989, Series A No 161, ° 120, from which it was deduced that the effective remedy required by Article 13 of the EHCR must permit an individual who considers himself to have been prejudiced by a measure in breach of the ECHR to have his claim decided and, if appropriate, to obtain redress (réparation' or redressement' in the French texts of the judgments).

(50) - Moreover, the Treaty establishing a Constitution for Europe also makes provision for bringing a direct action before the Community court for the annulment of restrictive measures against natural or legal persons adopted by the Council with regard to the common foreign and security policy, despite the limited powers conferred by that Treaty on the Court of Justice in that field (Article III-376).

(51) - Opinion of Advocate General Darmon in Johnston , point 3.

(52) - Opinion of Advocate General Léger in Köbler , point 68.

(53) - Under Article 39(1) EU, the European Parliament is merely consulted (and its opinion is not binding) before the adoption of framework decisions or decisions and it is not even consulted before the adoption of common positions.

(54) - Case C105/03 Pupino [2005] ECR I5285, paragraph 42.

(55) - See, by analogy, Union de Pequeños Agricultores v Council , paragraph 41. The principle was reiterated in Article I29(1) of the Treaty establishing a Constitution for Europe, under which Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'.

(56) - See Pupino , paragraphs 38 and 43.

(57) - Convention based on Article K.3 of the Treaty on European Union, on the establishment of a European Police Office (Europol Convention) (OJ 1995 C 316, p. 2).

(58) - Council Act of 23 July 1996 drawing up, on the basis of Article K.3 of the Treaty on European Union, the Protocol on the interpretation, by way of preliminary rulings, by the Court of Justice of the European Communities of the Convention on the establishment of a European Police Office (OJ 1996 C 299, p. 1).

(59) - OJ 2005 L 327, p. 19.

(60) - Case 314/85 Foto-Frost [1987] ECR 4199.

(61) - Foto-Frost , paragraph 16.

(62) - Pupino , cited above.

(63) - Pupino , paragraph 36 ([i]rrespective of the degree of integration envisaged by the Treaty of Amsterdam in the process of creating an ever closer union among the peoples of Europe within the meaning of the second paragraph of Article 1 EU,...'). My italics.

(64) - Foto-Frost , paragraph 15.

(65) - In his Opinion in Köbler , point 35, Advocate General Léger pointed out that the principle of State liability [for loss or damage caused to individuals by breach of Community law] constitutes the necessary extension of the general principle of effective judicial protection or of the right to challenge a measure before the courts'.

(66) - Brasserie du pêcheur and Factortame and Others , paragraph 29. In the words of Advocate

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General Léger (see his Opinion in Köbler , point 85), it is settled case-law that, in order to acknowledge the existence of a general principle of law, the Court does not require that the rule be a feature of all the national legal systems. Similarly, the fact that the scope and the conditions of application of the rule vary from one Member State to another is not material. The Court merely finds that the principle is generally acknowledged and that, beyond the divergences, the domestic laws of the Member States show the existence of common criteria'.

(67) - See, by analogy, Brasserie du pêcheur and Factortame and Others , paragraphs 29 and 31.

(68) - See, inter alia, Case 5/88 Wachauf [1989] ECR 2609, paragraph 18, and Article 52 of the Charter.

(69) - See, by analogy, Köbler , paragraphs 46 and 50.

(70) - See, inter alia, Case C-312/93 Peterbroeck [1995] ECR I4599, paragraph 12, and Case C13/01 Safalero [2003] ECR I8679, paragraph 49.

(71) - Paragraph 38 of the contested orders.

(72) - See, for Europol, Article 26(1) and (2) of the Europol Convention and, for the European Community, Articles 281 EC and 282 EC.

(73) - OJ 2001 L 12, p. 1.

(74) - The jurisdictional immunity of the European Community in the courts of Member States should also be considered to be implicitly excluded by Article 240 EC, under which [s]ave where jurisdiction is conferred on the Court of Justice by this Treaty, disputes to which the Community is a party shall not on that ground be excluded from the jurisdiction of the courts or tribunals of the Member States'.

(75) - I take the liberty of referring in this regard not only directly to the judgments of the European Court of Human Rights in Waite and Kennedy v. Germany , cited above, and in Beer and Regan v. Germany of 18 February 1999 (not published, but available at the site www.echr.coe.int), but also to the detailed analysis and review of cases in A. Reinisch and U.A. Weber, In the Shadow of Waite and Kennedy. The Jurisdictional Immunity of International Organisations, the Individual's Right of Access to the Courts and Administrative Tribunals as Alternative Means of Dispute Settlement', International Organisations Law Review , 2004, 1, p. 59, and to E. Gaillard and I. Pingel-Lenuzza, International Organisations and Immunity from Jurisdiction: to Restrict or to Bypass', International and Comparative Law Quarterly , 2002, Vol. 51, p. 1.

(76) - See Köbler , paragraphs 57 and 58.

(77) - Such a situation would ensure equal treatment of persons injured by one and the same act.

(78) - Paragraph 38 of the contested orders.

(79) - Ibid.

(80) - Les Verts v Parliament , in which the Court recognised that acts of the Parliament designed to produce legal effects vis-à-vis third parties could be challenged by bringing an action for annulment under Article 173 of the EEC Treaty, and Case C70/88 Parliament v Council [1990] ECR I2041, which recognised the right of the Parliament to bring an action for annulment under Article 173 of the EEC Treaty against an act of the Council or of the Commission allegedly breaching its prerogatives.

(81) - Case 22/70 Commission v Council [1971] ECR 263, paragraphs 38 to 43, in which the Court held that an action for annulment under Article 173 of the EEC Treaty must be available against all measures adopted by the institutions which are intended to have legal force'.

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(82) - Case C62/88 Greece v Council [1990] ECR I1527, paragraph 8, in which it was held that a complaint alleging infringement of a rule of the EAEC or ECSC Treaties could be examined in proceedings for the annulment of a measure based on a provision of the EEC Treaty, even though that possibility was not mentioned in Article 173 of the EEC Treaty.

(83) - Case 92/78 Simmenthal v Commission [1979] ECR 777, paragraphs 40 and 41, in which the Court held that Article 184 of the EEC Treaty was also applicable to general acts not in the form of regulations in order to provide individuals with the benefit of judicial review of the lawfulness of acts which they cannot challenge.

(84) - It was in these terms that Advocate General Van Gerven referred to the judgment in Les Verts v Parliament in his Opinion in Case C70/88 Parliament v Council , point 11.

(85) - Paragraph 44.

(86) - See Case 66/76 CFDT v Council [1977] ECR 305, paragraphs 8 to 12, with regard to the capacity to sue and be sued in actions under Article 33 of the ECSC Treaty, and the order of 13 January 1995 in Case C253/94 P Roujansky v Council [1995] ECR I7, paragraphs 9 and 11, with regard to acts whose legality is subject to review under Article 173 of the EC Treaty.

(87) - Opinion of Advocate General Jacobs in Union de Pequeños Agricultores v Council , point 54.

(88) - In some instances, it has essentially found a balance between fundamental rights and fundamental freedoms guaranteed by the EC Treaty (see Case C112/00 Schmidberger [2003] ECR I5659 and Case C36/02 Omega [2004] ECR I 9609).

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11997E241 : N 123
11997E288 : N 135
11997E288-L2 : N 134 154
11997E307-P1 : N 160 163
11997E308 : N 167
11997M005 : N 66 104
11997M006-P1 : N 66 73 77 102 105
11997M006-P2 : N 37 49 65 74 77 101 102 105 138 139 160 166 174
11997M007 : N 75
11997M011-P1 : N 75
11997M034 : N 56 90 98 105 108 114 121 123 125 128 130 131 138 - 140 149 154 171
11997M034-LA : N 133
11997M035 : N 60 - 62 98 108 112 117 123 127 - 129 131 132 171 - 173
11997M035-P1 : N 95 109 110 113 115 133 139
11997M035-P2 : N 113 - 117 123 139
11997M035-P3 : N 116 139
11997M035-P3LA : N 119
11997M041 : N 134
11997M046 : N 59 66 104 171 173 174
11997M046-LB : N 59 62
11997M046-LD : N 63 - 65 101
11997M046-LF : N 65 66
11997M049 : N 75
12001C/PRO/02-A58L1 : N 33
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32001R0044-A02P1 : N 147
32001R0044-A05P3 : N 146 147
32001E0931 : N 1 8 15 141 144
32001E0931-A01 : N 9 47 57
32001E0931-A01P4L1 : N 57
32001E0931-A01P4L2 : N 57
32001E0931-A04 : N 9 47 48 55 56 92 93 95
32001E0931-N : N 10 11 47
32001E0931-C5 : N 54
32002E0340 : N 15
32002E0462 : N 15
32003D0048-C8 : N 37 49 160 162
61970J0022 : N 168
61976J0066 : N 170
61978J0092 : N 168
61983J0294 : N 77
61984C0222 : N 101
61984J0222 : N 80
61985J0314 : N 121 - 123 127
61988J0005 : N 138
61988J0062 : N 168
61988C0070 : N 168

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61988J0070 : N 166
61989J0260 : N 78
61993J0046 : N 135
61993J0312 : N 70
61994V0002 : N 78
61994O0253 : N 170
61995J0299 : N 78
61998J0082 : N 33 35
61999J0424 : N 80
62000C0050 : N 173
62000J0050 : N 77 80 107 171 175
62000J0112 : N 176
62000J0204 : N 34
62001J0013 : N 140
62001C0224 : N 101 134 135
62001J0224 : N 140 154
62002J0036 : N 176
62002B0333 : N 23 36 48 63 67 71 82 91 - 94 141 156 157 159 175
62003J0105 : N 106 110 124 - 126
62003J0540 : N 76 78 80

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APPLICA Person

DEFENDA Council ; Institutions

NATIONA Spain

PROCEDU Action for damages;Appeal - inadmissible;Appeal - unfounded

ADVGEN Mengozzi

JUDGRAP Bonichot

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OPINION OF ADVOCATE GENERAL
MENGOZZI
delivered on 26 October 2006 [1](1)

Case C-354/04 P

Gestoras Pro Amnistía
Juan Mari Olano Olano
Julen Zelarain Errasti
v
Council of the European Union

and Case C-355/04 P

Segi
Araitz Zubimendi Izaga
Aritza Galarraga
v
Council of the European Union

(European Union – Police and judicial cooperation in criminal matters – Measures to combat terrorism – Common Position 2001/931/CFSP – Measures relating to persons, groups and entities involved in terrorist acts – Action for damages – Jurisdiction of the Community court)

1. By orders of 7 June 2004 made in Case T-333/02 *Gestoras Pro Amnistía and Others* v *Council* (not published in the ECR) and Case T-338/02 *Segi and Others* v *Council* [2004] ECR II-1647 ('the contested orders'), the Court of First Instance dismissed the actions brought by the organisations Gestoras Pro Amnistía and Segi and their respective spokespersons against the Council of the European Union for compensation for damage allegedly suffered as a result of the inclusion of Gestoras Pro Amnistía and Segi on the list of persons, groups and entities to which Council Common Position 2001/931/CFSP of 27 December 2001 on the application of specific measures to terrorism applies. (2)

2. The Court is seised of two appeals against the aforesaid orders lodged by the same parties as brought the actions at first instance (Gestoras Pro Amnistía and Messrs J.M. Olano Olano and J. Zelarain Errasti in Case C–354/04 P, and Segi and Messrs A. Zubimendi Izaga and A. Galarraga in Case C–355/04 P).

I – Facts

3. The factual background to the disputes, which is described in broadly similar terms in the

Judgment of the Court (Fifth Chamber)
of 10 March 2005
Criminal proceedings against Filomeno Mario Miraglia. Reference for a preliminary ruling: Tribunale di Bologna - Italy. Article 54 of the Convention implementing the Schengen Agreement - Principle ne bis in idem - Scope - Decision of a Member State's judicial authorities to discontinue prosecution by reason solely of the initiation of similar proceedings in another Member State. Case C-469/03.

European Union - Police and judicial cooperation in criminal matters - Protocol integrating the Schengen acquis - Convention implementing the Schengen Agreement - Principle ne bis in idem - Scope - Decision of the judicial authorities of one Member State closing a case on the ground that similar proceedings have been started in another Member State without any determination whatsoever as to the merits of the case - Excluded

(Art. 2, fourth indent, first subpara, EU; Convention implementing the Schengen Agreement, Art. 54)

The principle ne bis in idem , enshrined in Article 54 of the Convention implementing the Schengen Agreement, the purpose of which is to ensure that no one is prosecuted on the same facts in several Member States on account of his having exercised his right to freedom of movement, does not fall to be applied to a decision of the judicial authorities of one Member State declaring a case to be closed, after the Public Prosecutor has decided not to pursue the prosecution on the sole ground that criminal proceedings have been started in another Member State against the same defendant and for the same acts, without any determination whatsoever as to the merits of the case. Such a decision cannot in fact constitute a decision finally disposing of the case against that person within the meaning of Article 54.

The consequence of applying that principle to such a decision to close criminal proceedings would be to make it more difficult, indeed impossible, actually to penalise in the Member States concerned the unlawful conduct with which the defendant is charged. Such a consequence would clearly run counter to the very purpose of the provisions of Title VI of the Treaty on European Union, as set out in the fourth indent of the first subparagraph of Article 2 EU.

(see paras 30, 33-35, operative part)

In Case C-469/03,

REFERENCE for a preliminary ruling under Article 35 EU, from the Tribunale di Bologna (Italy), made by decision of

22 September 2003

, registered at the Court on

10 November 2003

, in the criminal proceedings brought against

Filomeno Mario Miraglia ,

THE COURT (Fifth Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, R. Schintgen (Rapporteur) and P. Kris, Judges,

Advocate General: A. Tizzano,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on

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15 December 2004,

after considering the observations submitted on behalf of:

- Mr Miraglia, by N. Trifiro, avvocatessa,

- the Italian Government, by I.M. Braguglia, acting as Agent, and G. Aiello, avvocato dello Stato,

- the Greek Government, by M. Apessos, I. Bakopoulos and M. Tassopoulou, acting as Agents,

- the Spanish Government, by M. Muñoz Pérez, acting as Agent,

- the French Government, by R. Abraham, G. de Bergues and C. Isidoro, acting as Agents,

- the Netherlands Government, by H.G. Sevenster and J. van Bakel, acting as Agents,

- the Swedish Government, by A. Kruse, acting as Agent,

- the Commission of the European Communities, by E. de March and W. Bogensberger, acting as Agents,

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

gives the following

Judgment

1. This reference for a preliminary ruling concerns the interpretation of Article 54 of the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (OJ 2000 L 239, p. 19; the CISA'), signed on 19 June 1990 at Schengen (Luxembourg).

2. The reference was made in the course of criminal proceedings against Mr Miraglia, who is charged with having organised, with others, the transport to Bologna of heroin-type narcotics.

The legal background

The Convention implementing the Schengen Agreement

3. Under Article 1 of the Protocol integrating the Schengen acquis into the framework of the European Union, annexed to the Treaty on European Union and to the Treaty establishing the European Community by the Treaty of Amsterdam (the Protocol'), 13 Member States, amongst them the Italian Republic and the Kingdom of the Netherlands, are authorised to establish closer cooperation among themselves within the scope of the Schengen acquis , as set out in the Annex to the Protocol.

4. The Schengen acquis thus defined includes, inter alia, the Agreement, signed in Schengen on 14 June 1985, between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (OJ 2000 L 239, p. 13; the Schengen Agreement') and the CISA.

5. By virtue of the first paragraph of Article 2(1) of the Protocol, from the date of entry into force of the Treaty of Amsterdam the Schengen acquis is to apply immediately to the 13 Member States referred to in Article 1 of the Protocol.

6. In accordance with the second sentence of the second paragraph of Article 2(1) of the Protocol, on 20 May 1999 the Council adopted Decision 1999/436/EC determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions or decisions which constitute the Schengen acquis (OJ

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1999 L 176, p. 17). It is apparent from Article 2 of the decision, in conjunction with Annex A thereto, that the Council selected Articles 34 EU and 31 EU, which form part of Title VI of the Treaty on European Union, Provisions on Police and Judicial Cooperation in Criminal Matters', as the legal basis for Articles 54 to 58 of the CISA.

7. The latter make up Chapter 3, Application of the ne bis in idem principle', of Title III, Police and Security'. In particular, they provide as follows:

A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party.'

European Convention on Mutual Assistance in Criminal Matters

8. Article 2(b) of the European Convention on Mutual Assistance in Criminal Matters, signed at Strasbourg on 20 April 1959 (the European Convention on Mutual Assistance'), provides:

Assistance may be refused:

...

(b) if the requested Party considers that execution of the request is likely to prejudice the sovereignty, security, ordre public or other essential interests of its country.'

9. The Kingdom of the Netherlands has formulated the following reservation concerning Article 2(b) of the European Convention on Mutual Assistance:

The Government of the Kingdom of the Netherlands reserves the right not to grant a request for assistance:

...

(b) in so far as the request concerns a prosecution or proceedings incompatible with the principle ne bis in idem ;

(c) in so far as it relates to an investigation of facts for which the defendant is prosecuted in the Netherlands.'

The provisions of Netherlands law

10. In accordance with Article 36 of the Netherlands Code of Criminal Procedure:

1. Where the criminal proceedings are not pursued, the trial court before which the case was last prosecuted may declare, at the defendant's request, that the case is closed.

2. The court may reserve its decision on the request at any time for a certain period if the prosecuting authorities adduce evidence demonstrating that the matter will still be prosecuted.

3. Before the court gives its decision, it shall summon the person directly concerned of whom it is aware in order to hear his views on the defendant's request.

4. The order shall be notified to the defendant forthwith.'

11. Article 255 of that Code provides:

1. Where a case does not proceed to judgment, after the order declaring the case closed has been notified to the defendant, or after he has been notified that no further action is to be taken, without prejudice in the latter case to Article 12i or 246, no further proceedings may be taken against the defendant in respect of the same acts, unless new evidence is brought forward.

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2. Only statements made by witnesses or the defendant or documents, acts or official records which have subsequently come to light and have not been examined can constitute new evidence.

3. In such a case, the defendant can be summoned before the Rechtbank only after a preliminary judicial inquiry into that new evidence ...'.

12. Finally, with regard to requests for mutual assistance in criminal matters, Article 552-l of the Netherlands Code of Criminal Procedure provides:

1. The request shall not be granted:

...

(b) in so far as to grant it would serve to collaborate in proceedings or an action incompatible with the principle underlying Article 68 of the Criminal Code and Article 255(1) of this Code;

(c) in so far as it is made for the purposes of an inquiry concerning facts in respect of which the defendant is prosecuted in the Netherlands...'.

The case in the main proceedings and the question referred for a preliminary ruling

13. In connection with an investigation conducted by the Italian and Netherlands authorities in cooperation, Mr Miraglia was arrested in Italy on 1 February 2001 under an order for his pre-trial detention issued by the examining magistrate of the Tribunale di Bologna.

14. Mr Miraglia was charged with having organised, with others, the transport to Bologna of 20.16 kg of heroin, an offence laid down by and punishable under Articles 110 of the Italian Criminal Code and 80 of Presidential Decree No 309/90.

15. On 22 January 2002 the examining magistrate of the Tribunale di Bologna committed Mr Miraglia to be tried for that offence and decided to replace his detention in prison by house arrest. The Tribunale di Bologna later replaced house arrest by an obligation to reside in Mondragone (Italy), and then revoked all detention measures, so that at present the defendant is at liberty.

16. Criminal proceedings in respect of the same criminal acts were instituted concurrently before the Netherlands judicial authorities, Mr Miraglia being charged with having transported about 30 kg of heroin from the Netherlands to Italy.

17. The defendant was arrested on that charge by the Netherlands authorities on 18 December 2000 and released on 28 December 2000. On 17 January 2001 the Gerechtshof te Amsterdam (Netherlands) rejected the appeal brought by the prosecuting authorities against the order of the Rechtbank te Amsterdam (Netherlands) dismissing their application for the defendant to be kept in custody.

18. The criminal proceedings against Mr Miraglia were closed on 13 February 2001 without any penalty or other sanction's being imposed on him. In those proceedings the Netherlands public prosecutor did not initiate a criminal prosecution of the defendant. It is apparent from the file before the Court that that decision was taken on the ground that a prosecution in respect of the same facts had been brought in Italy.

19. By order of 9 November 2001 the Rechtbank te Amsterdam awarded the defendant compensation for the damage suffered through his having been remanded in custody and also the costs of the lawyers instructed.

20. By letter of 7 November 2002 the Public Prosecutor's Office of the Rechtbank te Amsterdam refused the request for judicial assistance made by the Public Prosecutor's Office of the Tribunale di Bologna, taking as its ground the reservation formulated by the Kingdom of the Netherlands with regard to Article 2(b) of the European Convention on Mutual Assistance in Criminal Matters, given that the Rechtbank had closed the case without imposing any penalty'.

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21. On 10 April 2003 the Italian Public Prosecutor requested the Netherlands judicial authorities to provide information about the outcome of the criminal proceedings against Mr Miraglia and the way in which the proceedings had been settled in order to assess their significance for the purposes of Article 54 of the CISA.

22. By note of 18 April 2003 the Netherlands Public Prosecutor informed his Italian counterpart that the criminal proceedings against Mr Miraglia had been stayed, but did not supply information considered sufficient by the Italian court conquering the order made and its content. The Netherlands Public Prosecutor stated that it was a final decision of a court' precluding, pursuant to Article 225 of the Netherlands Code of Criminal Procedure, any prosecution in respect of the same criminal acts and any judicial cooperation with foreign authorities, unless new evidence should be produced against Mr Miraglia. The Netherlands judicial authorities added that any request for assistance made by the Italian State would run foul of Article 54 of the CISA.

23. According to the Italian court, the Netherlands authorities decided not to prosecute Mr Miraglia on the ground that criminal proceedings against the defendant had in the meantime been instituted in Italy for the same criminal acts. That assessment is ascribable to the preventive' application of the principle ne bis in idem.

24. Now, according to the Tribunale di Bologna, that interpretation of Article 54 of the CISA is mistaken, for it removes any real opportunity for the two States concerned to take action so that the defendant's responsibility could actually be examined.

25. Indeed, Article 54 of the CISA, thus interpreted, would at the same time prevent the Netherlands authorities from prosecuting Mr Miraglia on the ground that proceedings were pending in Italy for the same acts, and the Italian authoritie s from determining whether the defendant was guilty.

26. The Italian court adds that, even if it should not find, as the Netherlands authorities have done, a situation in which the principle ne bis in idem applied and should decide to continue the proceedings, it would be forced to determine Mr Miraglia's guilt or innocence without the important benefit of the evidence gathered by the Netherlands authorities or their judicial assistance.

27. Those were the circumstances in which the Tribunale di Bologna decided to stay proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

Must Article 54 of the [CISA] apply when the decision of a court in the first State consists of discontinuing the prosecution without any adjudication on the merits of the case and on the sole ground that proceedings have already been initiated in another State?'

Concerning the question referred

28. By its question the Italian court seeks, in substance, to ascertain whether the principle ne bis in idem , enshrined in Article 54 of the CISA, is applicable to a decision of the judicial authorities of one Member State declaring a case to be closed, after the Public Prosecutor has decided not to pursue the prosecution on the sole ground that criminal proceedings had been started in another Member State against the same defendant and for the same acts, without any determination whatsoever as to the merits of the case.

29. It is clear from the actual wording of Article 54 of the CISA that a person may not be prosecuted in a Member State for the same acts as those in respect of which his case has been finally disposed of' in another Member State.

30. Now, a judicial decision, such as that at issue in the case in the main proceedings, taken after the public prosecutor has decided not to pursue the prosecution on the sole ground that criminal proceedings have been initiated in another Member State against the same defendant and in respect of the same acts, but where no determination has been made as to the merits of the case, cannot

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constitute a decision finally disposing of the case against that person within the meaning of Article 54 of the CISA.

31. The aptness of that interpretation of Article 54 of the CISA is borne out by the fact that it is the only interpretation to give precedence to the object and purpose of the provision rather than to procedural or purely formal matters, which, after all, vary as between the Member States concerned, and to ensure that that article has proper effect.

32. It is in fact settled case-law that the objective of Article 54 of the CISA is to ensure that no one is prosecuted on the same facts in several Member States on account of his having exercised his right to freedom of movement (Joined Cases C-187/01 and C-385/01 Gözütok and Brügge [2003] ECR I-1345, paragraph 38).

33. Now, the consequence of applying that article to a decision to close criminal proceedings, such as that in question in the main proceedings, would be to make it more difficult, indeed impossible, actually to penalise in the Member States concerned the unlawful conduct with which the defendant is charged.

34. First, that decision to close proceedings was adopted by the judicial authorities of a Member State when there had been no assessment whatsoever of the unlawful conduct with which the defendant was charged. Next, the bringing of criminal proceedings in another Member State in respect of the same facts would be jeopardised even when it was the very bringing of those proceedings that justified the discontinuance of the prosecution by the Public Prosecutor in the first Member State. Such a consequence would clearly run counter to the very purpose of the provisions of Title VI of the Treaty on European Union, as set out in the fourth indent of the first subparagraph of Article 2 EU, namely: to maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to ... prevention and combating of crime'.

35. Consequently, the reply to be given to the question referred has to be that the principle ne bis in idem , enshrined in Article 54 of the CISA, does not fall to be applied to a decision of the judicial authorities of one Member State declaring a case to be closed, after the Public Prosecutor has decided not to pursue the prosecution on the sole ground that criminal proceedings have been started in another Member State against the same defendant and for the same acts, without any determination whatsoever as to the merits of the case.

Costs

36. 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) rules as follows:

The principle ne bis in idem , enshrined in Article 54 of the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, signed on 19 June 1990 at Schengen, does not fall to be applied to a decision of the judicial authorities of one Member State declaring a case to be closed, after the Public Prosecutor has decided not to pursue the prosecution on the sole ground that criminal proceedings have been started in another Member State against the same defendant and for the same acts, without any determination whatsoever as to the merits of the case.

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DOCNUM	62003J0469
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
PUBREF	European Court reports 2005 Page I-02009
DOC	2005/03/10
LODGED	2003/11/10
JURCIT	11997M002-L1T4 : N 34 31999D0436-A02 : N 6 42000A0922(01)-A01 : N 4 42000A0922(02)-A54 : N 1 6 7 28 - 32 35 42000A0922(02)-A55 : N 6 42000A0922(02)-A56 : N 6 42000A0922(02)-A57 : N 6 42000A0922(02)-A58 : N 6 62001J0187 : N 32
CONCERNS	Interprets 42000A0922(02) -A54
SUB	Justice and home affairs
AUTLANG	Italian
OBSERV	Italy ; Greece ; Spain ; France ; Netherlands ; Sweden ; Member States ; Commission ; Institutions
NATIONA	Italy
NATCOUR	*A9* Tribunale di Bologna, ordinanza del 22/09/03 ; - Amalfitano, Chiara: Bis in idem per il "Ne bis in idem" : nuovo quesito alla Corte di giustizia, Rivista di diritto internazionale privato e processuale 2004 p.85-102
NOTES	Blanco Cordero, Isidoro: El principio "ne bis in idem" en la Union Europea (Comentario a la sentencia del Tribunal de Justicia (Sala 5.¬) de 10 de marzo de 2005 en el Asunto C-469/2003: Asunto Miraglia), Diario La ley 2005 no 6285 p.1-9 ; Armone, G. M.: Il Foro italiano 2005 IV Col.235-237 ; Rübenstahl, Markus: Ne bis in idem - einmal ist nicht zweimal, European Law Reporter 2005 p.223-227 ; Svieenu, Richard: Princíp ne bis in idem II., Justicna revue : casopis pre pravnu prax. Príloha 2005 p.1140-1148 ; Alicino, Francesco: Il ne bis in idem comunitario e la cooperazione giudiziaria tra gli Stati membri dell'Unione europea: due facce di una stessa medaglia, Diritto pubblico comparato ed europeo 2005 p.1509-1522 ; Ciampi, Annalisa: Sull'ovvia inefficacia preclusiva della pronuncia di applicazione "preventiva" del principio del ne bis in idem, Il Corriere giuridico 2005 p.115-118 ; Rinuy, Lionel: Revue des affaires européennes 2005 p.327-331 ; Luparia, Luca: Una recente decisione della Corte di Giustizia sull'allargamento delle ipotesi di audizione del minore in incidente probatorio, Cassazione penale 2005 p.3541-3545 ; Reijntjes, J.M.: Nederlandse jurisprudentie

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; Uitspraken in burgerlijke en strafzaken 2006 no 225

PROCEDU	Reference for a preliminary ruling
ADVGEN	Tizzano
JUDGRAP	Schintgen
DATES	of document: 10/03/2005 of application: 10/11/2003

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Judgment of the Court (Grand Chamber)
of 13 September 2005
Commission of the European Communities v Council of the European Union. Action for annulment - Articles 29 EU, 31(e) EU, 34 EU and 47 EU - Framework Decision 2003/80/JHA - Protection of the environment - Criminal penalties - Community competence - Legal basis - Article 175 EC. Case C-176/03.

Environment - Protection - Community competence - Criminal penalties - Framework Decision 2003/80 on the protection of the environment through criminal law - Appropriate legal basis - Article 175 EC - Decision based on Title VI of the Treaty on European Union - Infringement of Article 47 EU

(Arts 135 EC, 175 EC and 280(4) EC; Art. 47 EU; Council Framework Decision 2003/80, Arts 1 to 7)

Framework Decision 2003/80 on the protection of the environment through criminal law, being based on Title VI of the Treaty on European Union, encroaches upon the powers which Article 175 EC confers on the Community, and, accordingly, the entire framework decision being indivisible, infringes Article 47 EU. Articles 1 to 7 of that framework decision, which entail partial harmonisation of the criminal laws of the Member States, in particular as regards the constituent elements of various criminal offences committed to the detriment of the environment, could have been properly adopted on the basis of Article 175 EC in so far as, on account of both their aim and their content, their principal objective is the protection of the environment, which constitutes one of the essential objectives of the Community.

In this regard, while it is true that, as a general rule, neither criminal law nor the rules of criminal procedure fall within the Community's competence, this does not, however, prevent the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, from taking measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective. That competence of the Community legislature in relation to the implementation of environmental policy cannot be called into question by the fact that Articles 135 EC and 280(4) EC reserve to the Member States, in the spheres of customs cooperation and the protection of the Community's financial interests respectively, the application of national criminal law and the administration of justice.

(see paras 41-42, 47-48, 51-53)

In Case C-176/03,

APPLICATION for annulment pursuant to Article 35 EU brought on 15 April 2003,

Commission of the European Communities, represented by M. Petite, J.F. Pasquier and W. Bogensberger, acting as Agents, with an address for service in Luxembourg,

applicant,

supported by:

European Parliament, represented by G. Garzon Clariana, H. Duintjer Tebbens and A. Baas, and M. Gomez-Leal, acting as Agents, with an address for service in Luxembourg,

intervener,

v

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Council of the European Union, represented by J.C. Piris, J. Schutte and K. Michoel, acting as Agents, with an address for service in Luxembourg,

defendant,

supported by:

Kingdom of Denmark, represented by J. Molde, acting as Agent,

Federal Republic of Germany, represented by W.D. Plessing and A. Dittrich, acting as Agents,

Hellenic Republic, represented by E.M. Mamouna and M. Tassopoulou, acting as Agents, with an address for service in Luxembourg,

Kingdom of Spain, represented by N. Díaz Abad, acting as Agent, with an address for service in Luxembourg,

French Republic, represented by G. de Bergues, F. Alabrune and E. Puisais, acting as Agents,

Ireland, represented by D. O'Hagan, acting as Agent, and P. Gallagher, E. Fitzsimons SC and E. Regan BL, with an address for service in Luxembourg,

Kingdom of the Netherlands, represented by H.G. Sevenster and C. Wissels, acting as Agents,

Portuguese Republic, represented by L. Fernandes and A. Fraga Pires, acting as Agents,

Republic of Finland, represented by A. Guimaraes-Purokoski, acting as Agent, with an address for service in Luxembourg,

Kingdom of Sweden, represented by A. Kruse, K. Wistrand and A. Falk, acting as Agents,

United Kingdom of Great Britain and Northern Ireland, represented by C. Jackson, acting as Agent, and R. Plender QC,

interveners,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas, R. Silva de Lapuerta and A. Borg Barthet, Presidents of Chambers, R. Schintgen (Rapporteur), N. Colneric, S. von Bahr, J. N. Cunha Rodrigues, G. Arestis, M. Ilei and J. Malenovsku, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,

Registrar: K. Sztranc, Administrator,

having regard to the written procedure and further to the hearing on 5 April 2005,

after hearing the Opinion of the Advocate General at the sitting on 26 May 2005,

gives the following

Judgment

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

1. Annuls Council Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law;

2. Orders the Council of the European Union to pay the costs;

3. Orders the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Kingdom of the Netherlands, the Portuguese

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Republic, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland and the European Parliament to bear their own costs.

1. By its application the Commission of the European Communities is seeking annulment of Council Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law (OJ 2003 L 29, p. 55; the framework decision').

Legal framework and background

2. On 27 January 2003, on the initiative of the Kingdom of Denmark, the Council of the European Union adopted the framework decision.

3. Based on Title VI of the Treaty on European Union, in particular Articles 29 EU, 31(e) EU and 34(2)(b) EU, as worded prior to the entry into force of the Treaty of Nice, the framework decision constitutes, as is clear from the first three recitals in its preamble, the instrument by which the European Union intends to respond with concerted action to the disturbing increase in offences posing a threat to the environment.

4. The framework decision lays down a number of environmental offences, in respect of which the Member States are required to prescribe criminal penalties.

5. Thus, Article 2 of the framework decision, entitled Intentional offences', provides:

Each Member State shall take the necessary measures to establish as criminal offences under its domestic law

(a) the discharge, emission or introduction of a quantity of substances or ionising radiation into air, soil or water which causes death or serious injury to any person;

(b) the unlawful discharge, emission or introduction of a quantity of substances or ionising radiation into air, soil or water which causes or is likely to cause their lasting or substantial deterioration or death or serious injury to any person or substantial damage to protected monuments, other protected objects, property, animals or plants;

(c) the unlawful disposal, treatment, storage, transport, export or import of waste, including hazardous waste, which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, soil, water, animals or plants;

(d) the unlawful operation of a plant in which a dangerous activity is carried out and which, outside the plant, causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, soil, water, animals or plants;

(e) the unlawful manufacture, treatment, storage, use, transport, export or import of nuclear materials or other hazardous radioactive substances which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, soil, water, animals or plants;

(f) the unlawful possession, taking, damaging, killing or trading of or in protected wild fauna and flora species or parts thereof, at least where they are threatened with extinction as defined under national law;

(g) the unlawful trade in ozone-depleting substances,

when committed intentionally.'

6. Article 3 of the framework decision, entitled Negligent offences', provides:

Each Member State shall take the necessary measures to establish as criminal offences under its domestic law, when committed with negligence, or at least serious negligence, the offences enumerated

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in Article 2.'

7. Article 4 of the framework decision states that each Member State is to take the necessary measures to ensure that participating in or instigating the conduct referred to in Article 2 is punishable.

8. Article 5(1) of the framework decision provides that the penalties thus laid down must be effective, proportionate and dissuasive' including, at least in serious cases, penalties involving deprivation of liberty which can give rise to extradition'. Article 5(2) adds that the criminal penalties may be accompanied by other penalties or measures'.

9. Article 6 of the framework decision governs the liability, as the result of an act or omission, of legal persons and Article 7 sets out the sanctions to which they are to be subject, which include criminal or non-criminal fines and may include other sanctions'.

10. Finally, Article 8 of the framework decision concerns jurisdiction and Article 9 deals with prosecutions brought by a Member State which does not extradite its own nationals.

11. The Commission objected in the various Council bodies to the legal basis relied on by the Council to require the Member States to impose criminal penalties on persons committing environmental offences. In its submission, the correct legal basis in that respect was Article 175(1) EC and it had indeed put forward, on 15 March 2001, a proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law (OJ 2001 C 180 E, p. 238, the proposed directive'), based on Article 175 EC, the annex to which listed the Community law measures to which the offences set out in Article 3 of the proposal relate.

12. On 9 April 2002, the European Parliament expressed its view on both the proposed directive, at first reading, and on the draft framework decision.

13. It concurred with the Commission's view of the scope of the Community's competence, whilst calling on the Council (i) to use the framework decision as a measure complementing the directive that would take effect in relation to the protection of the environment through criminal law solely in respect of judicial cooperation and (ii) to refrain from adopting the framework decision before adoption of the proposed directive (see texts adopted by the Parliament on 9 April 2002 bearing references A50099/2002 (first reading) and A50080/2002).

14. The Council did not adopt the proposed directive, but the fifth and seventh recitals to the framework decision are worded as follows:

(5) The Council considered it appropriate to incorporate into the present Framework decision a number of substantive provisions contained in the proposed Directive, in particular those defining the conduct which Member States have to establish as criminal offences under their domestic law.

...

(7) The Council has considered this proposal but has come to the conclusion that the majority required for its adoption by the Council cannot be obtained. The said majority considered that the proposal went beyond the powers attributed to the Community by the Treaty establishing the European Community and that the objectives could be reached by adopting a Framework-Decision on the basis of Title VI of the Treaty on European Union. The Council also considered that the present Framework Decision, based on Article 34 of the Treaty on European Union, is a correct instrument to impose on the member States the obligation to provide for criminal sanctions. The amended proposal submitted by the Commission was not of a nature to allow the Council to change its position in this respect.'

15. The Commission appended the following statement to the minutes of the Council meeting at which the framework decision was adopted:

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The Commission takes the view that the Framework Decision is not the appropriate legal instrument by which to require Member States to introduce sanctions of a criminal nature at national level in the case of offences detrimental to the environment.

As the Commission pointed out on several occasions within Council bodies, it considers that in the context of the competences conferred on it for the purpose of attaining the objectives stated in Article 2 of the Treaty establishing the European Community, the Community is competent to require the Member States to impose sanctions at national level - including criminal sanctions if appropriate - where that proves necessary in order to attain a Community objective.

This is the case for environmental matters which are the subject of Title XIX of the Treaty establishing the European Community.

Furthermore, the Commission points out that its proposal for a Directive on the protection of the environment through criminal law has not been appropriately examined under the codecision procedure.

If the Council adopts the Framework Decision despite this Community competence, the Commission reserves all the rights conferred on it by the Treaty.'

The action

16. By order of the President of the Court of 29 September 2003, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Kingdom of the Netherlands, the Portuguese Republic, the Republic of Finland, the Kingdom of Sweden and the United Kingdom of Great Britain and Northern Ireland, on the one hand, and the Parliament, on the other, were granted leave to intervene in support of the form of order sought by the Council and the Commission respectively.

17. By order of 17 March 2004, the President of the Court dismissed the application brought by the European Economic and Social Committee for leave to intervene in support of the form of order sought by the Commission.

Arguments of the parties

18. The Commission challenges the Council's choice of Article 34 EU, in conjunction with Articles 29 EU and 31(e) EU, as the legal basis for Articles 1 to 7 of the framework decision. It submits that the purpose and content of the latter are within the scope of the Community's powers on the environment, as they are stated in Article 3(1) EC and Articles 174 to 176 EC.

19. Although it does not claim that the Community legislature has a general competence in criminal matters, the Commission submits that the legislature is competent, under Article 175 EC, to require the Member States to prescribe criminal penalties for infringements of Community environmentalprotection legislation if it takes the view that that is a necessary means of ensuring that the legislation is effective. The harmonisation of national criminal laws, in particular of the constituent elements of environmental offences to which criminal penalties attach, is designed to be an aid to the Community policy in question.

20. The Commission recognises that there is no precedent in this area. It relies, however, in support of its argument, on the case-law of the Court concerning the duty of loyal cooperation and the principles of effectiveness and equivalence (see, inter alia, Case 50/76 Amsterdam Bulb [1977] ECR 137, paragraph 33, Case C186/98 Nunes and de Matos [1999] ECR I4883, paragraphs 12 and 14, and the order of 13 July 1990 in Case C2/88 IMM Zwartveld and Others [1990] ECR I3365, paragraph 17).

21. Likewise, a number of regulations adopted in the sphere of fisheries and transport policy either require the Member States to bring criminal proceedings or impose restrictions on the types of

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penalties which those States may impose. The Commission refers, in particular, to two Community measures which require the Member States to introduce penalties which are necessarily criminal in nature, although that qualification has not been expressly employed (see Article 14 of Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering (OJ 1991 L 166, p. 77) and Articles 1 to 3 of Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence (OJ 2002 L 328, p. 17)).

22. In addition, the Commission submits that the framework decision must in any event be annulled in part on the ground that Articles 5(2), 6 and 7 thereof leave the Member States free to prescribe penalties other than criminal penalties, even to choose between criminal and other penalties, which undeniably falls within the Community's competence.

23. However, the Commission does not maintain that the framework decision as a whole should have been the subject-matter of a directive. In particular, it does not dispute that Title VI of the Treaty on European Union is the appropriate legal basis for the provisions of the decision which deal with jurisdiction, extradition and prosecutions of persons who have committed offences. However, given that those provisions are incapable of existing independently, it must apply for annulment of the framework decision in its entirety.

24. The Commission also puts forward a ground of challenge alleging abuse of process. In that regard, it relies on the fifth and seventh recitals in the preamble to the framework decision, which show that the choice of an instrument under Title VI of the Treaty was based on considerations of expediency, since the proposed directive had failed to obtain the majority required for its adoption because a majority of Member States had refused to recognise that the Community had the necessary powers to require the Member States to prescribe criminal penalties for environmental offences.

25. The Parliament concurs with the Commission's arguments. It submits, more specifically, that the Council confused t he Community's power to adopt the proposed directive and the power, not claimed by the Community, to adopt the framework decision in its entirety. The matters upon which the Council relies in support of its argument are, in reality, considerations of expediency concerning the choice of whether or not to impose solely criminal penalties, considerations which should have been dealt with in the legislative procedure on the basis of Articles 175 EC and 251 EC.

26. The Council and the Member States which have intervened in these proceedings, with the exception of the Kingdom of the Netherlands, submit that, as the law currently stands, the Community does not have power to require the Member States to impose criminal penalties in respect of the conduct covered by the framework decision.

27. Not only is there no express conferral of power in that regard, but, given the considerable significance of criminal law for the sovereignty of the Member States, there are no grounds for accepting that this power can have been implicitly transferred to the Community at the time when specific substantive competences, such as those exercised under Article 175 EC, were conferred on it.

28. Articles 135 EC and 280 EC, which expressly reserve to the Member States the application of national criminal law and the administration of justice, confirm that interpretation.

29. That interpretation is also borne out by the fact that the Treaty on European Union devotes a specific title to judicial cooperation in criminal matters (see Articles 29 EU, 30 EU and 31(e) EU), which expressly confers on the European Union competence in criminal matters, in particular as regards the determination of the constituent elements of the relevant offences and penalties. The Commission's position is therefore contradictory, since it amounts, on the one hand, to claiming that the authors of the Treaty on European Union and the EC Treaty intended to confer by implication

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on the Community competence in criminal matters and, on the other, to disregarding the fact that the same authors expressly attributed such a competence to the European Union.

30. None of the judgments or secondary legislation to which the Commission refers lends support to its argument.

31. First, the Court has never obliged the Member States to adopt criminal penalties. According to its case-law, it is certainly the responsibility of the Member States to ensure that infringements of Community law are penalised under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance, and the penalty must, moreover, be effective, dissuasive and proportionate to the infringement; furthermore, the national authorities must proceed with respect to infringements of Community law with the same diligence as that which they bring to bear in implementing corresponding national laws (see, in particular, Case 68/88 Commission v Greece [1989] ECR 2965, paragraphs 24 and 25). However, the Court has not held, either expressly or by implication, that the Community is competent to harmonise the criminal laws applicable in the Member States. It has rather held that the choice of penalties is a matter for the Member States.

32. Second, legislative practice is in keeping with that interpretation. The various pieces of secondary legislation restate the traditional form of words, by virtue of which effective, proportionate and dissuasive sanctions' are to be prescribed (see, for example, Article 3 of Directive 2002/90), but do not call into question the freedom of the Member States to choose between proceeding under administrative or criminal law. On the rare occasions when the Community legislature has specified that the Member States are to bring criminal or administrative proceedings, it has merely stated expressly the choice which was open to them in any event.

33. Furthermore, whenever the Commission has proposed to the Council that a Community measure having implications for criminal matters be adopted, the Council has detached the criminal part of that measure so that it may be dealt with in a framework decision (see Council Regulation (EC) No 974/98 of 3 May 1998 on the introduction of the euro (OJ 1998 L 139, p. 1), which had to be supplemented by Council Framework Decision 2000/383/JHA of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro (OJ 2000 L 140, p. 1); see also Directive 2002/90, supplemented by Council Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence (OJ 2002 L 328, p. 1)).

34. In this instance, regard being had to both its purpose and content, the framework decision concerns the harmonisation of criminal law. The mere fact that it seeks to combat environmental offences is not such as to found the Community's competence. In fact, the framework decision supplements Community law on environmental protection.

35. In addition, the Council contends that the plea alleging abuse of process is based on an incorrect reading of the preamble to the framework decision.

36. The Kingdom of the Netherlands, whilst supporting the form of order sought by the Council, adopts a slightly more qualified argument than the Council. It contends that, in exercising the powers conferred on it by the EC Treaty, the Community may require the Member States to provide for the possibility of punishing certain conduct under national criminal law, provided that the penalty is inseparably linked to the relevant substantive Community provisions and that it can actually be shown that imposing penalties under criminal law in that way is necessary for the achievement of the objectives of the Treaty in the area concerned (see Case C240/90 Germany v Commission [1992] ECR I5383). That could be the case if the enforcement of a harmonising rule based, for example, on Article 175 EC gave rise to a need for criminal penalties.

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37. Conversely, if it is apparent from the content and nature of the proposed measure that it is intended essentially to bring about a general harmonisation of criminal laws and that the system of penalties is not inseparably linked to the area of Community law concerned, Articles 29 EU, 31(e) EU and 34(2)(b) EU are the correct legal basis for the measure. That is the case in this instance. It is clear from the purpose and content of the framework decision that it is intended, generally, to secure harmonisation of criminal laws in the Member States. The fact that rules adopted under the EC Treaty may be concerned is not decisive.

Findings of the Court

38. Article 47 EU provides that nothing in the Treaty on European Union is to affect the EC Treaty. That requirement is also found in the first paragraph of Article 29 EU, which introduces Title VI of the Treaty on European Union.

39. It is the task of the Court to ensure that acts which, according to the Council, fall within the scope of Title VI of the Treaty on European Union do not encroach upon the powers conferred by the EC Treaty on the Community (see Case C170/96 Commission v Council [1998] ECR I-2763, paragraph 16).

40. It is therefore necessary to ascertain whether Articles 1 to 7 of the framework decision affect the powers of the Community under Article 175 EC inasmuch as those articles could, as the Commission maintains, have been adopted on the basis of the last-mentioned provision.

41. On that point, it is common ground that protection of the environment constitutes one of the essential objectives of the Community (see Case 240/83 ADBHU [1985] ECR 531, paragraph 13, Case 302/86 Commission v Denmark [1988] ECR 4607, paragraph 8, Case C213/96 Outokumpu [1998] ECR I1777, paragraph 32). In that regard, Article 2 EC states that the Community has as its task to promote a high level of protection and improvement of the quality of the environment' and, to that end, Article 3(1)(l) EC provides for the establishment of a policy in the sphere of the environment'.

42. Furthermore, in the words of Article 6 EC [e]nvironmental protection requirements must be integrated into the definition and implementation of the Community policies and activities', a provision which emphasises the fundamental nature of that objective and its extension across the range of those policies and activities.

43. Articles 174 EC to 176 EC comprise, as a general rule, the framework within which Community environmental policy must be carried out. In particular, Article 174(1) EC lists the objectives of the Community's action on the environment and Article 175 EC sets out the procedures to be followed in order to achieve those objectives. The Community's powers are, in general, exercised in accordance with the procedure laid down in Article 251 EC, following consultation of the Economic and Social Committee and the Committee of the Regions. However, in relation to certain spheres referred to in Article 175(2) EC, the Council takes decisions alone, acting unanimously on a proposal from the Commission after consulting the Parliament and the two abovementioned bodies.

44. As the Court has previously held, the measures referred to in the three indents of the first subparagraph of Article 175(2) EC all imply the involvement of the Community institutions in areas such as fiscal policy, energy policy or town and country planning policy, in which, apart from Community policy on the environment, either the Community has no legislative powers or unanimity within the Council is required (Case C36/98 Spain v Council [2001] ECR I779, paragraph 54).

45. Moreover, it must be borne in mind that, according to the Court's settled case-law, the choice of the legal basis for a Community measure must rest on objective factors which are amenable to judicial review, including in particular the aim and the content of the measure (see, inter alia,

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Case C-300/89 Commission v Council [1991] ECR I-2867, Titanium dioxide ', paragraph 10, and Case C336/00 Huber [2002] ECR I7699, paragraph 30).

46. As regards the aim of the framework decision, it is clear both from its title and from its first three recitals that its objective is the protection of the environment. The Council was concerned at the rise in environmental offences and their effects which are increasingly extending beyond the borders of the States in which the offences are committed', and, having found that those offences constitute a threat to the environment' and a problem jointly faced by the Member States', concluded that a tough response' and concerted action to protect the environment under criminal law' were called for.

47. As to the content of the framework decision, Article 2 establishes a list of particularly serious environmental offences, in respect of which the Member States must impose criminal penalties. Articles 2 to 7 of the decision do indeed entail partial harmonisation of the criminal laws of the Member States, in particular as regards the constituent elements of various criminal offences committed to the detriment of the environment. As a general rule, neither criminal law nor the rules of criminal procedure fall within the Community's competence (see, to that effect, Case 203/80 Casati [1981] ECR 2595, paragraph 27, and Case C226/97 Lemmens [1998] ECR I3711, paragraph 19).

48. However, the last-mentioned finding does not prevent the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, from taking measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective.

49. It should also be added that in this instance, although Articles 1 to 7 of the framework decision determine that certain conduct which is particularly detrimental to the environment is to be criminal, they leave to the Member States the choice of the criminal penalties to apply, although, in accordance with Article 5(1) of the decision, the penalties must be effective, proportionate and dissuasive.

50. The Council does not dispute that the acts listed in Article 2 of the framework decision include infringements of a considerable number of Community measures, which were listed in the annex to the proposed directive. Moreover, it is apparent from the first three recitals to the framework decision that the Council took the view that criminal penalties were essential for combating serious offences against the environment.

51. It follows from the foregoing that, on account of both their aim and their content, Articles 1 to 7 of the framework decision have as their main purpose the protection of the environment and they could have been properly adopted on the basis of Article 175 EC.

52. That finding is not called into question by the fact that Articles 135 EC and 280(4) EC reserve to the Member States, in the spheres of customs cooperation and the protection of the Community's financial interests respectively, the application of national criminal law and the administration of justice. It is not possible to infer from those provisions that, for the purposes of the implementation of environmental policy, any harmonisation of criminal law, even as limited as that resulting from the framework decision, must be ruled out even where it is necessary in order to ensure the effectiveness of Community law.

53. In those circumstances, the entire framework decision, being indivisible, infringes Article 47 EU as it encroaches on the powers which Article 175 EC confers on the Community.

54. There is therefore no need to examine the Commission's argument that the framework decision should in any event be annulled in part in so far as Articles 5(2), 6 and 7 leave the Member States free also to provide for penalties other than criminal penalties, even to choose between criminal

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penalties and other penalties, matters allegedly falling undeniably within the Community's competence.

55. In the light of all the foregoing, the framework decision must be annulled.

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 applied for in the successful party's pleadings. Since the Commission has applied for costs and the Council has been unsuccessful, the Council must be ordered to pay the costs. Pursuant to the first paragraph of Article 69(4), the interveners in these proceedings must bear their own costs.

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JURCIT
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PROCEDU Action for annulment - successful

ADVGEN Ruiz-Jarabo Colomer

JUDGRAP Schintgen

DATES of document: 13/09/2005
of application: 15/04/2003

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Opinion of Mr Advocate General Ruiz-Jarabo Colomer delivered on 26 May 2005. Commission of the European Communities v Council of the European Union. Action for annulment - Articles 29 EU, 31(e) EU, 34 EU and 47 EU - Framework Decision 2003/80/JHA - Protection of the environment - Criminal penalties - Community competence - Legal basis - Article 175 EC. Case C-176/03.

I - Introduction

1. The Commission, using Article 35(6) EU, is challenging Council Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law (hereinafter the Framework Decision'). (2) In its view, the legal basis chosen is erroneous, because the legislative enterprise in question should be undertaken in the context of the EC Treaty and not, as has been done, on the basis of Title VI of the Treaty on European Union.

2. Behind that succinct proposition there is a far-reaching issue, which involves the powers of the Community, since, on the assumption that the protection of the natural environment in the European Union demands concerted action in the form of the criminalisation of the most serious infringements, (3) it is necessary to determine whether approval of the necessary coordinating provisions falls within the third pillar, and is the province of the Council under Article 34(1)(b) EU, in conjunction with Article 31(1)(e) EU, or within the first, on the grounds that it is a Community action, as referred to in Article 175 EC. (4)

3. The positions set out in the various written submissions and at the hearing seem to be sharply defined, not only as regards the claim advanced in each instance, but also in the arguments deployed. The Commission, the European Parliament and the Economic and Social Committee align themselves with the second of the above propositions, whilst the Council and the 11 Member States which share its view (5) argue for the first.

4. The choice of one position or the other entails far-reaching consequences. Electing the unionist' option weakens the harmonising effect since, apart from the fact that framework decisions do not have direct effect, failure to transpose them cannot be overcome using an action for infringement, such as that provided for in Article 226 EC, and, in addition, the Court's jurisdiction to give preliminary rulings, in accordance with Article 35 EU, is not binding, since that jurisdiction is subject to acceptance by the Member States. The foregoing considerations explain the Commission's wish to situate competence under the first pillar.

5. Before undertaking an analysis of the action, it is necessary to give an overview of the legislation and the successive stages of the proceedings before the Court.

II - The legal framework

A - Community law

1. The Treaty Establishing the European Community

6. One of the objectives of the Community is to achieve a high level of protection and improvement of the quality of the environment (Article 2 EC), implementing adequate policy in that sphere (Article 3(1)(l) EC) and integrating environmental protection requirements into the definition and implementation of other Community policies, with a view to promoting sustainable development (Article 6 EC).

7. Article 174 EC sets out the aims of environmental policy (Article 174(1) and (2) EC), and the criteria to be taken into account in drawing it up (Article 174(3) EC), whilst Article 175 EC establishes the procedures for adopting the relevant measures (Article 175(1) to (3) EC), which must be financed and implemented by the Member States (Article 175(4) EC), and the latter may, in any event, according to Article 176 EC, introduce more stringent measures, provided that

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they are not incompatible with the Treaty.

8. In consequence, there is shared responsibility in the environmental sphere, (6) advocated by Article 174(4) EC, which leaves the way open for joint or unilateral cooperation with third countries and with international organisations.

9. As regards the Community, as a general rule it exercises competence through the codecision' procedure set out in Article 251 EC although, in respect of the matters to which Article 175(2) EC refers, (7) the Council can act alone, on a proposal from the Commission and after consulting the European Parliament, the Economic and Social Committee and the Committee of the Regions.

2. Proposal for a Directive on the criminallaw protection of the environment (8)

10. On the basis of Article 175(1) EC, the Commission, in accordance with Article 251 EC, put forward a proposal for a Directive seeking to ensure more robust application of the Community law on the protection of the environment, establishing a minimum set of criminal offences throughout the Community (Article 1).

11. Article 3 of the text submitted classifies as criminal offences certain types of conduct, (9) committed intentionally or with at least serious negligence, and Article 4 gives the Member States responsibility for punishing the commission or instigation of or the participation in such offences by means of effective, proportionate and dissuasive sanctions', including the deprivation of liberty. It also provides for other types of corrective measures, for both natural and legal persons, including fines, exclusion from entitlement to benefits and judicial intervention.

B - European Union law

1. The Treaty on European Union

12. The European Union, which embodies a new stage in the process of creating an ever-closer link between the peoples of Europe, is based on the Communities, supplemented by the policies and with the forms of cooperation established in the Treaty on European Union itself (Article 1). Accordingly, there are three distinct pillars:

- The first, or Community', pillar.

- The second covers common foreign and security policy (Title V).

- The third concerns police and judicial cooperation in criminal matters (Title VI).

13. The latter aims, without prejudice to the powers of the European Community , to provide citizens with a high level of safety within an area of freedom, security and justice, by means of common action among the Member States in the fields in question, in order to prevent and combat crime, through the approximation, where necessary, of national rules on criminal matters, in accordance with the provisions of Article 31(e) EU (Article 29 EU).

14. Judicial cooperation includes the progressive adoption of measures establishing minimum rules relating to the constituent elements of offences and to penalties in the fields of organised crime, terrorism and illicit drug trafficking (Article 31(1)(e) EU).

15. For such purposes, one of the tools created is the framework decision, which fosters the approximation of national statutory and regulatory provisions. In common with the directives under the first pillar, framework decisions are binding as to the result to be achieved, leaving to the national authorities the choice of form and methods, but, in contrast, never have direct effect (Article 34(2)(b) EU).

16. The powers under the third pillar may be transferred to the Community so that it can exercise them under Title IV of the EC Treaty, in relation to visas, asylum, immigration and other policies

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associated with the free movement of persons (Article 42 EU).

17. The terms of the Treaty on European Union do not affect the founding treaties of the European Community nor the subsequent Treaties and Acts modifying or supplementing them (Article 47).

2. The Framework Decision

18. Invoking Article 29 EU, Article 31(e) EU and Article 34(2)(b) EU, the Council, with the objective of giving a tough and concerted response to threats to the environment (recitals 2 and 3), approved the Framework Decision which the Commission now contests.

19. Articles 2 and 3 of the Framework Decision require the Member States to establish as criminal offences the intentional or negligent commission of certain conduct, (10) whilst Article 4 extends liability to the participation in and instigation of such conduct.

20. Article 5(1), for its part, predicates effective, proportionate and dissuasive' penalties which must include, at least in serious cases, penalties involving the deprivation of liberty and which can give rise to extradition, without prejudice to the fact that, as set out in Article 5(2), they may be accompanied by other sanctions or measures. (11)

21. Article 6 governs the liability for acts or omissions by legal persons, (12) and Article 7, the punishments they can incur. (13)

22. The foregoing provisions demonstrate that the Framework Decision is practically an exact reproduction of the Proposal for a Directive, as is acknowledged in Recital 5, with an explanation in Recital 7 that the Council considered the Proposal, but did not approve it, because it went beyond the powers granted to the Community by the EC Treaty. (14)

23. Article 8 refers to jurisdiction based on territory, whilst Article 9 addresses extradition and prosecution where a Member State does not extradite its nationals.

III - The proceedings before the Court of Justice

24. In addition to the Commission and the Council, the European Parliament, the Economic and Social Committee, Germany, Denmark, Spain, Finland, France, Greece, Ireland, the Netherlands, Portugal, the United Kingdom and Sweden have participated as interveners in the proceedings, and have also submitted written observations.

25. At the hearing, which took place on 5 April 2005, the representatives of the applicant and the defendant, and the agents for the interveners, with the exception of those of the Greek Government and the Economic and Social Committee, entered an appearance in order to make their submissions orally.

IV - Analysis of the action

A - Definition of the issues in contention

26. The dispute turns on Articles 1 to 7 of the Framework Decision, whilst Articles 8 to 12 remain tangential. What is in issue is not the power of the Council of the European Union to adopt those provisions, (15) but its duty to refrain from adopting them by virtue of the primacy of Community law, established in Article 47 EU, (16) since the Community is said to have power under the Treaty of Rome to require the Member States to give a response in criminal law to certain threats to the environment.

27. The discussion, therefore, has shifted from the third pillar to the first in order to examine whether there is any legal basis for the Community to intervene in the matter, cancelling out the powers of the Union. On that point likewise it is common ground that Community law contains no express or implicit general power to impose criminal penalties. (17)

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28. On the other hand, all the parties acknowledge that the Community is entitled, on the basis of the principle of loyal cooperation, referred to in Article 10 EC and intended to ensure the effectiveness of its legal order, to require the Member States to punish conduct which threatens that legal order. The parties and their interveners, however, differ as to whether that power enables the Community to require the Member States to define acts as criminal offences.

29. Resolving that question requires a rigorous examination of the judgments according to which the Community institutions have power to lay down rules imposing punishments.

B - The case-law on the Community's power to establish penalties

30. The judgment in Amsterdam Bulb (18) asserted that, in the absence of any provision in the Community rules for the punishment of individuals who fail to observe those rules, the national legislatures can adopt such sanctions as appear to them to be appropriate (paragraph 33). (19) That assertion is based on the duty of the Member States, under Article 5 of the EC Treaty (now Article 10 EC), to ensure fulfilment of their European obligations (paragraph 32).

31. In his Opinion in that case, Advocate General Capotorti sheds light on the reasoning behind the statement in question. In paragraph 4, after pointing out that, according to the case-law, Member States are precluded from taking measures which modify a Community regulation, even for the purpose of ensuring its application, he explains that the prospect of a penal sanction does not change the scope of a rule, since any penal provision related to a substantive rule of conduct is based on the presumption of conduct contrary to that rule and the rule is, therefore, taken for granted, complete with its contents. He later adds that the differentiated protection which the method provides is inherent in the differences between the national regimes, to which regimes Article 5 of the Treaty appeals in order to reinforce the effectiveness of Community law. To complete the picture, he states that the only restriction on the introduction of penal sanctions on the part of a Member State is the possibility that the Community rules have already provided for them.

32. So, Amsterdam Bulb turns on three premisses: (1) it is for Community law to design the penalty provisions which ensure its effectiveness; (2) where there are none, the Member States apply such penalty measures as they see fit; and (3) they are free to choose the methods which they consider most appropriate, even if variations are inherent in the system.

33. The first notion rests on the supposition that the Community penalty has the force inherent to the legal instrument used, be it a regulation or a directive. However, since the Community has no powers to impose criminal penalties, it must confine itself to regulating civil and administrative penalties. The foregoing is implicit in the words of Advocate General Capotorti when he concludes the same paragraph of his Opinion, observing that the fact that a Member State supplements Community legislation by penal sanctions, in order to ensure compliance with it, does not infringe the principles which inspire Community law, with the proviso, I should add, that it respects the safeguards which govern the exercise of any power to impose penalties and, in particular, of the ne bis in idem principle . (20)

34. In the Greek Maize ' case, (21) the Court of Justice reiterated the formula in paragraph 32 of the judgment in Amsterdam Bulb (paragraph 23), without specifically citing that case. It added two requirements for the legitimacy of national disciplinary measures intended to uphold Community law: (1) infringements must be penalised under procedural and substantive conditions which are analogous to those applicable to infringements of national law of a similar nature and importance; and (2) the conditions must make the penalty effective, proportionate and dissuasive (paragraph 24). In his Opinion in that case, Advocate General Tesauro had already stated that Article 5 of the Treaty entails a duty on Member States to impose appropriate penalties on those who infringe Community law in such a way as to prejudice its effectiveness (paragraph 12, second unnumbered paragraph).

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(22)

35. Accordingly, the way is open for Member States to put an end to conduct which contravenes Community law, both where that law is silent on the matter and where it contains express provisions. The national rules entail additional protection but, as already suggested in paragraph 17 of the judgment in Drexl , (23) Community law sets certain limits, and demands that the penalty be equivalent to that used in respect of infringements of domestic law (the principle of equal treatment or proportionality) and, furthermore, that it be effective.

36. The order in Zwartveld and Others , (24) delivered in a request for judicial cooperation by the Rechter-commissaris at the Arrondissementsrechtbank Groningen, attributed to Greek Maize a statement which does not appear in the text of the judgment in that case, but which pervades its spirit and that of the Amsterdam Bulb ruling: the Member States can and must guarantee compliance with the Treaty, resorting, if necessary, to criminal penalties (paragraph 17).

37. The tour of the case-law appears to conclude with Nunes and de Matos , (25) which addressed a question referred for a preliminary ruling by the Tribunal de Círculo, Oporto, seeking to ascertain whether a Member State is entitled to classify as a criminal offence conduct harmful to the financial interests of the Community, where the Community legislation only affords it a civil penalty. The Court of Justice held that the actions available under the auspices of Article 10 EC include criminal responses, and stated that:

- if Community law contains no measures to ensure compliance with its provisions, the Member States have a duty to establish such measures; if it does include them, the Member States acquire a complementary role concerned with reinforcing those provisions;

- the choice of the type of penalty lies with the national authorities, although the penalty must be comparable with that imposed for infringements of domestic law of similar nature and importance, and must in addition be effective, appropriate and dissuasive.

38. In short, neither the Council nor those who share its view are wrong to argue that the case-law does not, explicitly, recognise any power on the part of the Community to require the Member States to classify as criminal offences conduct which hinders achievement of the objectives laid down in the Treaties.

39. Taking the route of secondary Community legislation brings us to the same place.

C - Secondary legislation

40. Article 1(2) of Council Regulation (EEC) No 2241/87 of 23 July 1987 establishing certain control measures for fishing activities, (26) and Article 31(1) of Council Regulation (EEC) No 2847/93 of 12 October 1993 establishing a control system applicable to the common fisheries policy, (27) which has replaced the former, leave within the discretion of Member States the choice of the penalty for infringements of the provisions governing that policy. That interpretation is confirmed, as regards the first of those regulations, in Commission v France , (28) which examined whether actions, some administrative and some criminal, available in domestic law, complied with Community commitments in the field of conservation and monitoring of fishery resources.

41. For its part, Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering, (29) after stating that the phenomenon must be combated mainly by penal means (fourth recital), merely requires Member States to ensure full application of all its provisions, and to determine the penalties in the event of infringement (Article 14), subject to any stricter provisions to prevent such conduct (Article 15).

42. Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence (30) merely requests Member States to punish, with effective, proportionate

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and dissuasive sanctions' persons who commit, instigate, are accessories to or who attempt to commit certain acts (Articles 1 to 3), and the criminal nature of those sanctions is qualified in Council Framework Decision 2002/946/JHA of 28 November 2002. (31)

43. On occasions, a criminal penalty becomes imperative because it is the only sanction which fulfils the requirements outlined in the judgment in Greek Maize of being effective, proportionate and dissuasive'.

D - The undefined legal concept of an effective, proportionate and dissuasive penalty'

44. The notion in question, when looked at in the abstract, appears not to be precisely delineated, but, as with all such notions, is amenable to definition when applied to actual situations, most particularly if one bears in mind its intended purpose.

45. The expression which the Court of Justice employs is not accidental, since, by referring to the effectiveness, proportionality and the dissuasive nature of the penalty, it alludes to the basic requirements for achieving full application of a Community rule, notwithstanding its infringement. Furthermore, in the light of the fact that any punishment pursues the dual objective of general and specific deterrence, punishing the infringer with the appropriate legal mechanism and threatening society with the same kind of punishment if similarly culpable conduct occurs, the range of possible sanctions appearing very broad.

46. In some instances it is sufficient to restore the situation existing prior to the contravention. That outcome, however, which is not a punishment in the strict sense and which is usually referred to as a civil penalty', frequently requires, in order to attain the deterrent objectives referred to, the addition of punishments in the true meaning of the word, which must be more or less severe according to the importance of the legal interest under threat and the degree of social disapproval of the infringing behaviour.

47. Depending on the extent of the response, there are criminal penalties - those of greater severity - and administrative penalties. Both categories are manifestations of the penalising authority of the State and obey the same ontological principles. (32) However, the less stringent nature of the second type entails a relaxation of the safeguards which must accompany their imposition, without prejudice to the fact that, as I stated in my Opinion in Greece v Commission , (33) in both situations similar principles must be observed. (34)

48. It seems patent that, in keeping with what the Council and some of those supporting it have implied, no one is in a better position to assess the feasibility, appropriateness and effectiveness of a punitive response than the national legislating authorities. That has been my position when the issue was to determine, in the light of the principle of effectiveness, the adequacy of certain national procedural time-limits for bringing actions to enforce rights under Community law, (35) although with the proviso that there are well-publicised exceptions to that general rule (36) in which, because they are so manifest, the Community may lawfully make the assessment.

49. It must be recalled that upholding Community law is the responsibility of the Community institutions, although nothing prevents them from urging the Member States to penalise conduct which contravenes that law. It is only in so far as the most appropriate response cannot be provided - because the institutions do not have the information necessary to take a decision - that the task falls to the national legislatures. Conversely, if there are self-evident criteria for determining the effective, proportionate and dissuasive penalty', there is no substantive reason preventing the party which has competence in that sphere from making the decision. (37)

50. In other words, there is no sign of any obstacle to the view that the appropriate punishment for, for example, attempted murder or the corruption of minors, must be criminal, and, consequently,

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if the legal interests protected in such offences were one of objectives of the Community, no one would dispute the ability of its law-making bodies to require the Member States to prosecute in criminal law.

51. The next step, therefore, is to ascertain whether environmental protection, which is, in view of the statements in points 6 to 9 above, indisputably a Community matter, requires the shield of criminal law. That analysis must include the process by which environmental protection has been brought within the Community framework.

E - Environmental protection in the Community

52. In the Opinion which I delivered on 30 November 2004 in Case C-6/03 Deponiezweckverband Eiterköpfe , in which judgment was delivered on 14 April 2005, I stated that, although the natural environment and its preservation were not a matter of great concern to the drafters of the Treaties, it was not long before, in 1972, the Conference of Heads of State and Government, held in Paris, resolved to establish a specific policy in the area, (38) with the suggestion that use should be made of the legal basis afforded by Articles 100 and 235 of the EC Treaty (39) (now Articles 94 and 308 EC).

53. The Court of Justice took up that suggestion and based the rules in the area in question on Article 100, (40) holding, in ADBHU , (41) that environmental protection should be one of the Community's essential objectives' (paragraph 13), a notion reiterated years later, after approval of the Single European Act, (42) in the judgment in Commission v Denmark (paragraph 8). (43)

54. That Act inserted into the EC Treaty a specific part - Title VII (now Title XIX) -, (44) consisting of Articles 130r and 130s (now, after amendment, Articles 174 EC and 175 EC) and of Article 130t (now Article 176 EC), with the addition also of Article 100a(3) (now, after amendment, Article 95(3) EC), which obliges the Commission to ensure that the proposals referred to in Article 95(1) seek to achieve a high level of protection' of the environment.

55. The new approach placed environmental protection at the heart of Community activity, inspiring and informing that activity, as the Court pointed out in Commission v Council (paragraphs 22 and 24), (45) and, with signature in Maastricht of the Treaty on European Union, it became a Community objective.

56. Today, attainment of a high level of conservation and improvement of the environment, and improving the quality of life, have been confirmed as Community objectives (Article 2 EC), and call for specific action (Article 3(1)(l) EC). Furthermore, [e]nvironmental protection requirements must be integrated into the definition and implementation of the Community policies and activities referred to in Article 3, in particular with a view to promoting sustainable development' (Article 6 EC). The same concern is discernable in other provisions of the Treaty: Article 95 EC, already cited, or Article 161 EC, which addresses the setting up of a Cohesion Fund to provide a financial contribution to projects in the fields... of environment ...'.

57. The preservation of the environment has provided an avenue for embodying in legislation principles such as the precautionary principle and that of preventive action (first subparagraph of Article 174(2) EC), which inform broad swathes of Community law in which nature, life and personal integrity have acquired a universal dimension as a result of the globalisation of the threats inherent in technological and industrial progress. (46)

58. The Treaty establishing a Constitution for Europe (47) continues the same approach. According to Article II-97, which is based on Article 2 EC, [a] high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development'; Article III-119

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reiterates Article 6 EC. Articles III-233 and III-234, for their part, substantially reproduce Articles 174 to 176 EC.

59. It is therefore beyond doubt, as I stated in point 51 of this Opinion, that the environment' is a matter of Community competence, and has also come to represent a legal interest the protection of which inspires its other policies, a protective activity which may be clarified, furthermore, as an essential objective of the Community system.

60. Environmental concern is not exclusive to Europe, and has acquired a universal dimension.

F - The globalisation of environmental policy'

61. Numerous international pacts and agreements seek responses to combat the constant deterioration of ecosystems and life on our planet.

62. One example is the process occurring within the United Nations (48) starting with the Conference held in Stockholm between 5 and 16 June 1972 and marked by significant milestones. That meeting turned into a major event, because it drew world attention to the seriousness of the environmental situation in a Declaration on the Human Environment, which established 26 principles for the preservation of natural resources.

63. The 1982 World Charter for Nature (49) went further in the same direction, increasing commitment to the terms of the guidelines for behaviour and to their inclusion in national legal systems.

64. The Rio Declaration, adopted by the governments participating in the Conference on Environment and Development, held in Rio in June 1992, represented a decisive step forward. The high profile of the context from which it emerged and the broad consensus achieved for its approval have given it special meaning, as a universal agreement, the product of a shared awareness of the need to preserve the planet for future generations.

65. The 1992 United Nations Framework Convention on Climate Change and the Kyoto Protocol of 1997, which implements the former with a view to reducing emissions of greenhouse gases, (50) represent two further significant links in that unstoppable chain of events, which includes also the Protocol on Biosafety, signed in Montreal on 28 January 2000, at the Conference of the signatories of the Convention on Biological Diversity, which likewise emerged from the Rio Summit.

G - The right to an acceptable environment and public responsibility for its preservation

66. The concepts sustainable development' and quality of life' used in the EC Treaty occur closely linked with that of the environment', alluding to a human dimension which cannot be overlooked when mention is made of protecting and improving the environment. In the geophysical medium which our natural surroundings represent, quality of life asserts itself as a citizenship right emanating from various factors, some of them physical (the rational use of resources and sustainable development) and some more intellectual (progress and cultural development). It is a matter of attaining dignity of life in qualitative terms, once the quantitative threshold sufficient for subsistence has been passed. (51)

67. There thus emerges a right to enjoy an acceptable environment, not so much on the part of the individual as such, but as a member of a group, in which the individual shares common social interests. (52) A number of constitutions of Member States of the Community at the time the contested Framework Decision was approved recognise that right. (53) Accordingly, Article 20a of the Basic Law of the Federal Republic of Germany (54) provides that the State, assuming responsibility for future generations , (55) shall also protect the natural conditions of life in the framework of the constitutional order'. In Spain, amongst the principles governing social and economic policy, Article 45 of the Constitution (56) declares the right of all to enjoy an environment appropriate for personal development'. (57) Article 66(1) of the Portuguese Constitution reads similarly. (58) In Sweden, Article 18(3)

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of Chapter II of the Law of 24 November 1994, (59) amending the Instrument of Government, reiterates the right of access to nature.

68. Supplementing that right are the correlative duties on public authorities. One has already seen the terms of the Bonn Basic Law. Article 45(2) of the Spanish Constitution requires the public authorities to ensure the rational use of natural resources, in order to protect and improve the quality of life and to protect and restore the environment, relying on the necessary support of collective solidarity'. In the same vein, the Finnish Charter of Government (60) refers to a common responsibility for the care of nature and diversity, and of the environment (Article 20), whilst the Greek (Article 24(1)), (61) Netherlands (Article 21) (62) and Portuguese (Article 9(e)) Constitutions impose a duty on the authorities to preserve the environment. In Italy, the obligation on the Republic to safeguard the landscape, contained in Article 9(2) of the Constitution, (63) has been extended to include custody of the environment and of land. (64)

69. The human dimension of that environmental concern is implicitly enshrined in the European Union, whose Charter of Fundamental Rights, of 7 December 2000, (65) after declaring in the preamble that the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity, includes, in the Chapter devoted to the latter, alongside employment and welfare rights, a provision explaining that its policies include and ensure a high level of environmental protection and the improvement of the quality of the environment, in accordance with the principle of sustainable development (Article 37). That provision, as indicated, forms part of the Treaty establishing a Constitution for Europe (Article II-97).

70. I do not want to conclude the present section without emphasising that, irrespective of how the notion of the right to enjoy an appropriate natural environment is couched, (66) it is easy to discern its link with the content of certain fundamental rights. Two rulings of the European Court of Human Rights suffice to corroborate that view. Lopez Ostra v Spain , (67) held it to be obvious that severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as adversely to affect their private and family life (paragraph 51). (68) Guerra and Others v Italy (69) held that lack of official information on citizens' appropriate response to the polluting emissions from a nearby factory did infringe the fundamental right concerned (paragraph 60).

H - The criminal law response to serious offences against the environment

71. The foregoing overview clearly illustrates the importance which ecological consciousness' has acquired in recent decades. Neither the actual nor the potential impact of the changes which human activity has brought about in ecosystems is known with certainty, but there is an intuitive awareness of their capacity to degrade life on earth or render it impossible. The fact that humankind and its assaults on nature are endangering its survival as a species has highlighted the urgency of facilitating guidelines for conduct and of implementing environmental ethics', aiming at the harmonious integration of humankind in the environment in which it exists.

72. States use criminal codes as a last resort in defending themselves against threats to the values which sustain coexistence, and have in recent years determined that certain types of conduct which damage the natural environment are to be criminal. (70) If the aim is to attain a high level of protection and to improve the quality of life (Article 2 EC), it seems reasonable that Community law, through the powers entrusted to the institutions in order to achieve those ends, must in certain cases avail itself of criminal penalties as the only effective, proportionate and dissuasive' response.

73. In academic legal thinking a degree of consensus has emerged that ecosystems should be regarded as particularly important legal interests, and that their protection is vital for the very existence of humankind, with the consequence that their conservation and maintenance fully justify the intervention

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of criminal law with a specific safeguard. (71)

74. Administrative responses are often sufficient, but do not ensure appropriate protection in all instances of serious damage. Criminal penalties, conversely, represent an additional pressure, capable on a good number of occasions of inducing compliance with the requirements and a proliferation of statutory prohibitions on the carrying out of activities which are highly dangerous to the environment. The advent of ecology in criminal codes seeks also, in addition to enhancing the general deterrent effect, to raise public awareness of the social harmfulness' of offences against nature, reaffirming the recognition of environmental interests as autonomous rights ranking alongside the traditional values protected by the criminal law. (72) The ethical dimension of criminal punishment must not be overlooked. When an act is sanctioned in criminal terms, it is held to merit the most severe reproach because it transgresses the fundamental tenets of the legal system.

75. Having regard, therefore, to the essence of the case-law conferring on the Community authority to impose sanctions, with scope to harmonise national provisions, to the continuous process in which the Community is assuming competence for protection of the physical environment (73) and to the importance and the fragility of environmental interests, there are sufficient grounds for acknowledging the Community's power to require from Member States a response in criminal law to certain kinds of conduct which harm the planet. (74)

76. The Council and those who support it in these proceedings reject that proposition, arguing that it undermines the sovereignty of the Member States. Their complaint is in my view unfounded. First of all, it should be recalled that, as posited in Van Gend & Loos , (75) the Community constitutes a new legal order, for the benefit of which the Member States have limited their powers, with the effect that the sovereignty' argument adds nothing new to the discussion, even in the field of criminal law. Ample evidence of that fact is that Community law has decriminalised many acts which are offences in the national criminal codes, which interference' has not alarmed anyone. (76) Here a long list of situations could be added, familiar to all, in which, not solely in the context of criminal law, Community law has restricted the legislative powers of the States: tax law and procedural law are two good illustrations.

77. The present dispute brings into play another issue, which affects not so much the Member States as their citizens: their right that it be democratically elected representatives who determine criminal offences, which translates in legal terms as the principle of the legality of criminal law, with its dual dimension - a substantive dimension, that criminal conduct must be predetermined by legislation, and a formal aspect, embodied in an absolute reservation in favour of the holder of legislative power. With the position which I advocate, the nullum crimen sine lege rule remains intact, since Community harmonisation requires the intervention of the national parliaments for the final incorporation of the external provisions into their legal systems. (77)

78. Nor is that proposition shaken when Articles 135 EC and 280 EC, in the fields of customs activity and measures to counter fraud against Community interests, in which State cooperation has to be closer and more intense, exclude from their provisions the application of ... criminal law' and the... administration of justice', both of which expressions allude not to the power to create rules, but to the power to apply them, an issue not in dispute in these proceedings and which relates to competence which lies, quite undoubtedly, with the judges who exercise criminal jurisdiction.

79. It could be argued that, since cooperation in criminal matters has been placed within the third pillar, any initiative in the field, including any by the Community, must take place within the context of Title VI of the Treaty on European Union, but that syllogism is lacking its major premiss.

80. Article 29 EU outlines coordinated activity to prevent and combat crime via three courses

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of action. The first two take the form of police and judicial cooperation, whilst the last aims to approximate legislation in accordance with the provisions of Article 31(e)', which refers to the progressive adoption of minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organised crime, terrorism and illicit drug trafficking'. There is therefore, as I have already suggested, (78) no universal competence' on the part of the European Union to harmonise the criminal law of the Member States, using the framework decisions to which Article 34(2)(b) refers, but, rather, a power limited to certain offences of transnational scope.

81. The third pillar predicates operational assistance by the police and judiciary in order to combat crime more effectively, but the approximation of laws, which goes beyond the notion of cooperation and implies a more radical step towards integration, is confined to those elements which, by reason of their internationalisation', merit a uniform response.

82. Just as the Community lacks any general power in criminal matters, it likewise does not have any natural capacity' under the third pillar either, which would act as a magnet attracting all issues of that type which arose in the European Union. The solution must be reached via a different path, along the lines intimated by the case-law when it develops the power to impose penalties as a means of protecting the Community legal order.

83. The objections outlined by the Council and the Member States having been refuted, the line of argument must move forward. Leaving aside the reasons which militate in favour of a coordinated response, since the benefits of harmonisation (79) are not disputed, (80) it is necessary to clarify its scope. The objective, as has been seen, is to afford an effective, proportionate and dissuasive' penalty in response to serious contraventions of Community environmental policy. Criminal punishment fulfils those conditions, and the Community, in order to ensure the effectiveness of its activity in the field, can therefore constrain the Member States to impose such penalties, but it is not entitled, in my view, to go further. That statement has its basis, on the one hand, in the tenets of the case-law which confirms that authority and, on the other, in the nature of the Community's power in environmental matters.

I - For Community law to be effective it is only necessary that the sanction be a criminal penalty

84. The power to impose civil, administrative or criminal sanctions must be classified as an instrumental power (81) in the service of the effectiveness of Community law. (82) Where the integrity of that legal system requires a correctional dimension, the Member States must define the mechanisms required to that end, and their nature must be determined by the Community, provided that it is in a position to analyse how useful they are for the aim pursued, since otherwise the task falls to the national legislative authorities. In relation to the environment, it seems clear that the response to conduct which seriously harms the environment must be a criminal one, but, in terms of punishment, the choice of the penalty to admonish that conduct and to ensure the effectiveness of Community law is the province of the Member States.

85. Once Community harmonisation has introduced uniform offences, the national legal systems must penalise that proscribed conduct, indicating the specific methods of punishment associated with the offence, to restore in that way the physical and legal positions which have been disturbed. In that enterprise, no party seems to be in a better position than the national legislature which, since it has first-hand knowledge of the legal and sociological particularities of its arrangements for coexistence, must opt, within the framework previously defined by the Community, for the response most apt to uphold Community law. (83)

86. Criminal law affords the only effective, proportionate and dissuasive' response to conduct, such as the acts described in Article 2 of the Framework Decision, which seriously affects the environment but, once they have been placed within the criminal context, the exact admonishment

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can be determined only in the national legal system, which has access to the criteria necessary for that task, since the Community, at present, lacks the information necessary to assess the best way to protect the environmental interests in each Member State, deciding between the deprivation of liberty, other restrictions on rights or a financial liability.

87. The configuration described assigns to the Community the power to define precisely the legal interest protected and the nature of the offence, whilst the Member States are responsible for designing the penalty provisions, (84) either individually, or working in coordination through intergovernmental cooperation regulated under the third pillar of the Treaty on European Union.

J - The nature of Community powers relating to the environment

88. The Community shares its powers in the environmental field with the Member States, (85) and national legislation is permitted to be stricter.

89. Article 176 EC, as already indicated, authorises the Member States to maintain or enact measures affording greater protection, provided that they are compatible with the Treaty and are notified to the Commission. At the same time, Article 95 EC gives them power to maintain (Article 95(4)) or introduce (Article 95(5)) their own provisions, even where harmonisation measures exist, where justified on the grounds of concern for the environment, which they are to notify to the Commission. Lastly, Article 174(2) EC, second subparagraph, provides for a safeguard clause allowing Member States to take provisional measures, for non-economic environmental reasons', subject to inspection.

90. In my Opinion in Deponiezweckverband Eiterköpfe , cited above, I posited that the Member States are, therefore, called upon to perform an important role, with the effect that European provisions coexist with other, internal, rules which nuance Community legislation or create exceptions to it in order to afford extra protection, and it therefore seems completely consistent that, once the Community has indicated the minimum threshold (the criminal law response to infringements), the national legal systems should particularise that legislation, clarify it and instil it with the vigour necessary for it to serve its stated purpose.

K - Articles 1 to 7 of the Framework Decision as Community powers

91. In the light of the foregoing considerations, it is desirable to express a view on Articles 1 to 7 of the Framework Decision, analysing whether their terms fall within the purview of Community law, because, if they do, since they were approved by the Council under Article 29 EU, Article 31(e) EU and Article 34(2)(b) EU, they contravene Article 47 EU and are therefore null and void.

92. Articles 2 and 3 require the punishment under criminal law, when committed intentionally, or at least with serious negligence, of seven categories of offences detrimental to the environment, described according to their severity, either by reason of their capacity to cause death or serious injury to persons or substantial damage to elements of the natural and cultural environment, or because they affect protected species or the ozone layer. That being so, it is evident that power to decide that such acts should be subject to criminal penalties lies with the Community. Article 4 establishes something similar, in so far as it calls for the classification as offences of forms of participation other than their commission, and of instigating offending conduct. Both provisions are part of the Community harmonising minimum' because, by defining the persons who can incur criminal liability, they affect its nature.

93. Article 5(1), by requiring that the conduct described in Articles 2 and 3 be punished by effective, proportionate and dissuasive penalties, warrants the same assessment as the preceding provisions since, for the reasons set out, in such situations the choice of the penalty model - criminal, administrative or civil - is a matter for the Community.

94. However, the requirement, in Article 5(1) itself, that the most serious conduct should be punished

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with the deprivation of liberty, giving rise to extradition, transgresses the boundaries of the first pillar, since, within the criminal law context, it is for the State to choose the appropriate penalty. By the same token, the inclusion of accompanying penalties in Article 5(2) deserves no criticism whatsoever.

95. Article 6 refers to the liability of legal persons for the conduct described in Articles 2 to 4, by act or omission, whilst Article 7 regulates their punishment with effective, proportionate and dissuasive sanctions', but does not specify the nature of those sanctions. Both provisions suffer from the same defect as Articles 2 to 4 and Article 5(1). The requirement to prosecute not only natural persons but also legal persons goes to the design of the basic model of response to offences against the environment, which is a Community task. Article 7, none the less, since it enumerates five specific punishments, lies outside the preserve of Community law.

96. Lastly, Article 1 confines itself to defining three concepts used in Articles 2 and 6.

97. I am of the view, accordingly, that by virtue of the fact that the choice of the criminal law response to serious offences against the environment is the responsibility of the Community, the Council has no power to approve Articles 1 to 4, Article 5(1) - with the exception of the reference to sanctions involving the deprivation of liberty and extradition -, Article 6 or Article 7(1) of the Framework Decision. In consequence, the Commission's action is well founded, and should be upheld, with annulment of the provisions in question.

V - Costs

98. Since the Commission's application has been successful, the Council of the European Union must be ordered to pay the costs of the proceedings, in accordance with Article 69(2) of the Rules of Procedure.

99. The Member States, the European Parliament and the Economic and Social Committee, who have participated as interveners, are to bear their own costs, in accordance with Article 69(3) of those Rules.

VI - Conclusion

100. In the light of the foregoing considerations, I propose that the Court should:

(1) uphold the action for annulment brought by the Commission of the European Communities against Council Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law, and annul that Framework Decision to the extent indicated by point 97 above;

(2) order the Council of the European Union to pay the costs of the proceedings, and declare that the interveners should bear their own costs.

(1) .

(2) - OJ 2003 L 29, p. 55.

(3) - The same belief exists in the wider context of the Council of Europe, which on 4 November 1998 adopted a convention with the same title and name as the Framework Decision (European Treaty Series , No 172).

(4) - Academic thinking has addressed the present dispute. To that effect, Comte, F., Droit pénal de l'environnement et compétence communautaire', Revue du droit de l'Union européenne , No 4, 2002, pp. 775 to 799, and Blanco Cordero, I., El derecho penal y el primer pilar de la Union Europea', Revista Electronica de Ciencia Penal y Criminología , 6 May 2004.

(5) - The Netherlands, nevertheless, qualifies that view (see footnote 73, in fine).

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(6) - The Spanish legal system reproduces similar arrangements, in which the State approves the basic environmental legislation, without prejudice to the power of the Autonomous Communities, which are responsible for management in that area, to issue additional protective measures (Article 149.1.23 and Article 148.1.9 of the 1978 Constitution).

(7) - The provision covers fiscal and town and country planning measures, those relating to the management of water resources and any others affecting a Member State's choice of the general structure of its energy supply and between the various sources of energy.

(8) - Proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law, submitted by the Commission on 15 March 2001 (OJ 2001 C 180 E, p. 238).

(9) - The provision covers fiscal and town and country planning measures, those relating to the management of water resources and any others affecting a Member State's choice of the general structure of its energy supply and between the various sources of energy.

(10) - Article 2 provides that [e]ach Member State shall take the necessary measures to establish as criminal offences under its domestic law: (a) the discharge, emission or introduction of a quantity of substances or ionising radiation into air, soil or water which causes death or serious injury to any person; (b) the unlawful discharge, emission or introduction of a quantity of substances or ionising radiation into air, soil or water which causes or is likely to cause their lasting or substantial deterioration or death or serious injury to any person or substantial damage to protected monuments, other protected objects, property, animals or plants; (c) the unlawful disposal, treatment, storage, transport, export or import of waste, including hazardous waste, which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, soil, water, animals or plants; (d) the unlawful operation of a plant in which a dangerous activity is carried out and which, outside the plant, causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, soil, water, animals or plants; (e) the unlawful manufacture, treatment, storage, use, transport, export or import of nuclear materials or other hazardous radioactive substances which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, soil, water, animals or plants; (f) the unlawful possession, taking, damaging, killing or trading of or in protected wild fauna and flora species or parts thereof, at least where they are threatened with extinction as defined under national law; (g) the unlawful trade in ozone-depleting substances...'.

(11) - Article 5(2) enumerates, by way of illustration, the disqualification of a natural person from engaging in an activity requiring official authorisation or approval, or founding, managing or directing a company or a foundation, where the facts having led to his or her conviction show an obvious risk that the same kind of criminal activity may be pursued'.

(12) - Article 6(1) makes each Member State responsible for adopting the necessary measures to ensure that legal persons can be held liable for conduct referred to in Articles 2 and 3 committed for their benefit by any person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on: (a) a power of representation of the legal person, or (b) an authority to take decisions on behalf of the legal person, or (c) an authority to exercise control within the legal person, as well as for the involvement as accessories or instigators in the commission of conduct referred to in Article 2'. Article 6(2) adds that [a]part from the cases already provided for in paragraph 1, each Member State shall take the necessary measures to ensure that a legal person can be held liable where the lack of supervision or control by a person referred to in paragraph 1 has made possible the commission referred to in Articles 2 and 3 for the benefit of that legal person by a person under its authority'.

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(13) - Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article 6 is punishable by effective, proportionate and dissuasive sanctions, which shall include criminal or non-criminal fines and may include other sanctions such as: (a) exclusion from entitlement to public benefits or aid; (b) temporary or permanent disqualification from the practice of industrial or commercial activities; (c) placing under judicial supervision; (d) a judicial winding-up order; (e) the obligation to adopt specific measures in order to avoid the consequences of conduct such as that on which the criminal liability was founded.'

(14) - From those explanations in the preamble to the Framework Decision and from a number of statements made at the hearing, it emerges that the Proposal for a Directive did not come to fruition because there were differences of opinion amongst the Member States, and no unanimous position was reached.

(15) - However, that power is not so clearly apparent in the Treaty on European Union, since Article 29, authorising the Union to approximate the criminal law rules of the Member States, refers to Article 31(e), which alludes to the minimum rules relating to the constituent elements of offences and to penalties in the fields of organised crime, terrorism and illicit drug trafficking. The Council has approved several framework decisions in which it establishes coordinated provisions for the punishment of certain types of conduct. In the sphere of financial crime, it is possible to cite Council Framework Decision 2000/383/JHA of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro (OJ 2000 L 140, p. 1), as amended by Framework Decision 2001/888/JHA of 6 December 2001 (OJ 2001 L 329, p. 3); Framework Decision 2001/413/JHA of 28 May 2001 on combating fraud and counterfeiting of non-cash means of payment (OJ 2001 L 149, p. 1); and Framework Decision 2001/500/JHA of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime (OJ 2001 L 182, p. 1). The combating of terrorism by means of criminal law is the subject-matter of Framework Decision 2002/475/JHA of 13 June 2002 (OJ 2002 L 164, p. 3), and the trafficking in human beings, that of Framework Decision 2002/629/JHA of 19 July 2002 (OJ 2002 L 203, p. 1). The protection of the victims of illegal immigration, in turn, is addressed in Framework Decision 2002/946/JHA of 28 November 2002, on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence (OJ 2002 L 328, p. 1). Framework Decision 2003/568/JHA of 22 July 2003 harmonises national legal provisions for combating corruption in the private sector (OJ 2003 L 192, p. 54). Lastly, Framework Decision 2005/222/JHA of 24 February 2005 (OJ 2005 L 69, p. 67) governs the response in criminal law to attacks against information systems.

(16) - It must be borne in mind that Article 29 EU defines the objective of the Union, [w]ithout prejudice to the powers of the European Community', with the effect that, if any conflict arises, the latter prevail. Benzo Sainz, F., El título VI del Tratado UE: instrumentos, instancias decisorias e instituciones comunitarias en el tercer pilar', El tercer pilar de la Union Europea. La cooperacion en asuntos de justicia e interior , Ministerio del Interior, Madrid, 1997, p. 24, argues that, in view of that provision, the ways of proceeding in Title VI are not the only ones available to achieve the objectives sought, and must be used only when those objectives are not attained using the traditional procedures under Community law.

(17) - Case 203/80 Casati [1981] ECR 2595, stated that, in principle, the Member States are responsible for criminal legislation (paragraph 27). Vogel, J., Stand und Tendenzen der Harmonisierung des materiellen Strafrechts in der Europäischen Union', Strafrecht und Kriminalität in Europa , 2003, p. 232, and Dannecker, G., Strafrecht in der Europäischen Gemeinschaft', Juristenzeitung , 1996, p. 869, contend that legal academic thinking is unanimous in that respect. In 1972, Bigay, J., Droit communautaire et droit pénal', Revue trimestrielle du droit européen , 1972, No 4, p. 734, stressed that Council Regulation No 17 of 6 February 1962, First Regulation implementing

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Articles 85 and 86 of the EC Treaty (now Articles 81 and 82 EC), expressly stated that the sanctions it laid down were not in the nature of criminal penalties.

(18) - Case 50/76 [1977] ECR 137.

(19) - The case concerned a Netherlands rule which penalised infringements of the Community provisions on minimum prices for the export of certain bulbs.

(20) - On how that precept comes into play where the same conduct is penalised under different legal systems, see my Opinions in Case C213/00 P Italcementi v Commission [2004] ECR I-230, Case C-217/00 P Buzzi Unicem v Commission [2004] ECR I267 and Case C219/00 P Cementir v Commission [2004] ECR I342. In particular, in relation to the third pillar and the Schengen Agreement, see my Opinion in Joined Cases C187/01 and C-385/01 Gözütok and Brügge [2003] ECR I-1345.

(21) - Case 68/88 Commission v Greece [1989] ECR 2965. According to the judgment in the case, the Member State in question failed to fulfil its obligations because, amongst other reasons, it failed to bring disciplinary or criminal proceedings against those who participated in committing and concealing a number of operations which enabled the evasion of payment of agricultural levies due on certain consignments of maize imported from a non-member country in May 1986.

(22) - The legal thinking in that judgment is reproduced in Case C326/88 Hansen [1990] ECR I-2911, paragraph 17, ruling on a question referred for a preliminary ruling in criminal proceedings taking place in Denmark against an employer for infringement of Council Regulation (EEC) No 543/69 of 25 March 1969 on the harmonisation of certain social legislation relating to road transport (OJ English Special Edition, 1969 (I), p. 170). The judgment held that neither that regulation nor the general principles of Community law preclude the application of national provisions under which an employer whose driver has failed to observe the maximum daily driving period and the compulsory daily rest period may be the subject of a criminal penalty, on condition that the penalty is similar to that imposed in the event of infringement of provisions of national law and is proportionate to the seriousness of the infringement committed (operative part of the judgment).

(23) - Case C-299/86 [1988] ECR 1213.

(24) - Case C-2/88 Imm [1990] ECR I-3365.

(25) - Case C-186/98 [1999] ECR I-4883.

(26) - OJ 1987 L 207, p. 1.

(27) - OJ 1993 L 261, p. 1.

(28) - Case C-333/99 [2001] ECR I-1025.

(29) - OJ 1991 L 166, p. 77.

(30) - OJ 2002 L 328, p. 17.

(31) - Cited above in footnote 15.

(32) - The Contentious-Administrative Division of the Spanish Tribunal Supremo (Supreme Court) has, of old, denied any metaphysical difference between the two categories. In that vein, see the judgment of 9 February 1972, which was delivered at a time when the Spanish legal system lacked many of the means characteristic of the rule of law and which made use of the equivalence in question in order to subject the imposition of administrative penalties to many of the safeguards required for criminal penalties. García de Enterría, E. and Fernandez, T.R., Curso de derecho administrativo , Vol. II, No 7, Madrid, 2000, p. 163, report that there was an unprecedented increase in the use of administrative sanctions during the dictatorship of General Primo de Rivera, the Second

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Republic and the Franco era, regimes which used them as a routine means of combating political opposition.

(33) - Case C-387/97 [2000] ECR I-5047.

(34) - The Spanish Tribunal Constitucional (Constitutional Court) is of the view that the formal requirements of criminal proceedings operate in administrative proceedings which impose sanctions, to the extent necessary to uphold the essential values which underpin the right to a fair trial (judgments 18/1981 (BOE 143 of 16 June 1981) and 181/1990 (BOE 289 of 3 December 1990)), subject to the appropriate adaptations according to their particular nature (judgments 2/1987 (BOE 35 of 10 February 1987), 29/1989 (BOE 50 of 28 February 1989), 181/1990, cited above, 3/1999 (BOE 48 of 25 February 1999) and 276/2000 (BOE 299 of 14 December 2000)).

(35) - See my Opinions in Case C-255/00 Grundig Italiana [2002] ECR I-8003 (points 27 to 29) and in Case C30/02 Recheio [2004] ECR I-0000 (points 23 to 35), in which judgment was delivered on 17 June 2004.

(36) - Point 27 of the Opinion in Grundig Italiana and points 29 of the Opinion in Recheio.

(37) - The holder of that competence must, in theory, have instrumental competence. The representative of the Finnish Government stressed at the hearing that criminal law is not a tool, since it is substantive in its own right, although that proposition smacks of mere semantics, since, like any provision imposing punishment, a criminal provision exists for the sake of, and serves, a more far-reaching end. Case C240/90 Germany v Commission [1992] ECR I5383, drawing support from other authorities, attributes to the Community, in the field in which it has competence (the case concerned the common agricultural policy), power to determine the penalties to be imposed by the national authorities on traders guilty of fraud (paragraphs 11 to 13).

(38) - That initial lacuna in the legislation led to serious uncertainties in the quest for a legal basis for Community environmental law, which has been described in Spanish legal academic writing by Bravo-Ferrer Delgado, M., La determinacion de la base jurídica en el derecho comunitario del medio ambiente', Gaceta Jurídica , Nos B-92 and B93, March and April 1994, pp. 13 to 20 and 5 to 13, respectively. Another writer has also addressed the issue: Géradin, D., Les compétences respectives de la Communauté et des Etats membres dans le domaine de l'environnement: base juridique, subsidiarité et proportionnalité', Le droit communautaire de l'environnement. Mise en oeuvre et perspectives , Paris 1998, pp. 33 to 55.

(39) - Article 100 emerged as the mechanism for harmonising rules which directly affect the establishment or operation of the common market, and Article 235, which was broader in scope, provided the basis for adoption of the appropriate measures to attain Community objectives not expressly articulated in the Treaty.

(40) - According to Case 91/79 Commission v Italy [1980] ECR 1099, paragraph 8, it is not inconceivable that environmental provisions might be based on Article 100 of the Treaty, since such provisions are capable of being a burden on the undertakings to which they apply and, in the absence of the harmonisation of national provisions, there would be an appreciable distortion of competition.

(41) - Case 240/83 [1985] ECR 531.

(42) - OJ 1987 L 169, p. 1.

(43) - Case 302/86 [1988] ECR 4607.

(44) - Title VII was inserted in Part Three of the Treaty by Article 25 of the Single European Act, and Article 100a by Article 18. With the Treaty on European Union (Article G.28) it became Title XVI.

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(45) - Case C-300/89 [1991] ECR I-2867.

(46) - On the precautionary principle, see Gonzalez-Vaqué, L., La definicion del contenido y ambito de aplicacion del principio de precaucion en el derecho comunitario', Gaceta Jurídica de la Union Europea , No 221, September and October 2002, pp. 4 to 20. Also, my El desarrollo comunitario del principio de precaucion , pending publication.

(47) - OJ 2004 C 310, p. 1.

(48) - In that forum the starting point was the Universal Declaration of Human Rights (proclaimed by the General Assembly of the United Nations in Resolution 217 A (III) of 10 December 1948), in so far as it declares the existence of a right to a quality of life which ensures health and wellbeing (Article 25(1)). More far reaching, the International Pact on Economic, Social and Cultural Rights (approved by the same General Assembly in Resolution 2002 A (XXI) of 16 December 1966, which came into force on 3 January 1976), refers to the need to improve the environment as one of the requisites of the adequate development of the person (Article 12(2)(b)).

(49) - The Charter was agreed in Resolution 37/7 of 28 October 1982.

(50) - 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), transposes the Kyoto Protocol into Community law.

(51) - Mendizabal Allende, R., Pasado, presente y futuro de la jurisdiccion contencioso-administrativa', Actualidad Administrativa , No 19, 1994, p. 289. Loperena Rota, D., Los derechos al medio ambiente adecuado y a su proteccion, Revista Electronica de Derecho Ambiental , No 3, November 1999, states that an acceptable environment is not the product of social development, but a prerequisite for it to exist, and is a right bound up with human life, without which there is neither mankind nor society nor law.

(52) - The procedural embodiment of the phenomenon takes the form of conferring standing to bring actions on the holders of diffuse interests', that is to say, of extensive rights pertaining to groups which are loosely defined as to their composition and as a rule anonymous and indeterminate, although capable, with difficulty, of being determined. That type of mechanism, which has proved useful as a remedy for consumers and end users, operates in common law jurisdictions through what are known as class actions', which offer a solution to situations in which there are many injured parties, in such a way that, by the bringing of such an action, common aspirations, with implications for all, can be asserted individually and with no express formal grant of powers.

(53) - Velasco Caballero, F., Proteccion del medio ambiente en el constitucionalismo europeo', Noticias de la Union Europea , No 190, November 2000, pp. 183 to 190.

(54) - Grundgesetz für die Bundesrepublik Deutschland, approved on 23 May 1949 in the Rhineland city of Bonn by the Parliamentary Council (Parlamentarischer Rat).

(55) - Emphasis added.

(56) - Ratified by referendum on 6 December 1978 (BOE 311-1 of 29 December 1978).

(57) - The Spanish Tribunal Constitucional has emphasised that the provision in question reflects the ecological concern which has arisen in recent decades in broad sectors of opinion, embodied also in numerous international documents (judgment 64/1982 of 4 November (BOE 296 of 22 October 1982)).

(58) - Approved by the Constituent Assembly, sitting in plenary session, on 2 April 1976.

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(59) - Lag om ändring i regeringsformen, published in the Svenks Författningssamling (compendium of legislation) on 16 December 1994.

(60) - This basic law, which replaced that of 1919, entered into force on 1 March 2000 (Suomen Perustuslaki 731/1999).

(61) - Constitution of Greece, approved by the Fifth Chamber of Constitutional Review on 9 June 1975.

(62) - The Fundamental Law of the Kingdom of the Netherlands, revised text of 19 January 1983 (Staatsblad Nos 15 to 51).

(63) - Constitution of the Italian Republic, of 27 December 1947.

(64) - Merusi, F., Comentario della Costituzione , Rome/Bologna, 1975, p. 445, and Cavallo, B., Profili amministrativi della tutela dell'ambiente: il bene ambientale tra tutela del paesaggio e gestione del territorio', Rivista Trimestrale di Diritto Pubblico , 2 (1990), p. 412.

(65) - OJ 2000 C 364, p. 1.

(66) - Jordano Fraga, J., La proteccion del derecho a un medio ambiente adecuado , José María Bosch Editor, S.A., Barcelona, 1995, looks at the various academic views on the characterisation of that right (pp. 453 to 499). According to the classification devised by Vasak, K., Le droit international de droits de l'homme , 1972, it is one of the solidarity or third generation rights.

(67) - Eur. Court H.R., Lopez Ostra v. Spain judgment of 9 December 1994, Series A No 303-C, p. 55. The judgment of 16 November 2004 in Moreno Gomez v. Spain (No 4143/02) is couched in similar terms.

(68) - Huelin, J., Intimidad personal y familiar, domicilio y medio ambiente', Perfiles del derecho constitucional a la vida privada y familiar , Consejo General del Poder Judicial, Madrid 1996, pp. 257 to 273, is of the view that the axiomatic statement of the nine judges who, on that occasion, comprised the European Court of Human Rights, carries great weight. It means that, in the light of the factual circumstances of the case, passivity on the part of the public authorities in preventing situations in which one, some or many persons in their homes suffer noxious smells, emissions of fumes and repetitive noise from a water and other waste treatment plant which, although they do not seriously damage their health, impair their quality of life, can infringe Article 8 of the European Convention on Human Rights. That finding by the European Court of Human Rights was first stated in Powell and Rainer v. United Kingdom (Eur. Court H.R., judgment of 21 February 1990, Series A, 172), which held that noise generated by aircraft using an airport, to the extent to which it adversely affected the quality of life and enjoyment of the home, gave rise to an obligation to take into account Article 8 of the Convention (paragraph 40).

(69) - Eur. Court H.R., judgment of 19 February 1998, Series A No 735/932.

(70) - Article 45(3) of the Spanish Constitution provides for criminal prosecution of offences against the environment. On the basis of that provision, the Second Chamber of the Spanish Tribunal Supremo has rejected the suggestion that, in protecting the environment, criminal law has a role ancillary and secondary to that of administrative law (judgment of 29 September 2001, cassation appeal 604/2000).

(71) - De la Mata Barranco, N., Derecho comunitario y derecho estatal en la tutela penal del ambiente', Revista Electronica de Ciencia Penal y Criminología , 02-04 2000. See also De la Cuesta Aguado, P.M., Intervencion penal para la proteccion del medio ambiente?', Revista penal on line (www.geocities.com/icapda/ambiente.htm).

(72) - De la Mata Barranco, N., op. cit, gives some apposite reflections on the matter. Schmalenberg,

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F., Ein europäisches Umweltstrafrecht: Anforderungen und Umsetzungsprobleme unter Berücksichtigung des Richtlinienvorschlags KOM (2001) 139 endg., Berlin 2004, p. 32, in turn, states that in the sphere in question, administrative sanctions do not achieve the same impact as criminal sanctions.

(73) - A reading of the annex to the Proposal for a Directive on the protection of the environment through criminal law reveals the breadth of the Community powers in the field.

(74) - On 25 October 1979, at a symposium on the relationship between Community law and criminal law, held at the University of Parma, Hartley, T.C. was in no doubt that the former can oblige Member States to approve criminal penalties (L'impact du droit communautaire sur le procès pénal', Droit communautaire et droit pénal , Griuffrè, Milan 1981, pp. 33, 47 and 48). A good example of that ability is Article 30 of the Statute of the Court of Justice, according to which violation of an oath by a witnesses or an expert in Community court proceedings must be classified as an offence. Dannecker, G., Evolucion del derecho penal y sancionador comunitario , Madrid, Marcial Pons, 2001, p. 58, draws attention to the view of a number of writers, for whom the fact that the European Community has no powers in criminal law does not mean that it cannot issue instructions to the effect that certain acts should be punished with criminal sanctions. Stortini, L., L'environnement: des éléments de droit pénal dans la législation européenne', Les nouveaux droits de l'homme en Europe , 1999, pp. 269 to 268, argues that, in order to attain true supranational protection of the environment, States must have a duty to embrace a common model. From a broader perspective, Grasso, G., Comunidades Europeas y derecho penal. Las relaciones entre el ordenamiento comunitario y los sistemas penales de los Estados miembros , joint publication of the Univsersity of Castilla-La Mancha and the OPOCE, 1993, p. 198 et seq., takes the view that Community law can lead Member States to take the criminal law option. Biancarelli, J., Le droit communautaire et le droit pénal', Les lundis du droit communautaire , 21 June 1993, assumes that the Community must encourage the Member States to criminalise certain acts which contravene its fundamental values. In theory, the Netherlands Government upholds that proposition, stating in paragraph 15 of its written submission that the Community can require the States to impose criminal penalties for certain acts, provided it is indispensable in order to defend the substantive provisions of the EC Treaty, but in reality it shares the Council's view because, to its mind, as regards environmental policy, the threat of a criminal penalty does not seem necessary (paragraph 16).

(75) - Case 26/62 [1963] ECR 1.

(76) - At the symposium referred to in footnote 74, Olmi, G. described how Community law can require the repeal of national laws creating criminal offences (La sanction des infractions au droit communautaire', Droit communautaire et droit pénal , Griuffrè , Milan 1981, p. 167). Joined Cases C358/93 and C-416/93 Bordessa and Others [1995] ECR I-361 removed from the criminal codes the export of coins, banknotes or bearer cheques without prior authorisation. It will be recalled that Casati , cited above, after acknowledging that the criminal law and the rules of criminal procedure were the responsibility of the Member States, stated that Member States could not abuse those provisions in order to impose obstacles to the objectives of the Treaty (paragraph 27), with the effect that, as stated in Case 88/77 Schonenberg [1978] ECR 473, paragraph 16, and Case 269/80 Tymen [1981] ECR 3079, paragraph 16, a conviction imposed by virtue of a national law contrary to Community law is, in turn, incompatible with European law itself. Ultimately, as Case 187/87 Cowan [1989] ECR 195, paragraph 19, indicates, Community law sets certain limits on national authorities, whose provisions, including provisions of criminal law, may not restrict the fundamental freedoms under the Treaty. Zuleeg, M., Der Beitrag des Strafrechts zur europäischen Integration', Juristenzeitung , 1992, p. 762, relies on that latter ruling to refute the argument that criminal matters are the exclusive preserve' of State sovereignty.

(77) - For Grasso, G., op. cit., p. 218, if the national assemblies were to reject the Community

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rule, they would trigger the corresponding infringement proceedings, but not the replacement of the non-compliant internal provisions by the Community rules. Eisele, J., Einflussnahmeauf nationales Strafrecht durch Richtliniengebung der Europäischen Gemeinschaft', Juristenzeitung , 2001, p. 1160, is of the view that rules of criminal law, deriving from the transposition of a directive, are approved in accordance with the procedures indicated with sovereign authority by each Member State, and therefore, to that author's mind, have sufficient legitimacy in democratic terms.

(78) - See footnote 15.

(79) - Grasso, G., sets out those reasons in op. cit, pp. 223 and 224. Appel, I., Kompetenzen der Europäischen Gemeinschaft zur Überwachung und sanktionsrechtlichen Ausgestaltung des Lebensmittelstrafrechts und Verwaltungssanktionen in der Europäischen Union , Trier 1994, p. 165, is of the view that only a uniform system of penalties engenders the confidence necessary for the process of European integration to continue.

(80) - Both the Council of the Union and the Commission endorse the desirability of a coordinated response in criminal law.

(81) - In German legal academic circles it is thought that the power to approve a directive on environmental criminal law is an adjunct' to Article 175 EC. Accordingly, Schmalemberg, F., op. cit., p. 29, Vogel, J., cited above in footnote 17, pp. 37 and 47, Appel, I., op. cit., pp. 175 and 178; and Zeder, F., Auf dem Weg zu einem Strafrecht der EU?', Juridikum , 2001, p. 51. See footnote 37.

(82) - Zulleg, M., op. cit., p. 762, argues that the Member States should steer their legal systems in the direction of integration, which would be impaired if areas as important as criminal law were to be simply removed from the scope of application of Community law.

(83) - Grasso, G., op. cit., p. 219, recommends rules with a degree of flexibility, defining the conduct reproved and the classification of offences and sanctions, but without amounting to a rigorous quantification.

(84) - Amongst legal writers, Jacqué, J.P., La question de la base juridique dans le cadre de la Justice et des affaires intérieures', L'espace pénal européen: enjeux et perspectives , Institut d'études européennes, Brussels, 2002, pp. 255 and 256, concurs with that suggestion. Eisele J., op. cit., p. 1162, takes the view that the Community legislature should set a minimum standard when it defines the sanctionable conduct, whilst the national legislature must indicate the punishment. Grasso, G., op. cit., p. 218, is of the view that the Community bodies have power to procure the harmonisation of criminal provisions or to insist on the introduction of uniform offences, provided that it is necessary, where the Treaties grant those bodies specific powers for the purpose of achieving the Community objectives. At the same time, Community law must be transposed into the legal system of each Member State, embracing supranational criminal offences and determining their punishment within the framework previously defined. See also, Comte, F., op. cit., p. 781.

(85) - Article I-14(2)(e) of the Treaty establishing a Constitution for Europe expressly determines the nature of those powers, which is discernable from the rules currently in force, with the effect that, in accordance with the wording of Article I-12(2), [w]hen the Constitution confers on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised, or has decided to cease exercising, its competence'.

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32003F0080-A08 : N 23
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32003F0080-C2 : N 18
32003F0080-C3 : N 18
32003F0080-C5 : N 22
32003F0080-C7 : N 22
61962J0026 : N 76
61976J0050 : N 30 32
61979J0091 : N 53
61980J0203 : N 27
61983J0240 : N 53
61986J0299 : N 35
61986J0302 : N 53
61988J0002 : N 36
61988J0068 : N 34
61988J0326 : N 34
61989J0300 : N 55
61990J0240 : N 49
61997J0387 : N 47
61998J0186 : N 37
61999J0333 : N 40

SUB Justice and home affairs ; Environment

AUTLANG Spanish

APPLICA Commission ; Institutions

DEFENDA Council ; Institutions

PROCEDU Action for annulment - successful

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ADVGEN	Ruiz-Jarabo Colomer
JUDGRAP	Schintgen
DATES	of document: 26/05/2005 of application: 15/04/2003

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Judgment of the Court (Grand Chamber)
of 15 March 2005
Kingdom of Spain v Eurojust. Action for annulment under Article 230 EC - Action brought by a Member State challenging calls for applications, issued by Eurojust, for positions as members of the temporary staff - No jurisdiction of the Court - Inadmissible. Case C-160/03.

1. Procedure - Legal basis of an action - Choice for the applicant and not the Community judicature - Admissibility assessed in the light of the applicant's choice

2. Actions for annulment - Challengeable acts - Action brought by a Member State against a call for applications, issued by Eurojust, for positions as members of the temporary staff - Excluded - Requirement for judicial review - Rules

(Article 230 EC; Article 35 EU, 41 EU, 46(b) EU; Statute of the Court, Arts 40 and 56; Staff Regulations of Officials, Art. 91; Council Decision 2002/187, Art. 30)

1. In judicial proceedings, it is for the applicant to choose the legal basis of its action and not for the Community judicature itself to choose the most appropriate legal basis. It follows that, where the applicant brings its action under a particular provision, while leaving to the discretion of the Court the choice of the most appropriate legal basis to examine that action, the admissibility of that action must be examined in the light of that provision.

(see para. 35)

2. A call for applications, issued by Eurojust, for positions as members of the temporary staff is not capable of being the subject of an action for annulment under Article 230 EC. Such a call is not included in the list of acts the legality of which the Court may review under that article. Moreover, Article 41 EU does not provide that Article 230 EC is to apply to the provisions on police and judicial cooperation in criminal matters in Title VI of the EU Treaty, the jurisdiction of the Court in such matters being defined in Article 35 EU, to which Article 46(b) EU refers.

Such a call for applications is not, however, exempt from judicial review, for, as is clear from Article 30 of Decision 2002/187, setting up Eurojust with a view to reinforcing the fight against serious crime, Eurojust staff are to be subject to the rules and regulations applicable to officials and other servants of the European Communities. It follows that the main parties concerned, namely the candidates for the various positions in the contested calls for applications, have access to the Community Courts under the conditions laid down in Article 91 of the Staff Regulations of Officials. In the event of such an action, Member States would be entitled to intervene in the proceedings in accordance with Article 40 of the Statute of the Court of Justice and could, where appropriate, as is clear from the second and third paragraphs of Article 56 of that Statute, appeal against the judgment of the Court of First Instance.

(see paras 36-38, 40-43)

In Case C-160/03,

APPLICATION for annulment under Article 230 EC, brought on

8 April 2004

,

Kingdom of Spain, represented by L. Fraguas Gadea, acting as Agent, with an address for service in Luxembourg,

applicant,

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supported by:

Republic of Finland, represented by T. Pynnä, acting as Agent, with an address for service in Luxembourg,

v

Eurojust, represented by J. Rivas de Andrés, abogado, and D. O'Keeffe, Solicitor,

defendant,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas (Rapporteur) and A. Borg Barthet, Presidents of Chambers, R. Schintgen, N. Colneric, S. von Bahr, J.N. Cunha Rodrigues, E. Juhasz, G. Arestis, M. Ilei and J. Malenovsku, Judges,

Advocate General: M. Poiares Maduro,

Registrar: H. von Holstein, Deputy Registrar,

having regard to the written procedure and further to the hearing on 6 October 2004,

after hearing the Opinion of the Advocate General at the sitting on

16 December 2004,

gives the following

Judgment

Costs

45. 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. Since Eurojust has applied for costs and the Kingdom of Spain has been unsuccessful, the Kingdom of Spain must be ordered to pay the costs. In accordance with the first subparagraph of Article 69(4) of the Rules of Procedure, the Republic of Finland, which has intervened in the proceedings, must bear its own costs.

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

1. Declares that the application is inadmissible;

2. Orders the Kingdom of Spain to pay the costs;

3. Orders the Republic of Finland to bear its own costs.

1. By its application, the Kingdom of Spain seeks the annulment, in seven calls for applications for the recruitment of temporary staff issued by Eurojust (the contested calls for applications'), of the point concerning documents to be submitted in English by persons submitting their application form in another language, and of the various points in each call for applications concerning candidates' qualifications in respect of knowledge of languages.

Law

2. Title VI of the Treaty on European Union contains provisions on police and judicial cooperation in criminal matters, namely Articles 29 EU to 42 EU.

3. Article 31 EU describes the objectives of common action on judicial cooperation in criminal matters.

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4. Article 34(2) EU provides:

The Council shall take measures and promote cooperation, using the appropriate form and procedures as set out in this title, contributing to the pursuit of the objectives of the Union. To that end, acting unanimously on the initiative of any Member State or of the Commission, the Council may:

...

(c) adopt decisions for any other purpose consistent with the objectives of this title, excluding any approximation of the laws and regulations of the Member States. These decisions shall be binding and shall not entail direct effect; the Council, acting by a qualified majority, shall adopt measures necessary to implement those decisions at the level of the Union;

...'.

5. Article 35 EU relates to the jurisdiction of the Court with regard to the provisions of Title VI of the Treaty on European Union. Paragraphs 6 and 7 of that article are worded as follows:

6. The Court of Justice shall have jurisdiction to review the legality of framework decisions and decisions in actions brought by a Member State or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers. The proceedings provided for in this paragraph shall be instituted within two months of the publication of the measure.

7. The Court of Justice shall have jurisdiction to rule on any dispute between Member States regarding the interpretation or the application of acts adopted under Article 34(2) whenever such dispute cannot be settled by the Council within six months of its being referred to the Council by one of its members. The Court shall also have jurisdiction to rule on any dispute between Member States and the Commission regarding the interpretation or the application of conventions established under Article 34(2)(d).'

6. Article 41(1) EU provides:

Articles 189, 190, 195, 196 to 199, 203, 204, 205(3), 206 to 209, 213 to 219, 255 and 290 of the Treaty establishing the European Community shall apply to the provisions relating to the areas referred to in this title.'

7. Article 46 EU, which forms part of the final provisions of the Treaty on European Union, is worded as follows:

The provisions of the Treaty establishing the European Community, the Treaty establishing the European Coal and Steel Community and the Treaty establishing the European Atomic Energy Community concerning the powers of the Court of Justice of the European Communities and the exercise of those powers shall apply only to the following provisions of this Treaty:

...

(b) provisions of Title VI, under the conditions provided for by Article 35;

...'.

8. The first paragraph of Article 12 EC provides:

Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.'

9. The first paragraph of Article 230 EC is worded as follows:

The Court of Justice shall review the legality of acts adopted jointly by the European Parliament

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and the Council, of acts of the Council, of the Commission and of the ECB, other than recommendations and opinions, and of acts of the European Parliament intended to produce legal effects vis-à-vis third parties.'

10. Article 236 EC provides that the Court of Justice shall have jurisdiction in any dispute between the Community and its servants within the limits and under the conditions laid down in the Staff Regulations or the Conditions of Employment'.

11. Article 1 of Regulation No 1 of the Council of 15 April 1958 determining the languages to be used by the European Economic Community (OJ, English Special Edition 1952-1958, p. 59), as amended by 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), is worded as follows:

The official languages and the working languages of the institutions of the Union shall be Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish and Swedish.'

12. Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime (OJ 2002 L 63, p. 1, the Decision') is based on the Treaty on European Union, and in particular Articles 31 EU and 34(2)(c) EU. It provides in Article 1 that Eurojust is to be a body of the Union with legal personality.

13. Under Article 2 of that decision, Eurojust is to be composed of one national member seconded by each Member State in accordance with its legal system, being a prosecutor, judge or police officer of equivalent competence.

14. The objectives of Eurojust, described in Article 3 of the Decision, are to stimulate and improve the coordination, between the competent authorities of the Member States, of investigations and prosecutions in those States, to improve cooperation between those authorities, in particular by facilitating the execution of international mutual legal assistance and the implementation of extradition requests, and to support those authorities in order to render their investigations and prosecutions more effective. As appropriate, Eurojust may also assist investigations and prosecutions concerning a Member State and a nonmember State, or a Member State and the Community.

15. Article 30 of the Decision, headed Staff', provides:

1. Eurojust staff shall be subject to the rules and regulations applicable to the officials and other servants of the European Communities, particularly as regards their recruitment and status.

2. Eurojust staff shall consist of staff recruited according to the rules and regulations referred to in paragraph 1, taking into account all the criteria referred to in Article 27 of the Staff Regulations of Officials of the European Communities laid down by Regulation (EEC, Euratom, ECSC) No 259/68... , including their geographical distribution....

3. Under the authority of the College, the staff shall carry out its tasks bearing in mind the objectives and mandate of Eurojust...'.

16. Article 31 of that decision, headed Assistance with interpreting and translation', provides:

1. The official linguistic arrangements of the Union shall apply to Eurojust proceedings [In the Spanish text: El régimen lingüístico de las instituciones de la Comunidad Europea sera aplicable a Eurojust'].

2. The annual report to the Council, referred to in the second subparagraph of Article 32(1), shall be drawn up in the official languages of the Union institutions.'

17. Articles 12 to 15 of the Conditions of employment of other servants of the European Communities

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(the CEOS') concern the conditions of engagement of the latter. Article 12 provides:

1. The engagement of temporary staff shall be directed to securing for the institution the services of persons of the highest standard of ability, efficiency and integrity, recruited on the broadest possible geographical basis from among nationals of Member States of the Communities.

...

2. A member of the temporary staff may be engaged only on condition that:

...

(e) he produces evidence of a thorough knowledge of one of the languages of the Communities and of a satisfactory knowledge of another language of the Communities to the extent necessary for the performance of his duties.'

18. Article 91 of the Staff Regulations of Officials of the European Communities (the Staff Regulations'), which is applicable to temporary staff by reason of Article 73 of the CEOS, which refers to the provisions of Title VII of the Staff Regulations relating to appeals, sets out the conditions governing the admissibility of appeals brought by officials before the Court. It is settled caselaw that that remedy is available to candidates in open competitions or selection procedures, whether or not they are servants of the Communities (see, to that effect, Case 23/64 Vandevyvere v Parliament [1965] ECR 157, 163).

19. On 13 February 2003, the contested calls for applications were published in the Official Journal of the European Union. In those calls for applications, the requirements relating to knowledge of languages are the following:

- for the position of Data-protection Officer (OJ 2003 C 34 A, p. 1), excellent knowledge of English and French. Ability to work in other European Community languages would be an asset';

- for the position of Accounting Officer (OJ 2003 C 34 A, p. 4), thorough knowledge of one official language of the European Union and a satisfactory knowledge of another language of the Union, including a satisfactory knowledge of English';

- for the position of ITinformatics expert (webmaster) of the European judicial network (OJ 2003 C 34 A, p. 6), a good knowledge of English is essential. Capacity to communicate in at least two other official languages of the European Communities, including French, will definitely be considered an asset';

- for the position of Legal Officer (OJ 2003 C 34 A, p. 11), excellent knowledge of English and French. Ability to work in other European Community languages would be an asset';

- for the position of Librarian/Archivist (OJ 2003 C 34 A, p. 13), no particular requirements;

- for the position of Press Officer (OJ 2003 C 34 A, p. 16), capacity to communicate in at least English and French. Knowledge of other official languages of the European Communities will be an asset';

- for the position of Secretary to the General Administration (OJ 2003 C 34 A, p. 18), a thorough knowledge of English and French. A satisfactory knowledge of other Community languages would definitely be considered an asset'.

20. Those calls for applications state that the application form must be completed by candidates in their own language and in English. In addition, that form must be accompanied by a letter of motivation and a curriculum vitae, drawn up in English only.

Pleas in law

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21. The Kingdom of Spain puts forward three pleas in law in support of its action.

22. The first plea alleges infringement of Article 12(2)(e) of the CEOS, which provides that candidates may be required to have a thorough knowledge only of one language, namely, in principle, their mother tongue, and a satisfactory knowledge of another language, the choice of which is left to candidates.

23. The second plea alleges infringement of the rules governing the linguistic arrangements applicable to Eurojust, as laid down in Article 31 of the Decision. Those arrangements are defined by Regulation No 1, Article 1 of which specifies the official languages and the working languages of the institutions. Since no provision of the Decision states that the working languages of Eurojust are to be English and French, all the official languages of the Union may be used by the members of Eurojust and the staff of the secretariat of that body. Consequently, the calls for applications infringe the linguistic arrangements applicable to Eurojust.

24. The third plea alleges breach of the principle of the prohibition of discrimination set out in Article 12 EC and of the obligation to state reasons. The Kingdom of Spain submits in that regard that requiring candidates to complete certain documents in English and the conditions in the calls for applications relating to knowledge of English and French constitute manifest discrimination on grounds of nationality, since it favours candidates whose mother tongue is English or French. The more favourable treatment of those two languages is neither justified nor even explained, which constitutes a breach of the obligation to state reasons referred to in Article 253 EC.

Admissibility of the action

Arguments of the parties

25. Before putting forward its arguments on the substance, Eurojust raises an objection of inadmissibility which must be examined.

26. Eurojust contends that the action is inadmissible because there is no legal basis on which it can be brought.

27. In the first place, the action cannot be brought under Article 230 EC since the list of acts the legality of which may be reviewed by the Court does not mention those adopted by Eurojust, which is a body of the European Union with separate legal personality.

28. In the second place, the action cannot be brought under Article 35(6) EU since the contested acts are neither a framework decision nor one of the acts referred to in that provision.

29. In the third place, the action cannot be brought under Article 91 of the Staff Regulations in so far as, although that provision allows a candidate to file an appeal against the call for applications, it does not permit a Member State to bring an action to challenge acts alleged to affect adversely persons to whom the Staff Regulations apply.

30. In the fourth place, the action cannot be brought under the Decision, since the latter does not give the Court jurisdiction to rule on acts adopted by Eurojust.

31. Finally, the action cannot be brought under Article 35(7) EU since it is not an action regarding the interpretation of Article 31(1) of the Decision brought in accordance with the procedure referred to in Article 35(7) EU.

32. The Kingdom of Spain recalls that the Community is a community based on the rule of law whose acts are subject to judicial review (Case C50/00 P Union de Pequeños Agricultores v Council [2002] ECR I6677, paragraph 38) and submits that no act emanating from a body with legal personality which is subject to Community law can be exempt from judicial review.

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33. It acknowledges that, pursuant to Articles 35 EU and 46 EU, the jurisdiction of the Court in the context of the third pillar is limited. However, the contested calls for applications cannot be considered to be acts adopted in that context and the Court's review of those acts can likewise not be made subject to conditions.

34. The Kingdom of Spain nevertheless leaves to the discretion of the Court the choice of the most appropriate legal basis for its action, claiming that, in any event, any error which it may have made in that choice should not result in a declaration of inadmissibility or in no decision being given on the substance in this case.

Findings of the Court

35. First of all, it must be pointed out that it is for the applicant to choose the legal basis of its action and not for the Community judicature itself to choose the most appropriate legal basis (see, to that effect, Case 175/73 Union syndicale and Others v Council [1974] ECR 917, and the order of the Court of First Instance in Case T-148/97 Keeling v OHIM [1998] ECR II2217). It is clear from the examination of the action that the applicant brought it under Article 230 EC. The admissibility of that action must therefore be examined in the light of that provision.

36. As is clear from Article 230 EC, the Court shall review the legality of acts adopted jointly by the European Parliament and the Council, of acts of the Council, of the Commission and of the ECB, other than recommendations and opinions, and of acts of the European Parliament intended to produce legal effects vis-à-vis third parties'.

37. Clearly, the acts contested in the present action are not included in the list of acts the legality of which the Court may review under that article.

38. Moreover, Article 41 EU does not provide that Article 230 EC is to apply to the provisions on police and judicial cooperation in criminal matters in Title VI of the Treaty on European Union, the jurisdiction of the Court in such matters being defined in Article 35 EU, to which Article 46(b) EU refers.

39. In any event, the Kingdom of Spain has not denied that the contested calls for applications are to be regarded as acts adopted under Title VI of the Treaty on European Union.

40. It follows that the action brought under Article 230 EC cannot be declared admissible.

41. As regards the right to effective judicial protection in a community based on the rule of law which, in the view of the Kingdom of Spain, requires that all decisions of a body with legal personality subject to Community law be amenable to judicial review, it must be observed that the acts contested in this case are not exempt from judicial review.

42. As is clear from Article 30 of the Decision, Eurojust staff are to be subject to the rules and regulations applicable to officials and other servants of the European Communities. It follows that, in accordance with the consistent case-law, the main parties concerned, namely the candidates for the various positions in the contested calls for applications, had access to the Community Courts under the conditions laid down in Article 91 of the Staff Regulations (to that effect, see Vandevyvere v European Parliament , cited above, 163).

43. In the event of such an action, Member States would be entitled to intervene in the proceedings in accordance with Article 40 of the Statute of the Court of Justice and could, where appropriate, as is clear from the second and third paragraphs of Article 56 of that Statute, appeal against the judgment of the Court of First Instance.

44. It follows from all those considerations that the application is inadmissible.

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Opinion of Mr Advocate General Poiares Maduro delivered on 16 December 2004. Kingdom of Spain v Eurojust. Action for annulment under Article 230 EC - Action brought by a Member State challenging calls for applications, issued by Eurojust, for positions as members of the temporary staff - No jurisdiction of the Court - Inadmissible. Case C-160/03.

1. The present case is important in two respects. First, the action brought by the Kingdom of Spain against calls for applications for the recruitment of temporary staff to serve with Eurojust provides the Court once again with an opportunity to examine the meaning and scope of the language regime of the institutions and bodies of the European Union. The Court has already given a decision on the language regime applicable to the registration procedures in an agency of the European Community, the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM). (2) In this instance, it is called upon to give a decision concerning the language regime applicable to the recruitment procedures and internal proceedings of Eurojust, a European Union body. However, such an examination can be embarked upon only if the Court declares to be admissible an action for annulment brought by a Member State against a measure adopted by a body of the Union under the provisions of Title VI of the Treaty on European Union. In this case, therefore, the Court is invited to state its position concerning both the remedies available under the Treaty on European Union and the requirements concerning the languages to be used in Union institutions and bodies.

I - The case and its context

2. It is necessary to clarify a number of points concerning the authorship and content of the calls for applications contested in these proceedings (hereinafter the contested measures') before considering the subject-matter and the pleas in law.

A - The author of the contested measures

3. Eurojust is an important element in the development of the Union as an area of freedom, security and justice. (3) Pursuant to Article 29 EU, the creation of Eurojust reflects the need to provided citizens of the Union with a high level of protection by improving judicial cooperation between the Member States.

4. Eurojust was set up as a body of the Union, endowed with legal personality, by Council Decision 2002/187/JHA of 28 February 2002 (4) (hereinafter the Eurojust decision'). Its task, in relation to serious crime, is to promote and improve coordination of action for investigations and prosecutions in the Member States, to improve cooperation between the competent authorities of the Member States and to provide support for the latter.

5. For that purpose it has been provided with a structure that is original. First, under Article 2 of the decision establishing it, Eurojust is composed of one national member seconded by each Member State. A meeting of all the national members makes up the College. The College is responsible for the organisation and operation of Eurojust. It appoints the Administrative Director, who is responsible for the daytoday management of the body. (5) Second, Eurojust has its own administrative structure. Under Article 25 of Eurojust's Rules of Procedure, (6) the staff of the body is recruited by the Administrative Director, after evaluation and approval by the College of the posts to be filled. It is specifically the conditions for the recruitment of Eurojust staff that are at issue in the present action.

B - The content of the contested measures

6. On 13 February 2003, eight calls for applications were published in the Official Journal of the European Union (7) with a view to establishing reserve lists for Eurojust temporary staff. The calls for applications related in particular to the following posts: a data-protection officer, an accounting officer, an IT-informatics expert (webmaster) of the European judicial network,

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a legal officer, a librarian/archivist, a press officer and a secretary to the general administration. Each of the calls for applications describes the nature of the proposed duties, indicates the qualifications required of potential candidates and specifies the conditions for the recruitment and selection of candidates.

7. As regards the prescribed qualifications, certain linguistic knowledge in particular is required. The requirements vary according to the posts to the filled. For the posts of data-protection officer and legal officer, an excellent knowledge of French and English is required; also, the ability to work in other official languages of the Communities would be an asset. Candidates for the post of press officer must be able to communicate at least in English and French; in their case, knowledge of other official languages of the Communities would be an asset. For the post of secretary to the general administration, a thorough knowledge of English and French is required; in addition, a satisfactory knowledge of other Community languages would be an asset. For the post of IT-informatics expert, a good knowledge of English is essential, and the ability to communicate in at least two other official languages of the Communities, including French, is regarded as an asset. Candidates for the accounting officer post are required to have a thorough knowledge of one of the official languages of the Communities and a satisfactory knowledge of another Community language, including a satisfactory knowledge of English. Only the call for applications for the post of librarian/archivist lays down no particular linguistic requirements.

8. The conditions for submitting applications are set out in the same terms in all the contested measures. First, the application form must be completed not only in the language in which it was published and came to the notice of the applicant but also in English. Second, some of the documents to be forwarded, namely the letter of motivation and the curriculum vitae, must be drawn up in English.

C - Subject-matter of the action and pleas in law

9. The subject-matter of the action is twofold. In its application, the Kingdom of Spain asks the Court to annul, first, the paragraph in each of the contested measures concerning the documents to be forward in English and, second, any paragraphs in the contested measures relating to linguistic qualifications. By focusing the subject-matter of the action on linguistic matters, the applicant seeks to attack both the selection procedure and the selection criteria.

10. In support of its action, it puts forward three pleas in law. First, it submits that the contested measures were adopted in breach of the Conditions of Employment of Other Servants of the European Communities (the Conditions of Employment'). (8) In its view, the contested measures are contrary to Article 12(2)(e) of the Conditions of Employment in that they require, as the case may be, more than a satisfactory knowledge of a language other than the candidate's mother tongue, a knowledge of the French language and, in all cases, as an essential precondition, knowledge of the English language. Second, it alleges a breach of the language rules of Eurojust, (9) in that those rules require Eurojust to comply with the Community language regime, under which all the official languages of the European Communities must be used and respected. (10) Finally, it alleges a breach of the principle of non-discrimination on grounds of nationality, as embodied in Article 12 EC, since the requirements and conditions laid down in the contested measures unjustifiably favour candidates whose mother tongue is English or French.

II - The admissibility of the application

11. Eurojust contends that the action is inadmissible. This question is delicate. It must, in my opinion, be examined closely.

12. Considerations of two kinds are invoked to support the allegation of inadmissibility. The first are of a general nature. They are based on the fact that the contested measures were adopted outside the scope of Community law and, moreover, by an autonomous body not forming part of the institutional

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framework of the Union as established in Article 7 EC and Article 5 EU. It follows that, on those two grounds, the legality of the contested measures cannot be examined by the Community judicature. The second set of considerations is based on the actual wording of Treaty provisions. Neither Article 230 EC nor Article 35 EU allows an action to be brought against measures of the kind at issue. There is only one possible remedy, and that is reserved to aggrieved candidates, who may bring proceedings under Article 91 of the Staff Regulations of Officials of the European Communities which apply by analogy to temporary staff pursuant to Article 73 of the Conditions of Employment.

13. The weight of those arguments should not be understated. They would enable the Court to adopt a simple solution. Thus, it could conclude that there is no legal basis for any consideration of the present application. However, such a course of action comes up against the considerable difficulty that it is not consonant with the principles which have always guided the caselaw of the Court. It would result in depriving a Member State of an opportunity to contest a measure which might undermine a fundamental principle of Union law. It is essential, in my view, that the Court should give decisions on questions which affect the definition of the fundamental legal framework of the Union. The present action raises such questions. In that regard, although they deserve to be taken into account, none of the arguments put forward in favour of inadmissibility seems to me to be decisive. On the contrary, excellent arguments are available to support the idea of admissibility.

14. There is no doubt that admissibility cannot be based, despite the applicant's contention, on Article 230 EC. The contested measures are not Community measures. They are based on provisions of the Treaty on European Union which authorise the setting up, organisation and operation of Eurojust. It is thus in the context of those provisions that the admissibility of the action must be established. One of the provisions on judicial and police cooperation in criminal matters, Article 35 EU, provides that [t]he Court of Justice shall have jurisdiction to review the legality of framework decisions and decisions in actions brought by a Member State or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers'.

15. That wording is clearly inspired by the EC Treaty provisions concerning actions for annulment. (11) It will be recalled that, in this context, the Court has held that the European 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'. (12) The Court went on to conclude that, although Article 230 EC mentions only a limited number of measures which can be challenged, the 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'. (13) In such a Community, the principle of effective judicial supervision of authorities acting under Treaty provisions is the expression of a general principle safeguarding respect for the law. (14)

16. Such a principle therefore deserves wide recognition. First, it cannot be limited to the institutional framework referred to in Article 7 EC. The Court has consistently held that Community bodies, vested with legal personality by the EC Treaty, are also amenable to its jurisdiction. (15) Any other solution would be contrary to the principle that every Community decision having an adverse effect, wherever it emanates from, must be amenable to effective judicial review. (16)

17. Second, it seems to me that at present there is no obstacle preventing the Community system of law and the guarantees deriving from it from being extended to the European Union. In the context of Article 220 EEC, the Court sees its mission as requiring it to ensure compliance with the law in accordance with the criteria of a Community governed by the rule of law. (17) Pursuant to Article 46 EU, the provisions of the EC Treaty concerning the powers of the Court of Justice

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and the exercise of those powers apply to the provisions of the Treaty on European Union concerning judicial and police cooperation in criminal matters. (18) It is therefore incumbent on the Court to ensure, in that context, the observance of legality in accordance with the same criteria. That is the logical implication of a Union based on the rule of law, as referred to in Article 6 EU. (19) In a Union governed by the rule of law , it is essential for measures of Union institutions and bodies to be amenable to review by a Union Court, so long as they are intended to produce legal effects vis-à-vis third parties. (20)

18. That certainly applies to the contested measures. (21)

19. However, there can be no question of disregarding the conditions for bringing an action for annulment laid down by the Treaty on European Union. Although the principles of legality and effective judicial review, upheld in the Community context, also prevail in the context of a Union governed by the rule of law, it does not follow that the rules and arrangements for reviewing legality are identical. The Community and the Union pursue, in part, distinct objectives and are subject to different conditions. Where an action is based on Article 35 EU, two special conditions must be taken into account.

20. The first concerns the nature of the measures contested. Article 35 EU appears to limit actions to decisions and framework decisions adopted by the Council in accordance with Article 34 EU. It is common ground that, as far as Eurojust measures are concerned, no review of legality was expressly provided for in the applicable legal texts. The reason for this is, without doubt, that Eurojust, has no legislative role or decisionmaking power. (22) It is a body with an essentially operational function. The Eurojust decision thus contains only conditions governing liability (23) and a system of special appeals in connection with access to data of a personal nature. (24) However, the fact that such a lacuna cannot constitute an absolute impediment to the admission of an action is clear from the judgments in Les Verts v Parliament , cited above. (25) Just as the Court declared admissible, in that judgment, an action against an institution whose legislative function had gradually become an essential feature, it is appropriate to admit an action against a Union body to the extent to which it has a legislative function, even if it is used only on an exceptional basis. If Eurojust measures do not expressly appear in Article 35 EU, that too is because they emanate from a body which was not created until after the original version of that provision was drafted. It cannot therefore be inferred from that omission that its measures enjoy immunity.

21. The Court has already admitted, in the context of the scheme of the EC Treaty, that an action for annulment may be brought against all measures which produce legal effects, whatever their nature, form, or authorship. (26) That caselaw clearly applies in the context of the Union. Article 35 EU must be interpreted as enabling certain applicants to seek the annulment of any measures adopted in the context of Title XVI which produce legal effects visàvis third parties. In my opinion, the very idea of legality', as it must prevail in a Union governed by the rule of law, requires that to be the case. (27)

22. The second condition concerns the standing of the applicant. Under Article 35 EU, only the Member States and the Commission are entitled to bring an action. At first sight, that condition does not appear to raise any difficulty in this case. In principle, applicants endowed with that right by Article 35 EU are not required to demonstrate any interest in bringing proceedings. As the Court has held in the context of the EC Treaty, a Member State does not have to demonstrate that a measure contested by it has had an impact on it in order for its action to be admissible. (28) In view of the parallelism of the provisions concerning actions for annulment contained in the EC and EU treaties, that caselaw falls to be applicable in the context of Article 35 EU.

23. Account must also be taken of an objection raised by Eurojust in the present case: in so far as an action could properly be brought on the basis of Articles 90 and 91 of the Staff Regulations

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of Officials, against the contested measures, any endeavour to secure the admissibility of the present application is pointless. However, that objection overlooks the interest attaching to actions of this kind for the Member States. It is common ground that actions based on provisions of the Staff Regulations are of a special nature, in so far as they are concerned only with the relationship between the applicant and an institution. (29) However, the defence of interests deriving from that special relationship cannot be regarded as the only basis for proceedings before the Court. A Member State, which does not have an interest in that relationship, must be entitled to invoke, in support of an action for annulment, an infringement of Union law. (30)

24. Two arguments militate in favour of that solution in this case. It should be remembered, first, that the Treaty on European Union confers a very privileged status on the Member States. (31) It would therefore be rather inconsistent to allow actions by individuals without also granting the Member States a right of access to the Court. It should also be noted that the present action is concerned with an essential requirement of Union law which the Member States, primarily, are responsible for upholding. It is clear from Article 290 EC, by virtue of the reference to Article 41 EU, that the Union institutions are to exercise their competences in a way that upholds linguistic diversity. Respect for linguistic diversity is one of the essential aspects of the protection granted to the national identities of the Member States, as is apparent from Article 6(3) EU and Article 149 EC. (32) In those circumstances, the right available to candidates to defend their particular interests cannot be allowed to run counter to the fundamental interest in defending a rule such as that of linguistic diversity in the Union. (33). The Member States' interest is not subsumed under the interests of individuals; those interests in bringing proceedings coexist.

25. I therefore consider that the present action should be declared admissible.

III - Appraisal of the pleas in law

26. The applicant relies on rules of law whose relevance to the outcome of this case is contested by Eurojust. Before any discussion of the legality of the contested measures, it is appropriate to dispose of the preliminary issue of the applicability of the provisions referred to.

A - Determination of the applicable law

27. Two provisions, concerning the Conditions of Employment and the language regime of the European Community, and a general principle of Community law, the principle of non-discrimination laid down in Article 12 EC, are invoked in this case by the applicant.

28. There is no doubt as to the applicability of the Conditions of Employment. Moreover, it is not disputed. Under Article 30(1) of the Eurojust decision, Eurojust staff shall be subject to the rules and regulations applicable to the officials and other servants of the European Communities, particularly as regards their recruitment and status'. It follows in particular that the recruitment of Eurojust temporary staff is subject to the conditions of engagement laid down in Article 12 of the Conditions of Employment. According to that provision, [t]he engagement of temporary staff shall be directed to securing for the institution the services of persons of the highest standard of ability, efficiency and integrity, recruited on the broadest possible geographical basis from among nationals of the Member States of the Communities'. It also states that a member of the temporary staff may be engaged only on condition that... he produces evidence of a thorough knowledge of one of the languages of the Communities and of a satisfactory knowledge of another language of the Communities to the extent necessary for the performance of his duties'.

29. On the other hand, the application of the Community language regime is a matter of some controversy. Opposing its applicability, Eurojust puts forward two arguments, based on the same reasoning: an alleged divergence of wording as between the various language versions of Article 31 of the Eurojust decision. First, since all the language versions of the provision, with the exception of the Spanish

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version, refer to the official linguistic arrangements of the Union' and not to the linguistic arrangements of the Community institutions', it must be concluded that Regulation No 1 does not apply to that body. According to that argument, the language regime of the Union is different from that of the Communities and thus it is to be expected that the Union institutions are to adopt specific provisions on that point. Second, even if it is supposed that the Community language regime is held to be applicable, Eurojust denies that it applies to part of its area of activity. The fact that Article 31 of the Eurojust decision makes it clear, in all the language versions other than Spanish, that that regime applies to the proceedings' or to the procedures' of Eurojust means, in its view, that internal communications fall outside the scope of that regime.

30. Neither of those arguments stands up to analysis. First, the applicability of Regulation No 1 is apparent from a well-established chain of textual references. The language regime of the Union, in the context of the third pillar thereof, is provided for in Article 41 EU. That article expressly states that Article 290 EC is to be applicable to the provisions of the Union relating to police and judicial cooperation in criminal matters. According to that article, the rules governing the languages of the institutions of the Community are to be determined by a Council regulation, which was adopted in the form of Regulation No 1. (34) It is also noteworthy that the latest amended version of that regulation refers expressly to the languages of the institutions of the European Union'. It is precisely that regime which Article 31 of the Eurojust decision extends to Eurojust as a body operating in the context of the Treaty on European Union.

31. Second, the exclusion of that regime in relation to a part of Eurojust's operations is likewise not justified. That exclusion is based on a distinction between operational functions and purely administrative functions and has no foundation in law. There is nothing to indicate that administrative functions are excluded from the concept of working languages' as used in Regulation No 1. On the contrary, there is every reason to think that that term covers without distinction external communications and proceedings within institutions. Moreover, it is precisely in that sense that the Court has used that term. (35) The scope of the language regime embraces all the activities of the Union institutions and bodies, whether relating to external relations or to internal operations. That does not mean, however, that no distinction between external communications and internal communications can be accepted. But such a distinction can be seen as relevant only as regards the arrangements for applying the language regime. (36)

32. The issue of the applicability of the principle of nondiscrimination on grounds of nationality remains to be dealt with. Eurojust denies such applicability, on the ground that since that principle derives from Article 12 EC it is not applicable outside the Community context. That objection does not seem to me to be well founded. It is undisputed that Article 12 EC embodies a general principle of Community law, (37) as a a specific expression of the general principle of equality'. (38) Such principles rank as fundamental principles' of the Community legal order. (39) Accordingly, they form part of the basic acquis of the Community. (40) Under Article 2 EU, the Union sets itself the objective of maintain[ing] in full the acquis Communautaire and build[ing] on it'. Moreover, the category to which those principles belong is not wholly unknown in the context of the Treaty on European Union because, under Article 6 thereof, the Union shall respect fundamental rights... as general principles of Community law'. (41) It follows, in my opinion, that the fundamental principle of non-discrimination and its specific expression, the principle of non-discrimination on grounds of nationality, are perfectly well applicable within the sphere of the Treaty on European Union. Accordingly, they must be regarded as enforceable against the institutions and bodies operating in that context. (42)

33. That conclusion, based on protection of the acquis Communautaire , also reflects a concern for consistency. (43) The basis for the construction of an area of freedom, security and justice is to be found in the provisions both of the Treaty on European Union and of the EEC Treaty.

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It is essential that, whatever its basis, any action undertaken by the Union institutions in this context should be subject to the same standards. To that end, Article 3 EU provides expressly that the Union shall be served by a single institutional framework which shall ensure the consistency and continuity of the activities carried out in order to attain its objectives while respecting and building upon the acquis Communautaire.'

34. Finally, I should like to add a last remark concerning the applicable law. In my view, the question of linguistic requirements does not fall solely within the scope of regulations or specific Treaty provisions. This question must be linked with rights, with a principle and with an objective which are fundamental to the European Union. (44) It is important to bear in mind in that connection that respect for and promotion of linguistic diversity are not in any way incompatible with the objective of the common market. On the contrary, against the background of a Community based on the free movement of persons, the protection of the linguistic rights and privileges of individuals is of particular importance'. (45) It is common ground that the right of a national of the Union to use his own language is conducive to his exercise of the right of free movement and his integration into the host state. (46) In those circumstances, the Court condemns all forms of indirect discrimination based on knowledge of languages. (47)

35. In a Union intended to be an area of freedom, security and justice, in which it is sought to establish a society characterised by pluralism, (48) respect for linguistic diversity is of fundamental importance. That is an aspect of the respect which the Union owes, in the terms of Article 6(3) EU, to the national identities of the Member States. The principle of respect for linguistic diversity has also been expressly upheld by the Charter of Fundamental Rights of the European Union (49) and by the Treaty establishing a Constitution for Europe. (50) That principle is a specific expression of the plurality inherent in the European Union.

36. My motherland is the Portuguese language'. That famous statement by Pessoa, (51) taken up by numerous men of letters, such as Camus, (52) clearly expresses the link which may exist between language and a sense of national identity. Language is not merely a functional means of social communication. It is an essential attribute of personal identity and, at the same time, a fundamental component of national identity. (53)

37. In my opinion, the language regime of the Union institutions must not be severed from that context or from that principle. That regime guarantees that the linguistic rights of those individuals who have direct access to the Union institutions will be recognised. It stems from the special nature of the relationship between the Union and its citizens. It must therefore be regarded as a direct expression of the linguistic diversity inherent in the European Union. It thus constitutes a fundamental institutional rule of the European Union.

38. Admittedly, it is not possible to infer from the foregoing the existence of an absolute principle of equality of languages in the Union. As is clear from the judgment in Kik v OHIM , the references to the use of languages in the European Union contained in the Treaty cannot be regarded as evidencing a general principle of Community law that confers a right on every citizen to have a version of anything that might affect his interests drawn up in his language in all circumstances '. (54) There are circumstances in which that right cannot be applied. But those circumstances can but be limited and they must be justified on every occasion. In any event, the Union institutions and bodies have a duty to respect the principle of linguistic diversity.

B - Application of the foregoing considerations to the present case

39. This case involves not only an appraisal of the conformity with Union law of the conditions for the recruitment and selection of temporary staff within a Union body. Linguistic requirements such as those challenged in this case may be imposed either because of the language regime chosen

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for the internal functioning of a body or as a reflection of the nature of the posts to be filled. It seems to me that, in any analysis, care should be taken to draw a distinction between those two alternative requirements. Accordingly, a prior examination of the legal rules on the use of languages in the Union institutions and bodies is called for.

1. The language regime of the Union institutions and bodies

40. The foregoing considerations concerning the applicable law clearly show that the principle of respect for the linguistic diversity of the Union applies, as a fundamental requirement, to all the institutions and bodies of the Union. That said, it is a requirement that cannot be regarded as absolute. It is necessary to accept restrictions in practice, in order to reconcile observance of that principle with the imperatives of institutional and administrative life. But those restrictions must be limited and justified. In any event, they cannot undermine the substance of the principle whereby the institutions must respect and use all the official languages of the Union.

41. In assessing whether restrictions likely to be imposed on that principle are justified, it is necessary to take account of the context in which they are to apply. The exact determination of the scope of such a principle depends on the institution or body concerned, the surrounding circumstances and the conflicting interests to be taken into consideration in any such situation.

42. In that regard, I think that three different situations can be identified.

43. It is clear that it is in the context of communications between the institutions and the citizens of the Union that the principle of respect for linguistic diversity deserves the highest level of protection. In such cases, that principle is linked with a fundamental democratic principle of which the Court takes the greatest care to ensure observance. (55) That principle requires in particular that subjects of the law of the Union, be they Member States or European citizens, should have easy access to the legal texts of the Union and to the institutions which produce them. Only such access can offer Union citizens the opportunity to participate effectively and equally in the democratic life of the Union. (56) It follows that, for the purpose of exercising rights of participation attaching to European citizenship, respect for linguistic diversity must not be exposed to technical difficulties which an efficient institution can and must surmount.

44. Those rights also extend to relations between citizens and the administration. In the context of administrative procedures, it is essential that interested parties, whether Member States or citizens, should be able to understand the institution or body which they are communicating. Consequently, pursuant to Article 3 of Regulation No 1, the principle remains that the language of communications must be that of the individual concerned. (57) However, it is common ground that, in this context, the linguistic rights of such persons are subject to certain restrictions based on administrative requirements. Thus, the use of a language other than that of the persons concerned may be allowed in certain cases if it is clear that they have been put in a position where they can properly take note of the position of the institution concerned. (58) In that connection, account must be taken of the fact that the parties to the proceedings are to be regarded not simply as persons subject to the jurisdiction of a Member State, within the meaning of Article 2 of Regulation No 1, but rather as qualified interested parties benefiting from the availability of cognitive and material resources enabling them to be adequately informed. (59)

45. In those circumstances, it may be open to the Council, pursuant to Article 290 EC, to take a differential approach to the use of official languages. But, first, the choice made by the Council must be appropriate and proportionate, having regard to the principle of linguistic diversity. (60) Second, that choice may not give rise to unjustified discrimination between European citizens.

46. A distinction must be drawn between the rules on the internal functioning of Union institutions and bodies and those two cases. Whilst linguistic diversity is the fundamental rule in the context

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of outside contacts, that is because it is necessary to respect the linguistic rights of persons having access to Union institutions and bodies. The Treaty and the case-law are based on the understanding that the choice of the language of communication is a matter for the Member State or the person who has a relationship with the institutions. On the other hand, in the context of the internal functioning of Union institutions, the choice of the language to be used for internal communications is the responsibility of those institutions, which are entitled to impose that choice on their employees. It thus follows from Article 6 of Regulation No 1 that [t]he institutions of the Community may stipulate in their rules of procedure which of the languages are to be used in specific cases.'

47. Against that background, two conflicting requirements apply. On the one hand, basic reasons of administrative efficiency are conducive to choosing a limited number of working languages. (61) It is clear that a system of all-embracing linguistic pluralism is in practice unworkable and economically intolerable for an institution or body vested with technical and specialised competences. But, on the other hand, the internal language regime cannot be entirely dissociated from the rules governing external communications of the institutions. The functioning and the composition of Union institutions and bodies must always reflect a concern to safeguard the geographical and linguistic balance of the Union and respect the principle of nondiscrimination. (62) That is also the underlying reason for the institutions' obligation to recruit on as wide as possible a basis among the nationals of the Member States.

48. As far as determining the internal language regime is concerned, it is therefore necessary to grant a degree of operational autonomy to Union institutions and bodies. Such autonomy is necessary in order to ensure their proper functioning. (63) According to the Court, it is the expression of a principle inherent in all institutional systems'. (64) However, that autonomy must be strictly circumscribed. It can be exercised only within the limits allowed by the Treaty. (65) It must be borne in mind, in that connection, that the Treaty entrusts principally to the Council the responsibility of defining the language regime of the Union institutions. (66) That responsibility implies a considerable degree of latitude, provided that it does not in any way undermine the essence of the principle of linguistic diversity. In contrast, the Union institutions and bodies enjoy only a limited discretion for implementation of that regime. They must not be allowed to use it otherwise than for the purposes of their internal operational needs.

49. In those circumstances, the choice of one or more Union languages for internal purposes can be allowed only if it is based on objective considerations relating to the functional needs of the body concerned and if it does not give rise to unjustified differences of treatment as between Union citizens. It is important to make certain, first, that the regime chosen reflects the specific needs of the body concerned, having regard, for example, to the history of its coming into being, the location of its seat, its internal communication needs and the nature of the functions which it must discharge. It is necessary to verify, secondly, that the choice made does not compromise equal access for Union citizens to the jobs offered by Union institutions and bodies. In that connection, all those who possess the necessary skills to perform the duties associated with the posts to be filled must be able to secure access to and participate, on equal terms, in the recruitment procedures. (67)

50. In any event, it is not sufficient to seek to justify an internal language regime by reference to the nature of things', (la naturaleza de los hechos') as Eurojust saw fit to do before the Court.

2. The legality of the conditions of engagement

51. In the contested measures, Eurojust lays down language requirements not corresponding to those deriving from Article 12 (2) of the Conditions of Employment. Their scope is different, as is the level of knowledge required. The Kingdom of Spain claims that that difference constitutes, in itself, an infringement of the Conditions of Employment.

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52. Expressed in those terms, that claim does not seem to me to be well founded. The Community case-law does not preclude any Union institution or body from laying down professional requirements, linked in particular with knowledge of languages, that are more stringent than those reflected in the minimum conditions prescribed by the Conditions of Employment. (68) However, those additional requirements must be justified. (69) In other words, they must pursue a legitimate objective and be proportionate to that objective.

53. Before the Court, Eurojust has put forward explanations falling into two categories.

a) Justification by reference to the working language

54. According to Eurojust, the skills required are necessary to enable the candidates recruited to communicate with each other within the organisation. They are justified by the need to have a good command of Eurojust's working languages.

55. It is beyond doubt, in my opinion, that it may be necessary to choose an internal working language in order to ensure the proper functioning of Union institutions and bodies. (70) Such a choice is particularly legitimate where the body in question is a specialised organisation with limited resources. However, for the purpose of attaining that legitimate objective, the requirement of knowledge of both of two specified Union languages for all the posts in question, with the exception of those of accounting officer and librarian/archivist, does not seem to be appropriate. To ensure good communication within the organisation, command of a single common language would appear sufficient. As long as all Eurojust's employees are fluent in that language, it is clear that the requirement of a second working language cannot be justified for reasons of internal communications.

56. I should make it clear that that does not, however, mean that a body may not choose to have more than one working language. But that choice must be clearly established and justified by the specific operational needs of the organisation, having regard in particular to the diversity of the staff recruited. The use of several languages within the departments of an institution may justify the requirement of knowledge of one of those working languages. In such a case, however, to require knowledge of any one of those languages would appear sufficient. In any event, the cumulative requirement of knowledge of several languages cannot be justified by internal communication needs and can only be indicative of a wish to afford a privileged status to certain Union languages. However, it must be borne in mind that, under Article 290 EC, the power to apply differential rules regarding official languages of the Union is vested solely in the Council, which must exercise that power with due respect for the principle of linguistic diversity.

57. In this case, the requirement of knowledge of both of two specified Union languages in the calls for applications for the posts of data protection officer, legal officer, secretary to the general administration, ITinformatics expert and press officer appears to be clearly disproportionate. It cannot be justified by the sole objective of ensuring internal communication within the organisation.

58. As to the requirement of a satisfactory knowledge of English for the post of accounting officer, it could be permissible if the choice of English as the working language had been clearly established and duly justified. However, the observations submitted to the Court by Eurojust lack clarity. In some places it appears that a single language was chosen for internal communications, although that language is not clearly identified, (71) and elsewhere it appears that the two languages required in the calls for applications are those used for internal communications within the organisation. (72). Eurojust's Rules of Procedure moreover do not throw any further light on the matter. Since Eurojust has not clearly established or justified the choice of one or several working languages, the explanation put forward must also be rejected in this case.

59. The other justification put forward by Eurojust to defend the legality of the contested measures must now be examined.

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b) Justification by reference to the nature of the duties

60. Eurojust also contends that those language requirements are linked to the duties associated with the various posts involved.

61. It must be conceded that the nature of the proposed duties may justify requiring the command of a language other than the one used for internal communications within the organisation. However, a measure laying down wider-ranging linguistic requirements than those appearing in the Conditions of Employment must not run counter to a fundamental principle such as the principle of nondiscrimination. Accordingly, linguistic requirements imposed by reason of the nature of the work to be undertaken must be strictly linked with the posts to be filled and they must not result in any dilution of the requirement of geographical diversity of Union staff.

62. As regards the first of those conditions, it is necessary to verify that the prescribed linguistic requirements display a necessary and direct connection with the proposed duties. Should that link not be established, such requirements must be regarded as involving discrimination detrimental to Union nationals who have the necessary skills, within the meaning of Article 12 of the Conditions of Employment, to be appointed to the posts to be filled. Even if the criterion of nationality is disregarded, such discrimination based on language is liable to constitute an unjustified barrier to access to employment.

63. As regards the second condition, it is necessary to verify that the requirements decided upon do not excessively undermine the objective of ensuring a geographical balance within the Union institutions and the bodies. It is clear that preference for certain languages by way of professional requirements gives an advantage to those European citizens who have those languages as their mother tongues. However, such an advantage is liable to give rise to indirect discrimination adversely affecting other Union citizens. By virtue of the principle of nondiscrimination on grounds of nationality, therefore, a linguistic requirement imposed in connection with the needs of the service must not to result in a vacant post being reserved for one or more specified nationalities. (73)

64. In this case, it has not been established that the requirements laid down for the vacant posts involve discrimination based either on language or on nationality.

65. First, it does not seem that the contested measures have had a dissuasive effect on European citizens whose mother tongue is not one of those required in the contested measures. On the contrary, the information provided appears to be indicative of a balanced representation of the various nationalities both in the recruitment procedures and within Eurojust.

66. Second, it is true that Eurojust has not given very detailed explanations concerning such link as may exist between each of the duties considered and the corresponding linguistic requirements. In that connection, it confined itself to giving implicit' reasons deriving from the description of the duties involved. They reside, in particular, in the fact that constant contacts must be maintained with other people and organisations, at both national and international level, and in the need to secure rapid access to suitable working tools. In those circumstances, it must the borne in mind that Union bodies must be granted a degree of autonomy to determine the nature of their functional needs. It follows that the legality of the contested measures will only be affected if the prescribed requirements are manifestly inappropriate. In this case, it must be concluded that the Kingdom of Spain has not produced any specific evidence such as to raise doubts as to whether the prescribed linguistic knowledge is relevant to performance of the duties involved.

67. Even if, in this case, the explanation based on the language used for internal communications is not sufficient to justify the prescribed requirements, an explanation based on the nature of the functions cannot be rejected. In so far as the illegality of the linguistic requirements laid down in Eurojust's calls for applications has not been demonstrated, I consider that the pleas

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directed against that part of the contested measures must be rejected.

3. The legality of the selection conditions

68. The requirement that some of the documents forming part of the applications be submitted in English breaches the rule that private individuals are entitled to address the Union institutions and bodies in an official language of their choice. That rule applies to Eurojust pursuant to Article 2 of Regulation No 1, which was made applicable to Eurojust by Article 31 of the Eurojust decision. (74).

69. The question must therefore be asked whether that breach may be justified. The situation of candidates responding to a call for applications issued by a Union body is not comparable to that of citizens addressing institutions in the context of their democratic participation in the life of the Union. The applications they submit form part of an organised selection procedure and are directly connected with the exercise of specific duties. In those circumstances, the requirement at issue may be justified if, first, it is directly linked with the skills necessary for performance of the duties involved in the posts in question and, second, it does not have an excessive adverse impact on the legal interests of potential candidates.

70. That means that it cannot be justified, in any event, by reasons relating to the way in which the selection process is organised and run. A person cannot be excluded from a recruitment procedure simply for reasons of practicality. Such an exclusion would constitute a breach of the fundamental right of access to employment for the persons concerned. On the other hand, it is entirely possible to require candidates for posts within a Union body to demonstrate, in their applications, that they possess certain skills that are necessary for the post in question.

71. That is certainly so in the case of calls for applications in which an excellent, thorough or satisfactory knowledge of English language is one of the qualifications required for appointment to the posts on offer. In this case, a link can be established between the obligation to complete the application form in English and the prescribed professional qualifications. Moreover, all interested parties are able to ascertain what those requirements are by virtue of the publication of the calls for applications in all the official languages of the Union. Finally, candidates retain the right to submit their applications also in any language in which the calls for applications were published. It follows that the linguistic rights of the persons concerned were impaired to only a limited extent and, in any event, that was justified by the duties associated with the posts concerned.

72. However, in one case those conditions do not appear to have been complied with. The call for applications for the post of librarian/archivist states that the application documents must be submitted in English. However, no specific details are given in it regarding linguistic qualifications. The link between the duties involved and the requirement of submitting the application in English has not therefore been established. Without doubt, it might be inferred from another selection criterion laid down in the call for applications, namely that a sound knowledge of the sources of the main legal documentation for... [the] Common Law system' is required, that knowledge of English is necessary. But there is nothing to indicate that it is necessary to communicate and write in English in order to carry out the duties of the post in question.

73. In the absence of precise information concerning the linguistic knowledge required for the post in question, it is impossible to ascertain whether the requirement at issue is justified. Accordingly, I consider that the requirement in the call for applications for the post of librarian/archivist that the application documents must be in English is illegal.

IV - Consequences of the proposed solution

74. The Kingdom of Spain has asked the Court to annul the contested measures in part. In view

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of the foregoing considerations, that request should be acceded to in part.

75. However, in its case-law relating to competitions for officials and temporary staff, (75) the Court has always demonstrated a concern to take account not only of the need to uphold legality and safeguard the interests of candidates unjustly excluded but also to protect the interests of candidates already selected, against whom no criticism can be levelled. Thus, it has recognised that irregularities in a recruitment procedure do not automatically entail annulment of all the results of the competition in question.

76. It seems to me that such a solution is required in this case. If the Court should choose to follow this Opinion, it should make it clear that the partial annulment of the call for applications for the post of librarian/archivist cannot imply any adverse impact on the appointment already made on the basis of the call published.

V - Conclusion

77. In the light of the foregoing considerations, I propose that the Court should:

(1) annul the call for applications issued by Eurojust for the post of librarian/archivist to the extent to which it requires that the applicants' documents must be drawn up and submitted in English;

(2) for the rest, dismiss the action.

(1) .

(2) - Case C-361/01 Kik v OHIM [2003] ECR I-8283.

(3) - Under Article 2 EU, one of the objectives of the Union is (to maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with the appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime).

(4) - Decision of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime (OJ 2002, L 63, p. 1).

(5) - Article 28 of the Eurojust decision.

(6) - OJ 2002, C 286, p.1.

(7) - OJ 2003, C 34 A, pp. 1-19.

(8) - Those conditions supplement the Staff Regulations of Officials of the European Communities and govern the conditions of recruitment and work of members of temporary staff, members of auxiliary staff and local employees, as well as special advisers employed by the Communities.

(9) - Pursuant to Article 31(1) of the Eurojust decision, ([t]he official linguistic arrangements of the Union shall apply to Eurojust proceedings).

(10) - Under Article 1 of Council Regulation No 1 determining the languages to be used by the European Economic Community (OJ English Special Edition 1952-1958, p. 59), as in force when this action was brought, ([t]he official languages and the working languages of the institutions of the Community shall be Danish, Dutch, English, French, Finnish, German, Greek, Italian, Portuguese, Spanish and Swedish.)

(11) - See, to that effect, M. Gautier, L'influence du modèle Communautaire sur la coopération en matière de justice et d'affaires intérieures , Bruylant, Brussels, 2003, p. 564.

(12) - Case 294/83 Les Verts v Parliament [1986] ECR 1339, p. 23.

(13) - Les Verts v Parliament , paragraph 24.

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(14) - See, among others, Case T-111/96 Promedia v Commission [1998] ECR II-2937, paragraph 60, and Case 222/84 Johnston [1986] ECR 1651, paragraph 18.

(15) - See, in particular, Case C-15/00 Commission v EIB [2003] ECR I-7281, paragraph 75, and Case C-370/89 SGEEM and Etroy v EIB [1992] ECR I-6211, paragraphs 15 and 16. It is also interesting to note that the Commission considers, in a Communication concerning European regulatory agencies, that European agencies must respect the principles of the institutional system of which they form part, and in particular the principle of legality (COM 2002/718 final).

(16) - See, in particular, the order of the Court of First Instance of 8 June 1998 in Case T-148/87 Keeling v OHIM [1998] ECR II-2217, paragraph 33).

(17) - See, most recently, Case C-496/99 P Commission v CAS Succhi di Frutta [2004] ECR I-0000, paragraph 63.

(18) - Case C-170/96 Commission v Council [1998] ECR I-2763, paragraph 15.

(19) - See J. Rideau, L'incertaine montée vers l'Union de droit, De la Communauté de droit à l'Union de droit. Continuité et avatars européens , LGDJ, Paris 2000, p. 1.

(20) - It will be noted in that connection that the text of the Treaty establishing a Constitution for Europe, signed in Rome on 29 October 2004 by the representatives of the Member States, provides in Article III-365 that the Court of Justice is to review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties' (CIG 87/2/04).

(21) - That is not contested in the cases in which the Community judicature has been called on to examine the legality of similar measures in the context of the EC Treaty: see, in particular, Case T-146/95 Bernardi v Parliament [1996] ECR II-769, order of the Court of First Instance of 30 March 2000 in Case T-33/99 Méndez Pinedo v ECB [2000] ECR-SC IA63 and II-273, and Case 225/87 Belardinelli and Others v Court of Justice [1989] ECR 2353, paragraphs 13 and 14.

(22) - The rules on judicial remedies are common to other Union agencies: see, on this point, the study by J. Molinier, Le regime contentieux des Agences de l' Union européenne ', Les Agences de l'Union européenne. Recherche sur les organismes Communautaires décentralisés , Presses de l'Université des sciences sociales, Toulouse, 2002, page 113.

(23) - Article 24 of the Eurojust decision.

(24) - Article 19 of the Eurojust decision. In that connection, the preamble to the Eurojust decision makes it clear that the competences of the common supervisory body, responsible for overseeing the activities of Eurojust, are to be exercised without prejudice to the jurisdiction of national courts or to the arrangements for any appeals which may be brought before them.'

(25) - In that judgment, cited in footnote 12 above, the Court made it clear that [t]he 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 visavis third parties.'

(26) - Case 22/70 Commission v Council [1971] ECR 263, Case 60/81 IBM v Commission [1981] ECR 2639, paragraph 9, and Les Verts v Parliament , paragraph 24.

(27) - See, by analogy, the Opinion of Advocate General Mancini in Les Verts v Parliament , point 7.

(28) - See, to that effect, the order of 27 November 2001 in Case C-208/99 Portugal v Commission [2001] ECR I-9183, paragraph 23.

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(29) - Regarding the special nature of this relationship and of the associated remedies, see, in particular, Case 9/75 Meyer-Burckhardt v Commission [1975] ECR 1171.

(30) - See, by analogy, Case 41/83 Italy v Commission [1985] ECR 873, paragraph 30.

(31) - That status is evidenced both by the exceptional role attributed to the Member States in initiating measures adopted under Title VI of the Treaty on European Union (Article 34(2) EU) and by their power to bring proceedings before the Court with a view to securing review of measures intended to produce legal effects visàvis third parties (Article 35(6) EU).

(32) - According to Article 6 EU, [t]he Union shall respect the national identities of its Member States'. Article 149 EC, inserted by the Maastricht Treaty, for its part refers to the Community's duty to respect the cultural and linguistic diversity of the Member States.

(33) - See, by analogy, Case C-70/88 Parliament v Council [1990] ECR I-2041, paragraph 26.

(34) - It should be noted that the same applies in the case of Title V of the Treaty on European Union as regards the common provisions on the foreign and security policy, by virtue of Article 28 EU.

(35) - See Case 280/80 Bakke-d'Aloya v Council [1981] ECR 2887, paragraph 13.

(36) - See point 46 of this Opinion.

(37) - Case C-411/98 Ferlini [2000] ECR I-8081, paragraph 39.

(38) - Case C-224/00 Commission v Italy [2002] ECR I-2965, paragraph 14.

(39) - With regard to the principle of nondiscrimination on grounds of nationality as a fundamental rule' of the Community, see, most recently, Case C465/01 Commission v Austria [2004] ECR I0000, paragraph 25. As regards the principle of equal treatment as a fundamental principle' of Community law, see Case C-55/00 Gottardo [2002] ECR I-413, paragraph 34.

(40) - They are fundamental provisions of the Community legal order' which it is incumbent on the Court to protect (see to that effect Opinion 1/91 [1991] ECR I-6079, paragraph 41). See also P. Pescatore, Aspects judiciaires de l'acquis Communautaire', Revue trimestrielle de droit européen , 1981, p. 617.

(41) - It is noteworthy in that connection that the Charter of Fundamental Rights of the European Union upholds, in Article 21, the role of non-discrimination as a fundamental right enforceable against the institutions of the Union (OJ 2000, C 364, p. 1).

(42) - See, by analogy, the decisions given on the right of access to documents held by Union institutions: Case T-194/94 Carvel and Guardian Newspapers v Council [1995] ECR II-2765 and Case C-353/99 P Council v Hautala [2001] ECR I-9565.

(43) - See, to that effect, C. Timmermans, The Constitutionalisation of the European Union', Yearbook of European Law , 2002, vol. 21, p. 1.

(44) - See, to that effect, N. Nic Shuibhine, Commentaire de l'arrêt Kik v OHIM (C-361/01)' Common Market Law Review , 2004, p. 1093.

(45) - Case 137/84 Mutsch [1985] ECR 2681, paragraph 11, and Case C-274/96 Bickel and Franz [1998] ECR I-7637, paragraph 13.

(46) - Mutsch , paragraph 16, and Bickel and Franz , paragraph 16.

(47) - Case C-379/87 Groener [1989] ECR 3967, paragraphs 19 and 23.

(48) - That is one of the fundamental values of the Union according to Article 2 of the Treaty

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establishing a Constitution for Europe.

(49) - Article 22 of the Charter states that [t]he Union shall respect cultural, religious and linguistic diversity.'

(50) - Article I-3(3) provides that the Union must respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced'.

(51) - A minha patria é a língua portuguesa', B. Soares (a heteronym' of Fernando Pessoa), Livro do Desassossego , Lisbon, 1931-1932.

(52) - Camus reportedly said Oui, j'ai une patrie, c'est la langue française'.

(53) - That explains why the Community has provided itself with a single currency, whereas it is unthinkable that the Union could adopt a common language (to that effect, see B. Witte, Language Law of the European Union: Protecting or Eroding Linguistic Diversity?', Culture and the European Union , Oxford University Press, Oxford, 2004).

(54) - Kik v OHIM , paragraph 82 (emphasis added).

(55) - Case 138/79 Roquette Frères v Council [1980] ECR 3333, paragraph 33.

(56) - To that effect, the third paragraph of Article 21 EC provides: Every citizen of the Union may write to any of the institutions or bodies referred to in this article or in Article 7 in one of the languages mentioned in Article 314 and have an answer in the same language.'

(57) - Joined Cases T-79/89, T-84/89 to T-86/89, T-89/89, T-94/89, T-96/89, T-98/89, T-102/89 and T-104/89 BASF and Others v Commission [1992] ECR II-315. paragraphs 54 and 55, and Case C-263/95 Germany v Commission [1998] ECR I-441, paragraph 27.

(58) - See in particular Case T-77/92 Parker Pen v Commission [1994] ECR II-549, paragraphs 73 to 75, and Case T-118/99 Bonaiti Brighina v Commission [2001] ECR-SC I-A-25 and II-97, paragraphs 16 to 19, and Kik v OHIM , paragraphs 91 to 94.

(59) - Kik v OHIM , paragraphs 88 and 89.

(60) - Ibid, paragraph 94.

(61) - See, to that effect, the Opinion of Advocate General Jacobs in Kik v OHIM , paragraph 63, and the Opinion of Advocate General Van Gerven in Case C-137/92 P Commission v BASF [1994] ECR I-2555, point 43.

(62) - See, by analogy, Case 15/63 Lassale v Parliament [1964] ECR ???, in which the Court speaks in particular of the desire to safeguard the geographical balance required by the Community spirit' (at p. ???).

(63) - See, among others, Case 208/80 Lord Bruce of Donington [1981] ECR 2205, paragraph 17.

(64) - Case 5/85 AKZO v Commission [1986] ECR 2585, paragraph 37.

(65) - See, by analogy, Case C-213/88 Luxembourg v Parliament [1991] ECR I-5643, paragraph 34.

(66) - It will be noted, in that connection, that the Treaty of Nice, amending the Protocol on the Statute of the Court of Justice, calls on the Council to adopt rules relating to the language regime applicable to the Court of Justice and the Court of First Instance in the context of the Statute of the Court of Justice and no longer through the Rules of Procedure (Article 64 of the Protocol on the Statute of the Court of Justice). It follows that the latter would have to acquire the status of primary law and that every amendment would have to be approved by the Council unanimously,

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in accordance with the procedure under Article 245 EC. That amendment confirms the importance accorded by the Treaty to the provisions on the language regime and the particular responsibility borne by the Council in that connection.

(67) - That is also apparent from a combined reading of Articles 15 and 21 of the Charter of Fundamental Rights of the European Union, which protect, first, the right of every Union citizen to have access to employment and to the recruitment procedures organised in the Union and, second, the right not to suffer discrimination, in particular on grounds of language.

(68) - See Case 108/88 Cendoya v Commission [1989] ECR 2711, paragraph 24, and Case T-73/01 Pappas v Committee of the Regions [2003] ECR II-0000, paragraph 85.

(69) - See, to that effect, Lassale v Parliament , at p. ???

(70) - See point 47 of this Opinion.

(71) - Paragraphs 49 and 65 of the defence.

(72) - Paragraphs 13 and 28 of the rejoinder. That was also implied in the arguments put forward by Eurojust at the hearing.

(73) - See Lassale v Parliament.

(74) - See point 30 of this Opinion.

(75) - See, in particular, Case 144/82 Detti v Court of Justice [1983] ECR 2421, paragraph 33, and Case C-242/90 Commission v Albani and Others [1993] ECR I-3839, paragraphs 13 and 14.

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11997M003 : N 33
11997M005 : N 12
11997M006 : N 17 32
11997M006-P3 : N 24 35
11997M028 : N 30
11997M029 : N 3 - 5
11997M034 : N 20
11997M034-P2 : N 24
11997M035 : N 12 - 25
11997M035-P6 : N 24
11997M041 : N 24 30
11997M046 : N 17
12001C/PRO/02-A64 : N 48
12004V002 : N 35
12004V003-P3 : N 35
12004V365 : N 17
31958R0001 : N 29 - 50
31958R0001-A02 : N 44 68 - 70
31958R0001-A03 : N 44
31958R0001-A06 : N 46 - 50 55
31968R0259(01)-A90 : N 23 24
31968R0259(01)-A91 : N 12 23 24
31968R0259(02) : N 28
31968R0259(02)-A12 : N 28 62
31968R0259(02)-A12P2 : N 51 - 58 60 - 63
31968R0259(02)-A73 : N 12
32000X1218(01)-A15 : N 49
32000X1218(01)-A21 : N 32 49
32000X1218(01)-A22 : N 35
32002D0187 : N 4 5
32002D0187-A02 : N 5
32002D0187-A19 : N 20
32002D0187-A24 : N 20
32002D0187-A28 : N 5
32002D0187-A30P1 : N 28
32002D0187-A31 : N 29 30 68
32002Q1122(01) : N 58
32002Q1122(01)-A25 : N 5
61963J0015 : N 47 52 63
61970J0022 : N 21
61975J0009 : N 23
61979J0138 : N 43
61980J0208 : N 48
61980J0280 : N 31
61981J0060 : N 21
61982J0144 : N 75
61983C0294 : N 21
61983J0041 : N 23

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61983J0294 : N 15 20 21
61984J0137 : N 34
61984J0222 : N 15
61985J0005 : N 48
61987J0225 : N 18
61987J0379 : N 34
61988J0070 : N 24
61988J0108 : N 52
61988J0213 : N 48
61989A0079 : N 44
61989J0370 : N 16
61990J0242 : N 75
61991V0001 : N 32
61992A0077 : N 44
61992C0137 : N 47
61994A0194 : N 32
61995A0146 : N 18
61995J0263 : N 44
61996A0111 : N 15
61996J0170 : N 17
61996J0274 : N 34
61997B0148 : N 16
61998J0411 : N 32
61999A0118 : N 44
61999B0033 : N 18
61999J0353 : N 32
61999J0496 : N 17
61999O0208 : N 22
62000J0015 : N 16
62000J0055 : N 32
62000J0224 : N 32
62001A0073 : N 52
62001C0361 : N 47
62001J0361 : N 1 38 44 45
62001J0465 : N 32

SUB Justice and home affairs ; Principles, objectives and tasks of the Treaties ; Provisions governing the Institutions

AUTLANG Portuguese

APPLICA Spain ; Member States

DEFENDA EUROJUST ; Institutions

NATIONA Spain

PROCEDU Action for annulment - inadmissible

ADVGEN Poiares Maduro

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JUDGRAP Rosas

DATES of document: 16/12/2004
of application: 08/04/2003

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Judgment of the Court (Grand Chamber)
of 16 June 2005
Criminal proceedings against Maria Pupino. Reference for a preliminary ruling: Tribunale di Firenze - Italy. Police and judicial cooperation in criminal matters - Articles 34 EU and 35 EU - Framework Decision 2001/220/JHA - Standing of victims in criminal proceedings - Protection of vulnerable persons - Hearing of minors as witnesses - Effects of a framework decision. Case C-105/03.

1. Preliminary rulings - Reference to the Court of Justice - National court or tribunal for the purposes of Article 35 EU - Definition - Judge in charge of preliminary enquiries - Included

(Art. 35 EU)

2. Preliminary rulings - Jurisdiction of the Court of Justice - Police and judicial cooperation in criminal matters - Framework decision for the approximation of laws - Request for interpretation involving the principle of interpretation in conformity with national law - Jurisdiction to provide that interpretation

(Art. 234 EC; Arts 35 EU and 46(b) EU)

3. European Union - Police and judicial cooperation in criminal matters - Member States - Obligations - Duty of loyal cooperation with the institutions

4. European Union - Police and judicial cooperation in criminal matters - Framework decisions for the approximation of national laws - Implementation by Member States - Duty to interpret in conformity with national law - Limits - Compliance with general principles of law - Interpretation of national law contra legem - Not permissible

(Art. 249(3) EC; Art. 34(2)(b) EU)

5. European Union - Police and judicial cooperation in criminal matters - Status of victims in criminal proceedings - Framework Decision 2001/220 - Protection of particularly vulnerable victims - Arrangements - Conditions for hearing evidence of young children - Hearing outside the trial and before it takes place - Whether permissible - Limits

(Council Framework Decision 2001/220/JHA, Arts 2, 3 and 8(4))

1. Where a Member State has indicated that it accepts the jurisdiction of the Court of Justice to rule on the validity and interpretation of the acts referred to in Article 35 EU, the Court of Justice has jurisdiction to give a preliminary ruling on a question from a judge in charge of preliminary enquiries. Where acting in criminal proceedings, that judge acts in a judicial capacity, so that he must be regarded as a court or tribunal of a Member State' within the meaning of Article 35 EU.

(see paras 20, 22)

2. Under Article 46(b) EU, the system under Article 234 EC is capable of being applied to Article 35 EU, subject to the conditions laid down by that provision. Like Article 234 EC, Article 35 EU makes reference to the Court of Justice for a preliminary ruling subject to the condition that the national court considers that a decision on the question is necessary in order to enable it to give judgment', so that the case-law of the Court of Justice on the admissibility of references under Article 234 EC is, in principle, transposable to references for a preliminary ruling submitted to the Court of Justice under Article 35 EU.

It follows that the presumption of relevance attaching to questions referred by national courts for a preliminary ruling may be rebutted only in exceptional cases, where it is quite obvious that the interpretation of Community law sought bears no relation to the actual facts of the main action or to its purpose, or where the problem is hypothetical and the Court does not have before it the

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factual or legal material necessary to give a useful answer to the questions submitted. Save for such cases, the Court is, in principle, required to give a ruling on questions concerning the interpretation of the acts referred to in Article 35(1) EU.

In that context, irrespective of the degree of integration envisaged by the Treaty of Amsterdam in the process of creating an ever closer union among the peoples of Europe within the meaning of the second paragraph of Article 1 EU, it is perfectly comprehensible that the authors of the Treaty on European Union should have considered it useful to make provision, in the context of Title VI of that treaty, dealing with police and judicial cooperation in criminal matters, for recourse to legal instruments with effects similar to those provided for by the EC Treaty, in order to contribute effectively to the pursuit of the Union's objectives. The jurisdiction of the Court of Justice to give preliminary rulings under Article 35 EU would be deprived of most of its useful effect if individuals were not entitled to invoke framework decisions in order to obtain a conforming interpretation of national law before the courts of the Member States.

(see paras 19, 28-30, 36, 38)

3. It would be difficult for the Union to carry out its task effectively if the principle of loyal cooperation, requiring in particular that Member States take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under European Union law, were not also binding in the area of police and judicial cooperation in criminal matters under Title VI of the EU Treaty, which is moreover entirely based on cooperation between the Member States and the institutions.

(see para. 42)

4. The binding nature of framework decisions adopted on the basis of Title VI of the Treaty on European Union, dealing with police and judicial cooperation in criminal matters, is formulated in terms identical with those in the third paragraph of Article 249 EC, concerning directives. It involves an obligation on the part of the national authorities to interpret in conformity with national law. Thus, when applying national law, the national court that is called upon to interpret it must do so as far as possible in the light of the wording and purpose of the framework decision in order to attain the result which it pursues and thus comply with Article 34(2)(b) EU.

The obligation on the national court to refer to the content of a framework decision when interpreting the relevant rules of its national law is, however, limited by general principles of law, particularly those of legal certainty and non-retroactivity. In particular, those principles prevent that obligation from leading to the criminal liability of persons who contravene the provisions of a framework decision from being determined or aggravated on the basis of such a decision alone, independently of an implementing law.

Similarly, the principle of conforming interpretation cannot serve as the basis for an interpretation of national law contra legem. That principle does, however, require that, where necessary, the national court consider the whole of national law in order to assess how far it can be applied in such a way as not to produce a result contrary to that envisaged by the framework decision.

(see paras 34, 43-45, 47, 61, operative part)

5. Articles 2, 3 and 8(4) of Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings set out a number of objectives, including ensuring that particularly vulnerable victims receive specific treatment best suited to their circumstances. Those provisions must be interpreted as allowing the competent national court to authorise young children, who claim to have been victims of maltreatment, to give their testimony in accordance with arrangements allowing those children to be guaranteed an appropriate level of protection, for

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example outside the trial and before it takes place. The arrangements for taking evidence used must not, however, be incompatible with the basic legal principles of the Member State concerned, as Article 8(4) of that framework decision provides. Nor may they deprive the accused person of the right to a fair trial under Article 6 of the European Convention on Human Rights.

(see paras 54, 57, 59, 61, operative part)

In Case C-105/03,

REFERENCE for a preliminary ruling under Article 35 EU by the judge in charge of preliminary enquiries at the Tribunale di Firenze (Italy), made by decision of 3 February 2003, received at the Court on 5 March 2003, in criminal proceedings against

Maria Pupino

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas, R. Silva de Lapuerta and A. Borg Barthet, Presidents of Chambers, N. Colneric, S. von Bahr, J.N. Cunha Rodrigues (Rapporteur), P. Kris, E. Juhasz, G. Arestis and M. Ilei, Judges

Advocate General: J. Kokott,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 26 October 2004,

after considering the observations submitted on behalf of:

- Mrs Pupino, represented by M. Guagliani and D. Tanzarella, avvocati,

- the Italian Government, represented by I.M. Braguglia, acting as Agent, assisted by P. Gentili, avvocato dello Stato,

- the Greek Government, represented by A. Samoni-Rantou and K. Boskovits, acting as Agents,

- the French Government, represented by R. Abraham, G. de Bergues and C. Isidoro, acting as Agents,

- the Netherlands Government, represented by H.G. Sevenster and C. Wissels, acting as Agents,

- the Portuguese Government, represented by L. Fernandes, acting as Agent,

- the Swedish Government, represented by A. Kruse and K. Wistrand, acting as Agents,

- the United Kingdom Government, represented by R. Caudwell and E. O'Neill, acting as Agents, assisted by M. Hoskins, Barrister,

- the Commission of the European Communities, represented by M. CondouDurande and L. Visaggio, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 11 November 2004,

gives the following

Judgment

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

Articles 2, 3 and 8(4) of Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings must be interpreted as meaning that the national court must be able to authorise young children, who, as in this case, claim to have been victims of maltreatment,

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to give their testimony in accordance with arrangements allowing those children to be guaranteed an appropriate level of protection, for example outside the trial and before it takes place.

The national court is required to take into consideration all the rules of national law and to interpret them, so far as possible, in the light of the wording and purpose of the Framework Decision.

1. The reference for a preliminary ruling concerns the interpretation of Articles 2, 3 and 8 of Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings (OJ 2001 L 82, p. 1; the Framework Decision').

2. The reference has been made in the context of criminal proceedings against Mrs Pupino, a nursery school teacher charged with inflicting injuries on pupils aged less than five years at the time of the facts.

Legal background

European Union Law

The Treaty on European Union

3. Under Article 34(2) EU, in the version resulting from the Treaty of Amsterdam, which forms part of Title VI of the Treaty on European Union, headed Provisions on police and judicial cooperation in criminal matters':

The Council shall take measures and promote cooperation, using the appropriate form and procedures as set out in this Title, contributing to the pursuit of the objectives of the Union. To that end, acting unanimously on the initiative of any Member State or of the Commission, the Council may:

...

b) adopt framework decisions for the purpose of approximation of the laws and regulations of the Member States. Framework decisions shall be binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods. They shall not entail direct effect;

...'

4. Article 35 EU provides:

1. The Court of Justice shall have jurisdiction, subject to the conditions laid down in this Article, to give preliminary rulings on the validity and interpretation of framework decisions, and decisions on the interpretation of conventions established under this Title and on the validity and interpretation of the measures implementing them.

2. By a declaration made at the time of signature of the Treaty of Amsterdam or at any time thereafter, any Member State shall be able to accept the jurisdiction of the Court of Justice to give preliminary rulings as specified in paragraph 1.

3. A Member State making a declaration pursuant to paragraph 2 shall specify that either:

a) any court or tribunal of that State against whose decisions there is no judicial remedy under national law may request the Court of Justice to give a preliminary ruling on a question raised in a case pending before it and concerning the validity or interpretation of an act referred to in paragraph 1 if that court or tribunal considers that a decision on the question is necessary to enable it to give judgment; or

b) any court or tribunal of that State may request the Court of Justice to give a preliminary

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ruling on a question raised in a case pending before it and concerning the validity or interpretation of an act referred to in paragraph 1 if that court or tribunal considers that a decision on the question is necessary to enable it to give judgment.

...'

5. The information published in the Official Journal of the European Communities of 1 May 1999 (OJ 1999 L 114, p. 56) on the date of entry into force of the Treaty of Amsterdam shows that the Italian Republic has made a declaration under Article 35(2) EU, whereby it has accepted the jurisdiction of the Court of Justice to rule in accordance with the arrangements under Article 35(3)(b) EU.

The Framework Decision

6. Under Article 2 of the Framework Decision, headed Respect and recognition':

1. Each Member State shall ensure that victims have a real and appropriate role in its criminal legal system. It shall continue to make every effort to ensure that victims are treated with due respect for the dignity of the individual during proceedings and shall recognise the rights and legitimate interests of victims with particular reference to criminal proceedings.

2. Each Member State shall ensure that victims who are particularly vulnerable can benefit from specific treatment best suited to their circumstances.'

7. Article 3 of the Framework Decision, headed Hearings and provision of evidence' provides:

Each Member State shall safeguard the possibility for victims to be heard during proceedings and to supply evidence.

Each Member State shall take appropriate measures to ensure that its authorities question victims only insofar as necessary for the purpose of criminal proceedings.'

8. Article 8 of the Framework Decision, headed Right to protection', provides in paragraph 4:

Each Member State shall ensure that, where there is a need to protect victims - particularly those most vulnerable - from the effects of giving evidence in open court, victims may, by decision taken by the court, be entitled to testify in a manner which will enable this objective to be achieved, by any appropriate means compatible with its basic legal principles.'

9. Under Article 17 of the Framework Decision, each Member State is required to bring into force the laws, regulations and administrative provisions necessary to comply with the Framework Decision not later than 22 March 2002'.

National legislation

10. Article 392 of the Codice di procedura penale (Italian Code of Criminal Procedure; the CPP'), which appears in Book V, Part II, Title VII, headed Preliminary enquiries and preliminary hearing', provides:

1. During the preliminary enquiry, the Public Prosecutor's Office and the person being examined may ask the judge to take evidence under special arrangements:

a) where there are reasonable grounds for believing that the witness cannot be heard in open court by reason of illness or serious impediment;

b) where, on the basis of specific facts, there are reasonable grounds for believing that the witness is vulnerable to violence, threats, offers or promises of money or other benefits, to induce him or her not to testify or to give false testimony.

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...

1a. In proceedings for offences under Articles 600a, 600b, 600d, 609a, 609c, 609d, and 609g of the criminal code [concerning sexual offences or offences with a sexual background], the Public Prosecutor's Office and the person being examined may ask for persons aged under 16 years to be heard in accordance with special arrangements even outside the cases referred to in paragraph 1.

...'

11. Under Article 398(5a) of the CPP:

In enquiries concerning offences under Articles 600a, 600b, 600d, 609a, 609c, 609d, and 609g of the criminal code, where the evidence involves minors under 16, the judge shall determine by order the place, time and particular circumstances for hearing evidence where a minor's situation makes it appropriate and necessary. In such cases, the hearing can be held in a place other than the court, in special facilities or, failing that, at the minor's home. The witness statements must be fully documented by the use of sound and audiovisual recording equipment. Where recording equipment or technical personnel are not available, the judge shall use the expert report or technical advice procedures. The interview shall also be minuted. The recordings shall be transcribed only at the request of the parties.'

Factual background and the question referred

12. The order for reference shows that, in the criminal proceedings against Mrs Pupino, it is alleged that, in January and February 2001, she committed several offences of misuse of disciplinary measures' within the meaning of Article 571 of the Italian Criminal Code (the CP') against a number of her pupils aged less than five years at the time, by such acts as regularly striking them, threatening to give them tranquillisers and to put sticking plasters over their mouths, and forbidding them from going to the toilet. She is further charged that, in February 2001, she inflicted serious injuries', as referred to in Articles 582, 585 and 576 of the CP, in conjunction with Article 61(2) and (11) thereof, by hitting a pupil in such a way as to cause a slight swelling of the forehead. The proceedings before the Tribunale di Firenze are at the preliminary enquiry stage.

13. The referring court states in that respect that, under Italian law, criminal procedure comprises two distinct stages. During the first stage, namely that of the preliminary enquiry, the Public Prosecutor's Office makes enquiries and, under the supervision of the judge in charge of preliminary enquiries, gathers the evidence on the basis of which it will assess whether the prosecution should be abandoned or the matter should proceed to trial. The final decision on whether to allow the prosecution to proceed or to dismiss the matter is taken by the judge in charge of preliminary enquiries at the conclusion of an informal hearing.

14. A decision to send the examined person for trial opens the second stage of the proceedings, namely the adversarial stage, in which the judge in charge of preliminary enquiries does not take part. The proceedings proper begin with this stage. It is only at that stage that, as a rule, evidence must be taken at the initiative of the parties and in compliance with the adversarial principle. The referring court states that it is during the trial that the parties' submissions may be accepted as evidence within the technical sense of the term. In those circumstances, the evidence gathered by the Public Prosecutor's Office during the preliminary enquiry stage, in order to enable the Office to decide whether to institute criminal proceedings by proposing committal for trial or to ask for the matter to be closed, must be subjected to cross-examination during the trial proper in order to acquire the value of evidence' in the full sense.

15. The national court states, however, that there are exceptions to that rule, laid down by Article 392 of the CPP, which allow evidence to be established early, during the preliminary enquiry period,

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on a decision of the judge in charge of preliminary enquiries and in compliance with the adversarial principle, by means of the Special Inquiry procedure. Evidence gathered in that way has the same probative value as that gathered during the second stage of the proceedings. Article 392(1a) of the CPP has introduced the possibility of using that special procedure when taking evidence from victims of certain restrictively listed offences (sexual offences or offences with a sexual background) aged less than 16 years, even outside the cases envisaged in paragraph 1 of that article. Article 398(5a) of the CPP also allows the same judge to order evidence to be taken, in the case of enquiries concerning offences referred to in Article 392(1a) of the CPP, under special arrangements allowing the protection of the minors concerned. According to the national court, those additional derogations are designed to protect, first, the dignity, modesty and character of a minor witness, and, secondly, the authenticity of the evidence.

16. In this case, the Public Prosecutor's Office asked the judge in charge of preliminary enquiries in August 2001 to take the testimony of eight children, witnesses and victims of the offences for which Mrs Pupino is being examined, by the special procedure for taking evidence early, pursuant to Article 392(1a) of the CPP, on the ground that such evidence could not be deferred until the trial on account of the witnesses' extreme youth, inevitable alterations in their psychological state, and a possible process of repression. The Public Prosecutor's Office also requested that evidence be gathered under the special arrangements referred to in Article 398(5a) of the CPP, whereby the hearing should take place in specially designed facilities, with arrangements to protect the dignity, privacy and tranquillity of the minors concerned, possibly involving an expert in child psychology by reason of the delicate and serious nature of the facts and the difficulties caused by the victims' young age. Mrs Pupino opposed that application, arguing that it did not fall within any of the cases envisaged by Article 392(1) and (1a) of the CPP.

17. The referring court states that, under the national provisions in question, the application of the Public Prosecutor's Office would have to be dismissed. Those provisions do not provide for the use of the Special Inquiry procedure, or for the use of special arrangements for gathering evidence, where the facts are such as those alleged against the defendant, even if there is no reason to preclude those provisions also covering cases other than those referred to in Article 392(1) of the CPP in which the victim is a minor. A number of offences excluded from the scope of Article 392(1) of the CPP might well prove more serious for the victim than those referred to in that provision. That, in the view of the national court, is the case here, where, according to the Public Prosecutor's Office, Mrs Pupino maltreated several children aged less than five years, causing them psychological trauma.

18. Considering that, apart from the question of the existence or otherwise of a direct effect of Community law', the national court must interpret its national law in the light of the letter and the spirit of Community provisions', and having doubts as to the compatibility of Articles 392(1a) and 398(5a) of the CPP with Articles 2, 3 and 8 of the Framework Decision, inasmuch as the provisions of that code limit the ability of the judge in charge of pre liminary enquiries to apply the Special Inquiry procedure for the early gathering of evidence, and the special arrangements for its gathering, to sexual offences or offences with a sexual background, the judge in charge of preliminary enquires at the Tribunale di Firenze has decided to stay the proceedings and ask the Court of Justice to rule on the scope of Articles 2, 3 and 8 of the Framework Decision.

Jurisdiction of the Court of Justice

19. Under Article 46(b) EU, the provisions of the EC, EAEC and ECSC Treaties concerning the powers of the Court of Justice and the exercise of those powers, including the provisions of Article 234 EC, apply to the provisions of Title VI of the Treaty on European Union under the conditions laid down by Article 35 EU. It follows that the system under Article 234 EC is capable of being

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applied to the Court's jurisdiction to give preliminary rulings by virtue of Article 35 EU, subject to the conditions laid down by that provision.

20. As stated in paragraph 5 of this judgment, the Italian Republic indicated by a declaration which took effect on 1 May 1999, the date on which the Treaty of Amsterdam came into force, that it accepted the jurisdiction of the Court of Justice to rule on the validity and interpretation of the acts referred to in Article 35 EU in accordance with the rules laid down in paragraph 3(b) of that article.

21. Concerning the acts referred to in Article 35(1) EU, Article 35(3)(b) provides, in terms identical to those of the first and second paragraphs of Article 234 EC, that any court or tribunal' of a Member State may request the Court of Justice to give a preliminary ruling' on a question raised in a case pending before it and concerning the validity or interpretation' of such acts, if it considers that a decision on the question is necessary to enable it to give judgment'.

22. It is undisputed, first, that the judge in charge of preliminary enquiries in criminal proceedings, such as those instituted in this case, acts in a judicial capacity, so that he must be regarded as a court or tribunal of a Member State' within the meaning of Article 35 EU (see to that effect, in relation to Article 234 EC, Joined Cases C54/94 and C-74/94 Cacchiarelli and Stanghellini [1995] ECR I-391, and Joined Cases C-74/95 and C-129/95 X [1996] ECR I-6609) and, secondly, that the Framework Decision, based on Articles 31 EU and 34 EU, is one of the acts referred to in Article 35(1) EU, in respect of which the Court may give a preliminary ruling.

23. Whilst in principle, therefore, the Court of Justice has jurisdiction to reply to the question raised, the French and Italian Governments have nevertheless raised an objection of inadmissibility against the application that has been made, arguing that the Court's answer would not be useful in resolving the dispute in the main proceedings.

24. The French Government argues that the national court is seeking to apply certain provisions of the Framework Decision in place of national legislation, whereas, in accordance with the very wording of Article 34(2)(b) EU, Framework Decisions cannot have such a direct effect. It further points out that, as the national court itself acknowledges, an interpretation of national law in accordance with the Framework Decision is impossible. In accordance with the case-law of the Court of Justice, the principle that national law must be given a conforming interpretation cannot lead to an interpretation that is contra legem , or to a worsening of the position of an individual in criminal proceedings, on the basis of the Framework Decision alone, which is precisely what would happen in the main proceedings.

25. The Italian Government argues as its main argument that framework decisions and Community directives are completely different and separate sources of law, and that a framework decision cannot therefore place a national court under an obligation to interpret national law in conformity, such as the obligation which the Court of Justice has found in its case-law concerning Community directives.

26. Without expressly querying the admissibility of the reference, the Swedish and United Kingdom Governments generally argue in the same way as the Italian Government, insisting in particular on the inter-governmental nature of cooperation between Member States in the context of Title VI of the Treaty on European Union.

27. Finally, the Netherlands Government stresses the limits imposed on the obligation of conforming interpretation and poses the question whether, assuming that obligation applies to framework decisions, it can apply in the case in the main proceedings, have regard precisely to those limits.

28. As stated in paragraph 19 of this judgment, the system under Article 234 EC is capable of being applied to Article 35 EU, subject to the conditions laid down in Article 35.

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29. Like Article 234 EC, Article 35 EU makes reference to the Court of Justice for a preliminary ruling subject to the condition that the national court considers that a decision on the question is necessary in order to enable it to give judgment', so that the case-law of the Court of Justice on the admissibility of references under Article 234 EC is, in principle, transposable to references for a preliminary ruling submitted to the Court of Justice under Article 35 EU.

30. It follows that the presumption of relevance attaching to questions referred by national courts for a preliminary ruling may be rebutted only in exceptional cases, where it is quite obvious that the interpretation of Community law sought bears no relation to the actual facts of the main action or to its purpose, or where the problem is hypothetical and the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted. Save for such cases, the Court is, in principle, required to give a ruling on questions concerning the interpretation of the acts referred to in Article 35(1) EU (see for example, in relation to Article 234 CE, Case C-355/97 Beck and Bergdorf [1999] ECR I-4977, paragraph 22, and Case C-17/03 VEMW and Others [2005] ECR I0000, paragraph 34).

31. Having regard to the arguments of the French, Italian, Swedish, Netherlands and United Kingdom Governments, it has to be examined whether, as the national court presupposes and as the French, Greek and Portuguese Governments and the Commission maintain, the obligation on the national authorities to interpret their national law as far as possible in the light of the wording and purpose of Community directives applies with the same effects and within the same limits where the act concerned is a framework decision taken on the basis of Title VI of the Treaty on European Union.

32. If so, it has to be determined whether, as the French, Italian, Swedish and United Kingdom Governments have observed, it is obvious that a reply to the question referred cannot have a concrete impact on the solution of the dispute in the main proceedings, given the inherent limits on the obligation of conforming interpretation.

33. It should be noted at the outset that the wording of Article 34(2)(b) EU is very closely inspired by that of the third paragraph of Article 249 EC. Article 34(2)(b) EU confers a binding character on framework decisions in the sense that they bind' the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods'.

34. The binding character of framework decisions, formulated in terms identical to those of the third paragraph of Article 249 EC, places on national authorities, and particularly national courts, an obligation to interpret national law in conformity.

35. The fact that, by virtue of Article 35 EU, the jurisdiction of the Court of Justice is less extensive under Title VI of the Treaty on European Union than it is under the EC Treaty, and the fact that there is no complete system of actions and procedures designed to ensure the legality of the acts of the institutions in the context of Title VI, does nothing to invalidate that conclusion.

36. Irrespective of the degree of integration envisaged by the Treaty of Amsterdam in the process of creating an ever closer union among the peoples of Europe within the meaning of the second paragraph of Article 1 EU, it is perfectly comprehensible that the authors of the Treaty on European Union should have considered it useful to make provision, in the context of Title VI of that treaty, for recourse to legal instruments with effects similar to those provided for by the EC Treaty, in order to contribute effectively to the pursuit of the Union's objectives.

37. The importance of the Court's jurisdiction to give preliminary rulings under Article 35 EU is confirmed by the fact that, under Article 35(4), any Member State, whether or not it has made a declaration pursuant to Article 35(2), is entitled to submit statements of case or written observations to the Court in cases which arise under Article 35(1).

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38. That jurisdiction would be deprived of most of its useful effect if individuals were not entitled to invoke framework decisions in order to obtain a conforming interpretation of national law before the courts of the Member States.

39. In support of their position, the Italian and United Kingdom Governments argue that, unlike the EC Treaty, the Treaty on European Union contains no obligation similar to that laid down in Article 10 EC, on which the case-law of the Court of Justice partially relied in order to justify the obligation to interpret national law in conformity with Community law.

40. That argument must be rejected.

41. The second and third paragraphs of Article 1 of the Treaty on European Union provide that that treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe and that the task of the Union, which is founded on the European Communities, supplemented by the policies and forms of cooperation established by that treaty, shall be to organise, in a manner demonstrating consistency and solidarity, relations between the Member States and between their peoples.

42. It would be difficult for the Union to carry out its task effectively if the principle of loyal cooperation, requiring in particular that Member States take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under European Union law, were not also binding in the area of police and judicial cooperation in criminal matters, which is moreover entirely based on cooperation between the Member States and the institutions, as the Advocate General has rightly pointed out in paragraph 26 of her Opinion.

43. In the light of all the above considerations, the Court concludes that the principle of conforming interpretation is binding in relation to framework decisions adopted in the context of Title VI of the Treaty on European Union. When applying national law, the national court that is called upon to interpret it must do so as far as possible in the light of the wording and purpose of the framework decision in order to attain the result which it pursues and thus comply with Article 34(2)(b) EU.

44. It should be noted, however, that the obligation on the national court to refer to the content of a framework decision when interpreting the relevant rules of its national law is limited by general principles of law, particularly those of legal certainty and non-retroactivity.

45. In particular, those principles prevent that obligation from leading to the criminal liability of persons who contravene the provisions of a framework decision from being determined or aggravated on the basis of such a decision alone, independently of an implementing law (see for example, in relation to Community directives, Joined Cases C-74/95 and C-129/95 X [1996] ECR I-6609, paragraph 24, and Joined Cases C-387/02, C-391/02 and C-403/02 Berlusconi and Others [2005] ECR I-0000, paragraph 74).

46. However, the provisions which form the subject-matter of this reference for a preliminary ruling do not concern the extent of the criminal liability of the person concerned but the conduct of the proceedings and the means of taking evidence.

47. The obligation on the national court to refer to the content of a framework decision when interpreting the relevant rules of its national law ceases when the latter cannot receive an application which would lead to a result compatible with that envisaged by that framework decision. In other words, the principle of conforming interpretation cannot serve as the basis for an interpretation of national law contra legem. That principle does, however, require that, where necessary, the national court consider the whole of national law in order to assess how far it can be applied in such a way as not to produce a result contrary to that envisaged by the framework decision.

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48. In this case, as the Advocate General has pointed out in paragraph 40 of her Opinion, it is not obvious that an interpretation of national law in conformity with the framework decision is impossible. It is for the national court to determine whether, in this case, a conforming interpretation of national law is possible.

49. Subject to that reservation, the Court will answer the question referred.

The question referred for a preliminary ruling

50. By its question, the national court essentially asks whether, on a proper interpretation of Articles 2, 3 and 8(4) of the Framework Decision, a national court must be able to authorise young children, who, as in this case, claim to have been victims of maltreatment, to give their testimony in accordance with arrangements ensuring them an appropriate level of protection, outside the public trial and before it is held.

51. Article 3 of the Framework Decision requires each Member State to safeguard the possibility for victims to be heard during proceedings and to supply evidence, and to take appropriate measures to ensure that its authorities question victims only insofar as necessary for the purpose of criminal proceedings.

52. Articles 2 and 8(4) of the Framework Decision require each Member State to make every effort to ensure that victims are treated with due respect for their personal dignity during proceedings, to ensure that particularly vulnerable victims benefit from specific treatment best suited to their circumstances, and to ensure that where there is a need to protect victims, particularly those most vulnerable, from the effects of giving evidence in open court, victims may, by decision taken by the court, be entitled to testify in a manner enabling that objective to be achieved, by any appropriate means compatible with its basic legal principles.

53. The Framework Decision does not define the concept of a victim's vulnerability for the purposes of Articles 2(2) and 8(4). However, independently of whether a victim's minority is as a general rule sufficient to classify such a victim as particularly vulnerable within the meaning of the Framework Decision, it cannot be denied that where, as in this case, young children claim to have been maltreated, and maltreated, moreover, by a teacher, those children are suitable for such classification having regard in particular to their age and to the nature and consequences of the offences of which they consider themselves to have been victims, with a view to benefiting from the specific protection required by the provisions of the Framework Decision referred to above.

54. None of the three provisions of the Framework Decision referred to by the national court lays down detailed rules for implementing the objectives which they state, and which consist, in particular, in ensuring that particularly vulnerable victims receive specific treatment best suited to their circumstances', and the benefit of special hearing arrangements that are capable of guaranteeing to all victims treatment which pays due respect to their individual dignity and gives them the opportunity to be heard and to supply evidence, and in ensuring that those victims are questioned only insofar as necessary for the purpose of criminal proceedings'.

55. Under the legislation at issue in the main proceedings, testimony given during the preliminary enquiries must generally be repeated at the trial in order to acquire full evidential value. It is, however, permissible in certain cases to give that testimony only once, during the preliminary enquiries, with the same probative value, but under different arrangements from those which apply at the trial.

56. In those circumstances, achievement of the aims pursued by the abovementioned provisions of the framework decision require that a national court should be able, in respect of particularly vulnerable victims, to use a special procedure, such as the Special Inquiry for early gathering

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of evidence provided for in the law of a Member State, and the special arrangements for hearing testimony for which provision is also made, if that procedure best corresponds to the situation of those victims and is necessary in order to prevent the loss of evidence, to reduce the repetition of questioning to a minimum, and to prevent the damaging consequences, for those victims, of their giving testimony at the trial

57. It should be noted in that respect that, according to Article 8(4) of the Framework Decision, the conditions for giving testimony that are adopted must in any event be compatible with the basic legal principles of the Member State concerned.

58. Moreover, in accordance with Article 6(2) EU, the Union must respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 (the Convention'), and as they result from the constitutional traditions common to the Member States, as general principles of law.

59. The Framework Decision must thus be interpreted in such a way that fundamental rights, including in particular the right to a fair trial as set out in Article 6 of the Convention and interpreted by the European Court of Human Rights, are respected.

60. It is for the national court to ensure that - assuming use of the Special Inquiry and of the special arrangements for the hearing of testimony under Italian law is possible in this case, bearing in mind the obligation to give national law a conforming interpretation - the application of those measures is not likely to make the criminal proceedings against Mrs Pupino, considered as a whole, unfair within the meaning of Article 6 of the Convention, as interpreted by the European Court of Human Rights (see, for example, ECHR judgments of 20 December 2001, P.S. v Germany , of 2 July 2002, S.N. v Sweden , Reports of judgments and decisions 2002-V, of 13 February 2004, Rachdad v France , and the decision of 20 January 2005, Accardi and Others v Italy , App. 30598/02).

61. In the light of all the above considerations, the answer to the question must be that Articles 2, 3 and 8(4) of the Framework Decision must be interpreted as meaning that the national court must be able to authorise young children, who, as in this case, claim to have been victims of maltreatment, to give their testimony in accordance with arrangements allowing those children to be guaranteed an appropriate level of protection, for example outside the trial and before it takes place. The national court is required to take into consideration all the rules of national law and to interpret them, so far as possible, in the light of the wording and purpose of the Framework Decision.

Costs

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

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PROCEDU Reference for a preliminary ruling

ADVGEN Kokott

JUDGRAP Cunha Rodrigues

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Opinion of Advocate General Kokott delivered on 11 November 2004. Criminal proceedings against Maria Pupino. Reference for a preliminary ruling: Tribunale di Firenze - Italy. Police and judicial cooperation in criminal matters - Articles 34 EU and 35 EU - Framework Decision 2001/220/JHA - Standing of victims in criminal proceedings - Protection of vulnerable persons - Hearing of minors as witnesses - Effects of a framework decision. Case C-105/03.

I - Introduction

1. In these proceedings the Court is called upon for the first time to interpret a framework decision adopted on the basis of Articles 31 and 34(2)(b) EU, namely, Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings (hereinafter the Framework Decision'). (2) The Tribunale di Firenze wishes to know whether, under that framework decision, in criminal proceedings concerning physical injury caused to five-year-old children, those children must be examined as witnesses outside the trial by recording their evidence beforehand, even though the Italian law of criminal procedure does not provide for such a procedure in relation to the offences in question.

II - Legal framework

A - Union law

2. For the purpose of interpreting the Framework Decision, the Treaty on European Union, in the version resulting from the Treaty of Amsterdam, is authoritative, since the Framework Decision was adopted before the Treaty of Nice came into force. The legislative effect of framework decisions results from Article 34(2)(b) EU:

... Framework decisions shall be binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods. They shall not entail direct effect.'

3. The application of the preliminary ruling procedure to acts referred to in Title VI of the Treaty on European Union results from Article 35 EU. On that basis, Italy has made a declaration which entitles all Italian courts to request preliminary rulings.

4. The framework decision contains various provisions which may be relevant with regard to the standing of children as victims and witnesses in criminal proceedings.

5. Article 2 relates to respect for and recognition of victims in general:

(1) Each Member State shall ensure that victims have a real and appropriate role in its criminal legal system. It shall continue to make every effort to ensure that victims are treated with due respect for the dignity of the individual during proceedings and shall recognise the rights and legitimate interests of victims with particular reference to criminal proceedings.

(2) Each Member State shall ensure that victims who are particularly vulnerable can benefit from specific treatment best suited to their circumstances.'

6. Article 3 deals with victims as witnesses:

Each Member State shall safeguard the possibility for victims to be heard during proceedings and to supply evidence.

Each Member State shall take appropriate measures to ensure that its authorities question victims only insofar as necessary for the purpose of criminal proceedings.'

7. Member States are to develop special procedures for giving evidence in accordance with Article 8(4):

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Each Member State shall ensure that, where there is a need to protect victims - particularly those most vulnerable - from the effects of giving evidence in open court, victims may, by decision taken by the court, be entitled to testify in a manner which will enable this objective to be achieved, by any appropriate means compatible with its basic legal principles.'

B - Italian law

8. According to the referring court, in the Italian law of criminal procedure the trial is intended to be the cornerstone of the procedure. In principle, therefore, evidence must be taken at the initiative of the parties in an adversarial procedure conducted between them at the trial under the direct supervision of the judge. However, a special inquiry procedure for recording evidence beforehand has also been introduced, enabling evidence to be taken at an early stage where, by its nature, it cannot be deferred until the trial. Use of that special inquiry procedure may be requested by either the prosecution or the defence. The decision on the request is taken by the investigating judge who, if he grants the request, then immediately orders the evidence to be taken in an adversarial procedure involving the parties. Evidence taken beforehand by that special procedure has the same full evidential value as that taken at the trial.

9. The legislature has listed specifically and exhaustively the situations in which use of that procedural instrument is admissible, either by indicating the types of evidence which may be recorded beforehand or by indicating the specific features of factual situations which justify recourse to the early taking of evidence.

10. Article 392(1) of the Codice di procedura penale (Code of Criminal Procedure; hereinafter the CPP') provides inter alia that a witness statement may be recorded beforehand where there is good reason to believe that it will not be possible to examine the witness at the trial because of illness or some other serious impediment or where, on the basis of clear and specific indications, there is good reason to believe that the witness is vulnerable to violence, threats, offers or promises of money or other benefits, intended to induce him not to testify or to give false testimony. Under subsequent amendments of the law, even if none of the aforementioned reasons applies, a court may order the special procedure of recording evidence beforehand in relation to the examination of a witness who is under 16 years of age where the case involves sexual offences or offences with a sexual background.

11. Under Article 398(5a) of the CPP, the court may opt for special forms of procedure for taking and recording evidence where the case involves sexual offences or offences with a sexual background and the witness statement of a person under 16 has to be given using the special procedure of recording it beforehand, if the minor's situation makes that necessary or shows it to be advisable. Those special forms of procedure consist of the possibility of holding the hearing in a place other than the court, in particular in special facilities or even at the minor's place of residence. The witness statements must also be fully documented by the use of sound or audiovisual reproduction equipment.

III - Facts and reference for a preliminary ruling

12. The referring court has pending before it criminal proceedings against a nursery school teacher, Ms Pupino, who is charged with having, in January and February 2001, misused disciplinary measures against and injured children entrusted into her care.

13. In August 2001, the Public Prosecutor's Office applied to examine, by the special procedure of recording their evidence beforehand, eight children born in 1996 who are witnesses to and victims of the offences at issue in the criminal proceedings. It argued that, because of the tender age of the witnesses and the resulting inevitable alteration of their psychological state and because of a possible process of psychological repression', that evidence could not be repeated at the trial. It also requested that the evidence be taken under protected conditions, that is, in a special

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facility under conditions which would safeguard the children's dignity, need for privacy and peace of mind, if necessary bringing in an expert in child psychology because of the sensitivity called for by the events in question and their significance and because of the difficulty of relating to the persons to be questioned because of their tender age.

14. The defence opposed that application since there was no provision for taking evidence in that way in the case of the offences in question.

15. The referring court takes the view that the application by the Public Prosecutor's Office should be rejected, pursuant to the abovementioned provisions of Italian law of criminal procedure, since the recording of evidence beforehand, as an instrument for taking evidence at an earlier stage than the trial, is a procedural mechanism which is absolutely exceptional in character and cannot be used in situations other than those specified by law.

16. The court is nevertheless of the opinion that the restriction by Italian law of the use of the special procedure for recording evidence beforehand infringes Articles 2, 3 und 8 of the Framework Decision. Minors are always victims who are particularly vulnerable' within the meaning of Article 2(2) of the Framework Decision. Special arrangements for the examination of witnesses should therefore always apply, regardless of the offence in question, in order to protect them. The referring court infers from Article 3 of the Framework Decision that repetitions of examinations of victims are, as a general rule, to be avoided because of the psychological stress involved. In view of the particular vulnerability of juvenile victims, it is therefore necessary to derogate from the basic rule that only statements made at the trial have evidential value. The referring court infers from Article 8(4) of the Framework Decision the principle that a court must always have the power to dispense with the hearing in open court if it may have adverse effects on victims as witnesses.

17. Since the referring court wishes to ascertain whether it is possible to interpret Italian law in the light of the Framework Decision, it asks the Court of Justice to rule on whether its proposed interpretation of Article 2(3) and Article 8(4) of the Framework Decision is correct.

IV - Legal assessment

A - The right to make references for a preliminary ruling

18. As all the parties acknowledge, the referring court is in principle entitled to submit questions concerning framework decisions to the Court of Justice since Italy has exercised the option provided for in Article 35(3)(b) EU of conferring such jurisdiction on all its national courts and tribunals.

B - Admissibility of the request for a preliminary ruling

19. The French and Italian Governments and probably also, by implication, the Swedish Government challenge the admissibility of the request for a preliminary ruling on the ground that an answer given by the Court can have no bearing on the main proceedings. In the Commission's view, the Framework Decision does however require national law to be interpreted in conformity with it, so that an interpretation of the Framework Decision by the Court would have to be taken into account in the main proceedings.

1. Conditions for admissibility

20. It is settled case-law that it is solely for the national court before which the case has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted by the national court concern the interpretation of Community law, the Court of Justice is, in principle, bound to give a ruling. (3) Nevertheless, the Court has also stated that, in exceptional circumstances, it should examine the conditions

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in which the case was referred to it by the national court, in order to assess whether it has jurisdiction. According to that caselaw, references for a preliminary ruling which are inadmissible include those which manifestly bear no relation to the actual facts of the main action or its purpose. (4) Although that case-law was developed in connection with Article 234 EC, there is no apparent reason why it should not be applied to references for a preliminary ruling under Article 35 EU.

21. The objections to the admissibility of the request for a preliminary ruling are based in essence on the view that the Court's reply can have no bearing on the main proceedings. In the present case, however, the request for a preliminary ruling may in any event have a bearing on the main proceedings if Articles 2, 3 and 8 of the Framework Decision are in principle relevant to the interpretation of the Italian provisions in question. (5) The request for a preliminary ruling is therefore admissible if national law must be interpreted in conformity with the Framework Decision or even may be so interpreted (in that regard, see section 2 below) and an interpretation of the relevant provisions of Italian law of criminal procedure in conformity with the Framework Decision is not precluded from the outset (in that regard, see section 3 below).

2. Interpretation in conformity with framework decisions

22. In the view of the Greek and Portuguese Governments and the Commission, framework decisions likewise require national law to be interpreted in conformity with them. The Swedish Government, on the other hand, objects that Title VI of the Treaty on European Union establishes only intergovernmental cooperation. Acts adopted under Article 34 EU are therefore purely international law and cannot create an obligation under Union law for national courts to interpret their laws in conformity with framework decisions. The Italian and United Kingdom Governments expressed similar misgivings at the hearing.

23. The basis of the principle that national law must be interpreted in conformity with Community law derives from settled caselaw and may be summarised as follows: the third paragraph of Article 249 and Article 10 EC and each individual directive oblige the Member States, that is, all their authorities, including the courts and tribunals, to achieve the result envisaged in that directive by taking all appropriate measures, whether general or particular, to fulfil that obligation. It follows that, when applying national law, whether adopted before or after the directive, the national court which has to interpret that law must do so, as far as possible, in the light of the wording and purpose of the directive so as to achieve the result it has in view and thereby comply with it. (6)

24. All those requirements are also amply fulfilled with respect to the Framework Decision. Although there is no identicallyworded equivalent to Article 10 EC in Union law, the Member States nevertheless have a duty of loyalty to the Union. Article 34(2)(b) EU is equivalent - so far as is relevant here - to the third paragraph of Article 249 EC and therefore obligations for the Member States also arise from the Framework Decision itself, including the duty to interpret their national laws in conformity with it.

I shall now examine those aspects in detail.

a) Loyalty to the Union

25. The Italian and United Kingdom Governments point out that there is no provision equivalent to Article 10 EC in Union law. As in Co mmunity law, however, Member States and institutions are also bound by a duty of mutual loyalty in Union law.

26. That is apparent from an overview of the provisions of the Treaty on European Union. Article 1 EU lays down the objective of creating a new stage in the process of achieving an ever closer union among the peoples of Europe, on the basis of which relations between the Member States and

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between their peoples can be organised in a manner demonstrating consistency and solidarity. That objective will not be achieved unless the Member States and institutions of the Union cooperate sincerely and in compliance with the law. Loyal cooperation between the Member States and the institutions is also the central purpose of Title VI of the Treaty on European Union, appearing both in the title - Provisions on Police and Judicial Cooperation in Criminal Matters - and again in almost all the articles.

27. Against that background, Article 10 EC lays down some axiomatic principles, namely, that obligations must be fulfilled and damaging measures refrained from. The same applies in Union law, without needing to be expressly mentioned.

b) Article 34(2)(b) EU

28. Framework decisions in Union law are also largely identical in their structure to directives in Community law. Under Article 34(2)(b) EU, they are binding upon the Member States as to the result to be achieved but leave the choice of form and methods to the national authorities. Although direct effect is expressly excluded, at least the wording concerning their binding character as to the result to be achieved corresponds to that of the third paragraph of Article 249 EC, on the basis of which - together with other reasons - the Court has developed the doctrine of the application of national law in conformity with Community directives.

29. However, the Swedish Government's objection is effectively that, despite that similar wording, Article 34(2)(b) EU does not have legal effects comparable to those of the third paragraph of Article 249 EC. In that respect it is true that the Court has held, in connection with the European Economic Area in particular, that the fact that the provisions of an agreement and the corresponding Community provisions are identically worded does not mean that they must necessarily be interpreted identically. An international treaty is to be interpreted - and this also in the light of the Vienna Convention on the Law of Treaties of 23 May 1969 - not only on the basis of its wording, but also in the light of its objectives. (7)

30. In the same way as the EC Treaty (8) or the Agreement on the European Economic Area, the Treaty on European Union is a treaty with its origin in international law. It is distinguished from the EC Treaty by its lesser degree of integration and from the EEA Agreement primarily by its objectives.

31. The lesser degree of integration under the Treaty on European Union is apparent in the definition of a framework decision, which excludes direct effect. The powers of the Court of Justice under Article 35 EU are reduced in comparison with Community law. Its substantive power of review is expressly excluded in paragraph 5, so far as concerns 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. The preliminary ruling procedure is available only if the Member State concerned has expressly opted in' and the Commission cannot bring Treaty infringement proceedings. In addition, Council decisions do not necessarily require a proposal from the Commission, but may also be taken on the initiative of any Member State. Under Article 34(2) EU, the Council does not decide by a majority, but in principle unanimously. Finally, under Article 39 EU, the Parliament's involvement takes the form only of consultation.

32. Unlike the EEA Agreement, which is concerned only with the application of rules on free trade and competition in economic and commercial relations between the Contracting Parties, (9) but provides for no transfer of sovereign rights to the inter-governmental institutions which it sets up, (10) the Treaty on European Union, as stated in the second paragraph of Article 1, marks a new stage in the process of creating an ever closer union among the peoples of Europe. To that end it supplements

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the activities of the Community with new policies and forms of cooperation. The term policies indicates that, contrary to the view of the Swedish Government, the Treaty on European Union includes not only intergovernmental cooperation, but also joint exercise of sovereignty by the Union. Moreover, the first paragraph of Article 3 EU obliges the Union to respect and build upon the acquis communautaire. (11)

33. The increasing degree of integration expressed in the phrase ever closer cooperation' is also shown by the development of the Treaty on European Union which, after its creation by the Treaty of Maastricht, was brought ever more closely into line with the structures of Community law by the Treaties of Amsterdam and Nice and is to be merged fully with Community law by the Constitutional Treaty.

34. Consequently, according to its definition, a framework decision has been approximated closely to a directive and Article 34(2)(b) EU must be interpreted in the same way as the third paragraph of Article 249 EC since those provisions are identical in substance.

35. At the hearing, the United Kingdom objected, with regard to acts adopted under Article 34 EU, that, in contrast to Community law, (12) there is no complete system of legal remedies and procedures designed to ensure that the legality of acts of the institutions is subject to judicial review. Such acts can only be reviewed by way of a request for a preliminary ruling if the Member State concerned has accepted the jurisdiction of the Court of Justice to give preliminary rulings, as specified in Article 35 EU. Nor is it possible for individuals to bring direct actions. The Italian Government held a similar view. In rebuttal of that view, it must be said that interpretation in conformity does not lead to the introduction of new rules, but presupposes that rules already exist which - within the limits of what is permissible under national law - are amenable to an interpretation in accordance with the framework decision. Thus it would be in relation to the provisions of national law amenable to a conforming interpretation that legal remedies would have to be sought.

c) Intermediate conclusion

36. In summary, it follows from Article 34(2)(b) EU and from the principle of loyalty to the Union that every framework decision obliges national courts to bring their interpretation of national laws as far as possible into conformity with the wording and purpose of the framework decision, regardless of whether those laws were adopted before or after the framework decision, so as to achieve the result envisaged by the framework decision.

37. Even if it were necessary to concur with the Swedish Government in its view concerning the classification of the Framework Decision as international law, interpreting national law in conformity with the Framework Decision would still seem at least to be the natural solution. Even as an act of international law, the Framework Decision would be binding on the Member States. Consequently - as the United Kingdom argued at the hearing - even if the Framework Decision were deemed to be purely international law, it would have to be assumed that all the authorities of the Member States, including the courts and tribunals, would bring their conduct into compliance, as far as possible, with that obligation. At the same time, however, the United Kingdom Government pointed out that that form of interpretation in conformity cannot lay claim to the same primacy as Community law and may therefore - pursuant to national law - have to give way to other forms of interpretation. However, that would not preclude an answer given by the Court from being of help in the interpretation of national implementing legislation.

3. Possibility of an interpretation in conformity with the Framework Decision in the main proceedings

38. Even if there is a duty to interpret national law in conformity with the Framework Decision, the admissibility of the request for a preliminary ruling nevertheless presupposes that that duty is not manifestly irrelevant in the main proceedings in this case because such an interpretation

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would be impossible.

39. In that respect, the Italian and French Governments object that in the present case the result sought by the referring court is unachievable because of contrary provisions of Italian law. With regard to that objection, it must be conceded that interpretation in conformity with the Framework Directive is possible only in so far as national law provides for the possibility of such an interpretation. That is expressed in the qualification as far as possible' used by the Court. (13) Although the objectives pursued by provisions of Union law demand precedence over all other methods of interpretation, they cannot lead to a result which could not be achieved under national law by way of interpretation. (14) Only national courts can determine the extent to which, in the final analysis, their national law allows scope for that. (15)

40. In this case, however, it is not evident that an interpretation in conformity with the framework decision would be impossible and therefore that a reply from the Court would be of no value to the national court. The Italian Government itself refers to possible legal bases - which did not occur to the referring court -for examining juvenile victims under specially protected conditions during the trial. (16) Nor does it appear inconceivable, with regard to the recording of evidence beforehand, that the concept of other serious impediment' in Article 392(1) of the CPP could be construed as including the deterioration in the power of recollection and the psychological stress experienced by children as a consequence of examination at the time of the trial, and thus as providing the procedure of recording evidence beforehand with a legal basis other than Article 392(1a) of the CPP. Moreover, despite its presumption of an infringement of the Framework Decision, the referring court itself assumes that an interpretation in conformity with it is possible. Although the request for a preliminary ruling contains contradictions in that respect, it is not the task of the Court of Justice to call that assessment into question.

41. Contrary to the view of the French, Greek and Netherlands Governments, the obligation to interpret national laws in conformity is also not subject, in the context of the law of criminal procedure, to any special restrictions under Union law which would preclude the relevance of the request for a preliminary ruling. It is true that the rule that offences and punishments are to be strictly defined by statute (nullum crimen, nulla poena sine lege [scripta]) (17) must be taken into account. (18) That rule is one of the general legal principles underlying the constitutional traditions common to the Member States. It is also enshrined in Article 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter the ECHR'), the first sentence of Article 15(1) of the International Covenant on Civil and Political Rights (19) and the first sentence of Article 49(1) of the Charter of Fundamental Rights of the European Union. It is a specific enunciation of the principle of legal certainty in substantive criminal law.

42. However, this case does not concern substantive criminal law, but the law of criminal procedure. It is therefore not a question here of establishing or aggravating criminal responsibility, but of assessing the court procedure leading to judgment. It is not, therefore, the nulla poena sine lege rule which applies, but the principle of a fair trial, which must be further elaborated below.

43. An interpretation in conformity is also not precluded by the fact that the incidents to be investigated took place at a time before the adoption of the Framework Decision. According to settled case-law, procedural rules are generally held to apply to all proceedings pending at the time when they enter into force. (20)

44. Consequently, in the present case, an interpretation of Italian law in conformity with the Framework Decision is not manifestly precluded. The request for a preliminary ruling is therefore admissible.

C - Interpretation of the Framework Decision

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45. The referring court essentially asks whether Articles 2, 3 and 8 of the framework decision establish an obligation to examine eight five-year-old children as witnesses to the alleged physical abuse of which they were victims by recording their evidence beforehand in a manner appropriate for children. In that court's view, it is to be feared that, on the one hand, by reason of the psychological development of the children, their power of recollection of the offence will deteriorate and that, on the other hand, giving evidence at a (subsequent) trial could have detrimental psychological consequences for the children.

46. The basis of such an obligation could be Article 2(2), Article 3 and Article 8(4) of the Framework Decision. Under Article 2(2) of the Framework Decision, victims who are particularly vulnerable are to benefit from specific treatment best suited to their circumstances. Article 8(4) gives concrete expression to that obligation. It requires that, where there is a need to protect victims - particularly those most vulnerable - from the effects of giving evidence in open court, victims may, by decision taken by the court, be entitled to testify in a manner which will enable that objective to be achieved, by any appropriate means compatible with its basic legal principles. Under Article 3, each Member State must safeguard the possibility for victims to be heard during proceedings and to supply evidence. In particular, each Member State must, pursuant to that article, take appropriate measures to ensure that its authorities question victims only in so far as necessary for the purpose of criminal proceedings.

47. Next, therefore, it must be considered whether the children concerned here are to be regarded as victims who are particularly vulnerable. If so, it must then be considered whether the recording of their evidence beforehand, which is requested, would constitute the treatment best suited to their circumstances, in particular safeguarding their effective participation in the proceedings as witnesses.

1. Legal basis of the framework decision

48. Although the referring court has not raised any questions in this regard, an observation as to whether they were legitimately adopted on the chosen basis is called for before the provisions at issue are interpreted. Specifically in the case of acts adopted under Article 34 EU, particular attention is called for with regard to doubts concerning their lawfulness, especially since - as the United Kingdom Government has pointed out - the legal remedies available in relation to such acts are limited. (21) It is true that an act is presumed to be lawful and accordingly produces legal effects until such time as it is withdrawn, annulled in an action for annulment or declared invalid following a reference for a preliminary ruling or a plea of illegality. However, that principle does not apply to acts tainted by an irregularity whose gravity is so obvious that it cannot be tolerated. Such acts must be regarded as non-existent. (22) If serious doubts arise, therefore, the Court is in any event obliged, in preliminary ruling proceedings, to examine of its own motion the lawfulness of the provisions to be interpreted. An interpretation is in fact meaningful only if the provisions to be interpreted are valid.

49. At first sight, there could be doubt as to whether Article 3 EU and Article 34(2) EU constitute a sufficient legal basis for the provisions to be interpreted. Article 34(2)(b) merely defines framework decisions as a permissible form of action. The only possible basis with regard to the substance of the provisions to be interpreted here is therefore Article 31 EU. Under that article, common action on judicial cooperation in criminal matters includes various fields, listed under (a) to (e), which however can be applied to the protection of victims only with difficulty. Victim protection falls neither within the scope of facilitating and accelerating cooperation in relation to proceedings and the enforcement of decisions (a) nor within that of facilitating extradition (b), preventing conflicts of jurisdiction (d) or harmonising certain constituent elements of criminal acts (e). Only ensuring compatibility in rules applicable in the Member States, as may be necessary

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to improve such cooperation (c), could include victim protection. However, common standards of victim protection are not absolutely necessary in order to improve cooperation.

50. The fields of common action expressly listed are not exhaustive, however, a fact which is most clearly apparent in the French version of the introductory sentence. Instead of shall include', the latter uses the phrase vise entre autres '. The individual policy fields therefore describe only potential legislative spheres, without thereby strictly delimiting the competence of the Union. That competence is to be determined in the light of the general objectives of police and judicial cooperation in criminal matters, as they are laid down in Article 29 EU. The principal objective under that article is to provide citizens with a high level of safety within an area of freedom, security and justice through, in particular, improved judicial cooperation.

51. The protection of citizens who, despite the efforts to ensure their safety, have become victims of a crime certainly merits a prominent place within such an area. At the same time, common standards for the protection of victims when giving evidence in criminal proceedings may also encourage cooperation between judicial authorities, since they guarantee that that evidence is usable in all the Member States. Finally, the requirement of unanimity when the Council adopts framework decisions ensures that no Member State can become subject to a framework decision without its consent.

52. Consequently, despite the uncertainties which appear at first sight to exist with regard to the legal basis of the provisions to be interpreted, it must not simply be assumed in this case that those provisions are no longer covered by the Union's legislative powers. When questioned at the hearing, the French Government, the Netherlands Government and the Commission also expressed that view. Answering the question submitted is therefore not pointless on the ground that the law to be interpreted is non-existent.

2. The particular vulnerability of children

53. The Commission, like the referring court, assumes that children are, in principle, particularly vulnerable victims. The Commission bases its view primarily on the fifth recital in the preamble to Council Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings, (23) according to which children are more vulnerable and are therefore at greater risk of falling victim to trafficking. In the French Government's view, on the other hand, vulnerability must be assessed in the light of all the circumstances of the individual case, taking into account not only the age of the victim and the nature of the offence, but also other circumstances.

54. The Framework Decision does not define which victims are particularly vulnerable. In particular, it contains no reference to the fact that children are particularly vulnerable. Such references were still contained in Portugal's proposal, which, in Articles 2(2) and 8(4), expressly referred to age as a ground of particular vulnerability. (24) The Parliament even called expressly for particular account to be taken of children in the context of Article 3. (25)

55. The explanation for the fact that no such specific examples of particularly vulnerable victims are given lies in the fact that particular vulnerability can be due to a multitude of reasons which would be difficult to formulate in a definition. That is underlined by the documents used as background to the efforts to establish a European system of victim protection. The Commission's Communication of 1999, (26) mentioned in the second recital in the preamble to the Framework Decision, dealt almost exclusively with the position of Union citizens who were victims of crime in other Member States. In that connection, the Commission also mentioned the possibility of making it easier for them to take part in criminal proceedings in other Member States by the use, for example, of video conferencing or evidence given by telephone. (27) Similar measures are also called for in an earlier Council resolution which, however, concerns the protection of witnesses against all forms of direct or indirect threat, pressure or intimidation, in particular in connection with organised

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crime. (28) The conclusions of the European Council held at Tampere, referred to in the third recital in the preamble, mention the protection of witnesses only from the point of view of access to justice. (29) The Council of Europe Recommendation mentioned in the Portuguese Government's proposal for the Framework Decision refers in general terms to respect for victims and their dignity during the criminal procedure (30) and to the particular need for protection of victims of organised crime. (31) With regard to children, only the presence of their parents or guardians during questioning is mentioned. (32)

56. Nevertheless, at international level, all the Member States have already acknowledged a particular need for protection in the case of children. Under the first sentence of Article 25(2) of the Universal Declaration of Human Rights, children are entitled to special care and assistance. Article 24(1) of the International Covenant on Civil and Political Rights proclaims the right of the child to such measures of protection as are required by his status as a minor, on the part of the State. The Convention on the Rights of the Child, (33) which has been ratified by all the Member States of the Union, puts that duty of protection into specific terms. In particular, under Article 3(1), the best interests of the child are to be a primary consideration. The first sentence of Article 39 requires States Parties to take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of any form of neglect, exploitation, or abuse, torture or any other form of cruel, inhuman or degrading treatment or punishment.

57. Accordingly, Article 24 of the Charter of Fundamental Rights of the European Union guarantees the right of children to such protection and care as is necessary for their well-being. In all actions relating to children taken by public authorities the child's best interests must be a primary consideration.

58. Since according to the foregoing, children are, in principle, particularly in need of protection, they must in general also be regarded as particularly vulnerable when they have been victims of crime. In this case there is nothing to indicate that the vulnerability of the children concerned should be assessed in any other way. Being five years old at the time of the offence and on the date of the hearing sought, they were at an age when psychological damage as a consequence of what took place cannot be ruled out. Moreover, the offences charged in this case, involving maltreatment by a nursery school teacher - that is, a person in a position of trust - are particularly liable to harm the children's development.

59. In summary, it must be concluded that children who are victims of criminal offences are, in general, particularly vulnerable.

3. Need for a procedure of recording evidence beforehand

60. If the referring court shares the provisional assessment made above, the further question arises as to whether, under the Framework Decision, a hearing by the special procedure of recording evidence beforehand, as described above, is required. The referring court, but also the Portuguese Government seem to assume that, in the present case, pursuant to Article 2(2) and Article 3 of the Framework Decision, a procedure of recording evidence prior to the trial is necessary.

61. In that respect it must first be noted that neither of those two provisions contains specific requirements as to how its objectives are to be achieved. However, Article 2(2) of the Framework Decision requires treatment best suited to the circumstances of victims who are particularly vulnerable. The framework decision thus goes beyond the Portuguese proposal, which required only appropriate measures. A choice between two types of procedure is therefore permissible under Article 2(2) only where they are equally suited to the circumstances of the victim. Moreover, it follows from the first paragraph of Article 3 that victims must be given the opportunity to testify effectively. Here too, whichever procedure is conducive to effective participation merits priority. Finally,

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under the second paragraph of Article 3, victims are to be questioned only in so far as is necessary. Superfluous repetition of questioning must accordingly be avoided.

62. The referring court and probably also the Portuguese Government assume that in this case it would be less stressful for the victims to record their evidence beforehand than to testify subsequently at the trial. At the same time, the referring court is of the opinion that the victims would be better able in that way to contribute to establishing the facts, since they might no longer be able to recollect the sequence of events so well at the trial. If those assumptions are in fact justified, which only the trial court can assess after taking into account the child concerned in each case and consulting experts where appropriate, application of the procedure of recording evidence beforehand would in fact be, in this case, the best treatment for the victims, enabling them to participate in the criminal proceedings as witnesses effectively while affording them protection.

63. However, the Italian and French Governments object that in the Italian law of criminal procedure, under Article 392(1a) of the CPP, the recording of evidence beforehand is admissible only in the case of sex offences for statements by children who are both victims and witnesses. That provision of Italian law is not, they claim, in breach of the discretion allowed by the Framework Decision, to which the Netherlands Government also drew attention at the hearing.

64. However, no such discretion is apparent in Article 2(2) of the Framework Decision. In particular, there is no restriction of its application to specific offences. Nor is it evident that only the offences expressly mentioned by the Italian legislature require a procedure of recording evidence beforehand to be used for the benefit of children. On the contrary, it is possible that such a procedure would also be the treatment best suited to the circumstances of a particularly vulnerable victim in the case of other offences and therefore the treatment required under the Framework Decision. (34)

65. The only restriction is to be inferred from Article 8(4) of the Framework Decision. Under that provision, each Member State must ensure that, where there is a need to protect victims - particularly those most vulnerable - from the effects of giving evidence in open court, victims may, by decision taken by the court, be entitled to testify in a manner which will enable this objective to be achieved, by any appropriate means compatible with its basic legal principles. In relation to Article 2(2) of the Framework Decision, that provision is the lex specialis in so far as it makes the obligation to protect victims subject to special conditions where the normal practice of giving evidence in open court is to be dispensed with. Forms of oral evidence which are in breach of the requirement of a public hearing must only be allowed to the extent that they are compatible with the Member State's basic legal principles. In the present case, however, it cannot be argued that the procedure of recording evidence beforehand is fundamentally incompatible with Italy's basic legal principles, in so far as they stem from Italian law alone. Article 392(1a) of the CPP does in fact allow evidence to be recorded beforehand, at least in relation to the offences listed.

66. As the Commission and the French Government rightly argue, however, each Member State's basic legal principles must also take into account the right of the accused to a fair trial. Under Article 6(2) EU, the Union - that is to say, the Community and the Member States - must also respect that right, which is also enshrined in Article 47 of the Charter of Fundamental Rights. (35) In particular, Article 6 of the of the European Convention on Human Rights is applicable in this regard. Under that provision, the defendant in criminal proceedings is entitled inter alia to a public hearing and to have the main witnesses heard and questioned at that hearing, with a view to adversarial argument. At the same time, the defendant must have the opportunity to question and challenge witnesses. (36)

67. Those rights may have to be balanced against the interests of the witnesses, which are likewise protected as human rights, in particular where those witnesses are also victims. (37) In that connection,

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the European Court of Human Rights recognises that Article 6 of the ECHR allows the interests of juvenile witnesses to be taken into account in criminal proceedings. (38) However, the defendant must at least be given the opportunity to question vital prosecution witnesses. (39) Accordingly, the European Court of Human Rights held that there was a violation of Article 6 of the ECHR when convictions were based on the examination of children using special procedures for children where the defendant or his lawyer were unable to observe the examination or to put questions. (40) On the other hand, it allowed examination under conditions appropriate for a child prior to the hearing in a case where, although the defendant's lawyer had the opportunity to observe the examination and to put questions, he did not avail himself of that opportunity. (41)

68. The extent to which, pursuant to those principles, a procedure of recording evidence beforehand is admissible can be established only by striking a balance in each individual case, taking into account the interests of the witnesses, the rights of the defence and also, where appropriate, the importance attached to the imposition of a punishment. In general, having regard to Article 6 of the ECHR, it must also be assumed in that context that, at least in the case of offences involving physical injury to children, special protective arrangements, such as those proposed in this case, should apply.

69. In summary, Article 2(2), Article 3 and Article 8 (4) of the Framework Decision may, in the light of the circumstances of the particular case, create an obligation for the national courts to carry out a special procedure, appropriate for children, of recording evidence beforehand, provided that such a procedure is compatible with the Member State's basic legal principles - including the fundamental rights recognised by the Union.

V - Conclusion

70. In the light of the foregoing observations, I propose that the Court reply to the request for a preliminary ruling as follows:

(1) Under Article 34(2)(b) EU and in accordance with the principle of loyalty to the Union, any framework decision requires the national courts to adapt their interpretation of national law - regardless of whether the provisions in question were enacted before or after the framework decision - as far as possible to the wording and purpose of the framework decision, so as to attain the objective pursued by the framework decision.

(2) Children who are victims of crime are, in general, particularly vulnerable within the meaning of Article 2(2) and Article 8(4) of Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings.

(3) Article 2(2), Article 3 und Article 8(4) of Framework Decision 2001/220 are to be interpreted as meaning that they may, in the light of the circumstances of the individual case, create an obligation for the national courts to carry out a procedure of recording evidence beforehand, appropriate for children, provided that such a procedure is compatible with the Member State's basic legal principles, including the fundamental rights recognised by the Union.

(1) .

(2) - OJ 2001 L 82, p. 1.

(3) - Case 13/68 Salgoil [1968] ECR 679, 690; Case C415/93 Bosman [1995] ECR I4921, paragraph 59; Case C36/99 Idéal Tourisme [2000] ECR I6049, paragraph 20; Case C322/98 Kachelmann [2000] ECR I7505, paragraph 17; Case C379/98 PreussenElektra [2001] ECR I2099, paragraph 38; and Joined Cases C480/00, C481/00, C482/00, C484/00, C489/00, C490/00, C491/00, C497/00, C498/00 and C499/00 Ribaldi [2004] ECR I2943, paragraph 72.

(4) - Case 126/80 Salonia [1981] ECR 1563, paragraph 6, Bosman , paragraph 61, Idéal Tourisme

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, paragraph 20, Kachelmann , paragraph 17, PreussenElektra , paragraph 39, and Ribaldi , paragraph 72, cited in footnote 3.

(5) - See, to that effect, Joined Cases C-87/90 to C-89/90 Verholen and Others [1991] ECR I-3757, paragraph 13.

(6) - Case C105/89 Marleasing [1990] ECR I4135, paragraph 8; Case C334/92 Wagner Miret [1993] ECR I6911, paragraph 20; Case C91/92 Faccini Dori [1994] ECR I3325, paragraph 26; and Case C462/99 Connect Austria [2003] ECR I5197, paragraph 38.

(7) - Opinion 1/91 Opinion on the draft EEA Agreement [1991] ECR I-6079, paragraph 14; see also Case C-312/91 Metalsa [1993] ECR I-3751, paragraph 12; Case C-416/96 Eddline El-Yassini [1999] ECR I-1209, paragraph 47; and Case C268/99 Jany and Others [2001] ECR I-8615, paragraph 35.

(8) - Case 26/62 Van Gend & Loos [1963] ECR 1, 11, and Case 6/64 Costa v Enel [1964] ECR 585, 593.

(9) - Opinion 1/91, cited in footnote 7, paragraph 15.

(10) - Opinion 1/91, cited in footnote 7, paragraph 20.

(11) - The transfer of the acquis communautaire to Union law is illustrated by the judgment in Joined Cases C187/01 and C385/01 Gözütok and Brügge [2003] ECR I-1345, paragraph 45, in which the principle of interpretation of effectiveness is applied in the context of the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (OJ 2000 L 239, p. 19).

(12) - See Case C50/00 P Union de Pequeños Agricultores v Council [2002] ECR I6677, paragraph 40.

(13) - See the references in footnote 6.

(14) - Case 14/83 Von Colson and Kamann [1984] ECR 1891, paragraph 25, and Wagner Miret , cited in footnote 6, paragraph 22. A different view is taken by Advocate General Ruiz-Jarabo Colomer in his Opinion in Joined Cases C397/01 to C403/01 Pfeiffer and Others [2004] ECR I0000, point 24 et seq. However, see also the judgment in those joined cases, paragraph 116.

(15) - Judgment in Case C60/02 X [2004] ECR I651, paragraph 58 et seq.

(16) - See p. 5 et seq. of the Italian Government's observations.

(17) - Opinion of Advocate General Ruiz-Jarabo Colomer in Joined Cases C74/95 and C129/95 X [1996] ECR I-6609, I-6612, point 43. Opinion of Advocate General Jacobs in Joined Cases C304/94, C330/94, C342/94 and C224/95 Tombesi and Others [1997] ECR I-3564, point 37.

(18) - See in that regard the judgment of the Court of Justice in Joined Cases C74/95 and C129/95 X [1996] ECR I-6609, paragraph 24 et seq., with reference to the Eur. Court H. R., Kokkinakis v. Greece judgment of 25 May 1993, Series A no. 260-A, º 52, and the Eur. Court H. R., S.W. v. United Kingdom and C.R. v. United Kingdom judgments of 22 November 1995, Series A no. 335B, º 35, and no. 335-C, º 33. See also the judgments of the Court of Justice in Case 63/83 Kirk [1984] ECR 2689, paragraph 22, Case 80/86 Kolpinghuis Nijmegen [1987] ECR 3969, paragraph 13, Case C168/95 Arcaro [1996] ECR I-4705, paragraph 42, and X , cited in footnote 15, paragraph 61 et seq.. See also in detail in that regard my Opinions in Case C457/02 Niselli [2004] ECR I0000, point 53 et seq., and in Joined Cases C387/02, C391/02 and C403/02 Berlusconi [2005] ECR I0000, point 140 et seq..

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(19) - Opened for signature on 19 December 1966 (UN Treaty Series , vol. 999, p. 171).

(20) - Joined Cases 212/80 to 217/80 Salumi and Others [1981] ECR 2735, paragraph 9; Joined Cases C121/91 and C122/91 CT Control Rotterdam and JCT Benelux v Commission [1993] ECR I3873, paragraph 22; Case C61/98 De Haan [1999] ECR I5003, paragraphs 13 and 14, and Joined Cases C361/02 and C362/02 Tsapalos [2004] ECR I0000, paragraph 19.

(21) - See point 35 above.

(22) - Case C475/01 Commission v Greece (Ouzo) [2004] ECR I0000, paragraph 18 et seq.

(23) - OJ 2002 L 203, p. 1.

(24) - Initiative of the Portuguese Republic with a view to adopting a Council Framework Decision on the standing of victims in criminal procedure (OJ 2000 C 243, p. 4 et seq.).

(25) - Legislative resolution of 12 December 2000 (OJ 2001 C 236, p. 61 et seq.), proposed amendments Nos 13 and 25; see also Report No A5-0355/2000 of 24 November 2000 drawn up by Carmen Cerdeira Morterero MEP, p. 11 et seq. and p. 17.

(26) - Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee - Crime victims in the European Union - Reflections on standards and action (COM(1999) 349 final).

(27) - COM(1999) 349 final, p. 7.

(28) - Resolution of the Council of 23 November 1995 on the protection of witnesses in the fight against international organised crime (OJ 1995 C 327, p. 5).

(29) - Presidency Conclusions - European Council (Tampere), 15 and 16 October 1999, No 32.

(30) - Recommendation No R(85)11 of the Committee of Ministers to Member States on the position of the victim in the framework of criminal law and procedure, adopted on 28 June 1985, point 8.

(31) - Recommendation No R(85)11, point 16.

(32) - Recommendation No R(85)11, point 8.

(33) - Opened for signature on 20 November 1989 (UN Treaty Series , Vol. 1577, p. 43).

(34) - Thus, for example, under Paragraph 255a of the German Code of Criminal Procedure, in proceedings for offences against sexual self-determination (Paragraphs 174 and 184 f of the German Criminal Code) or against life (Paragraphs 211 to 222 of the German Criminal Code) or for maltreatment of wards (Paragraph 225 of the German Criminal Code), the examination of a witness under 16 may be replaced by a showing of the audiovisual recording of his earlier judicial examination if the accused and his defence had the opportunity to take part in it.

(35) - Case C276/01 Steffensen [2003] ECR I-3735, paragraph 69 et seq., with additional references.

(36) - Eur. Court HR, Van Mechelen and Others v. Netherlands , judgment of 23 April 1997, Reports of Judgments and Decisions 1997-III, p. 711, ° 51.

(37) - Eur. Court HR, Doorson v. Netherlands , judgment of 26 March 1996, Reports of Judgments and Decisions 1996-II, p. 470, ° 70.

(38) - Eur. Court HR, P.S. v. Germany , judgment of 20 December 2001, ° 28.

(39) - Eur. Court HR, Doorson , cited in footnote 37, ° 72 et seq.

(40) - Eur. Court HR, P.S. judgment, cited in footnote 38, ° 25 et seq., and A.M. v. Italy , judgment of 14 December 1999, Reports of Judgments and Decisions 1999-IX, ° 25 et seq.

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61983J0014 : N 39
61983J0063 : N 41
61986J0080 : N 41
61989J0106 : N 23 39
61990J0087 : N 21
61991V0001 : N 29 32
61991J0121 : N 43
61991J0312 : N 29
61992J0091 : N 23 39
61992J0334 : N 23 39
61993J0415 : N 20
61994C0304 : N 41
61995J0074 : N 41
61995C0074 : N 41
61995J0168 : N 41
61996J0416 : N 29
61998J0061 : N 43
61998J0322 : N 20
61998J0379 : N 20
61999J0036 : N 20
61999J0268 : N 29
61999J0462 : N 23 39
62000J0480 : N 20
62001J0187 : N 32
62001J0276 : N 66
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62001J0475 : N 48
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Judgment of the Court of First Instance (Fifth Chamber)
First Instance (Fifth Chamber)First Instance (Fifth Chamber)2007. CAS SpA v Commission of the European Communities. Association Agreement between the EEC and the Republic of Turkey - Remission of import duty - Fruit juice concentrate from Turkey - Community Customs Code - Movement certificates - Special situation - Rights of the defence. Case T-23/03.

1. Own resources of the European Communities - Repayment or remission of import or export duties

(Council Regulation No 2913/92, Art. 239)

2. Community law - Principles - Rights of the defence

(Art. 255 EC; Council Regulation No 2913/92, Art. 239)

3. International agreements - EEC-Turkey Association Agreement - Customs union - Origin of goods

(EEC-Turkey Association Agreement)

4. Actions for annulment - Interest in bringing proceedings

(Art. 230 EC)

5. International agreements - EEC-Turkey Association Agreement - Obligations of the Commission

(Art. 211 EC; EEC-Turkey Association Agreement)

6. Own resources of the European Communities - Post-clearance recovery of import or export duties

(Council Regulation No 2913/92, Art. 220(2)(b))

1. Observance of the right to be heard must be guaranteed in procedures for the remission of import duties, in particular in view of the power of assessment enjoyed by the Commission when it adopts a decision pursuant to the general equitable provision contained in Article 239 of Regulation No 2913/92 establishing the Community Customs Code.

(see para. 87)

2. As regards the administrative procedure for remission of import duties, the principle of respect for the rights of the defence implies only that the party concerned be placed in a position in which it may effectively make its views known as regards the evidence, including the documents used against it by the Commission as a basis for the decision. That principle therefore does not require the Commission, acting on its own initiative, to grant access to all the documents which may have some connection with the case at issue when an application for remission is referred to it. If the party concerned considers that such documents are relevant for establishing the existence of a special situation and/or the lack of deception or obvious negligence on its part, then it is for the party concerned itself to request access to those documents in accordance with the provisions adopted by the institutions under Article 255 EC.

It is at the request of the party concerned that the Commission is required to provide access to all non-confidential official documents concerning the contested decision. If no such request is made, it follows that there is no automatic access to the documents held by the Commission.

(see para. 88-89)

3. Determination of the origin of goods within the framework, inter alia, of the customs union established by the EEC-Turkey Association Agreement is based on a division of powers between the authorities of the exporting country and those of the importing country, inasmuch as origin is established by the authorities of the exporting country and the proper working of that system

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is monitored jointly by the authorities concerned on both sides. That system is justified by the fact that the authorities of the exporting country are in the best position to verify directly the facts which determine origin.

That mechanism can function only if the customs authorities of the importing country accept the determinations legally made by the authorities of the exporting country. The recognition of such decisions by the customs authorities of the Member States is necessary in order that the Community can, in turn, demand that the authorities of other countries with which it has concluded free-trade agreements accept the decisions taken by the customs authorities of the Member States concerning the origin of products exported from the Community to those non-member countries.

(see paras 120-121)

4. An applicant has no legitimate interest in the annulment of a decision on the ground of a procedural defect, where annulment of the decision can only lead to the adoption of another decision identical in substance to the decision annulled.

(see para. 132)

5. Pursuant to Article 211 EC and the principle of good administration, the Commission has a duty to ensure the proper application of the EEC-Turkey Association Agreement. That duty also results from the Association Agreement itself and the various decisions adopted by the Association Council.

(see para. 234)

6. Under Article 220(2)(b) of Regulation No 2913/92 establishing the Community Customs Code, three cumulative conditions must be met for the competent authorities to be able to waive subsequent accounting for import duties. Non-collection must have been due to an error by the competent authorities themselves; their error must be of such a kind that it could not reasonably have been detected by a person liable, acting in good faith; and, finally, the latter must have complied with all the provisions laid down by the legislation in force so far as his customs declaration is concerned.

That provision is intended to protect the legitimate expectations of the person liable that all the factors on which the decision whether or not to proceed with recovery of customs duties is based are correct. However, the legitimate expectations of the person liable attract the protection afforded by that provision only if it was the competent authorities themselves which created the basis for his expectations. Thus, only errors attributable to acts of the competent authorities which could not reasonably have been detected by the person liable create entitlement to the waiver of post-clearance recovery of customs duties.

(see paras 303-304)

In Case T23/03,

CAS SpA, established in Verona (Italy), represented by D. Ehle, lawyer,

applicant,

v

Commission of the European Communities, represented by X. Lewis, acting as Agent, and M. Nuñez Müller, lawyer,

defendant,

ACTION for annulment in part of the Commission's decision of 18 October 2002 (REC 10/01) concerning an application for remission of import duties,

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THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES (Fifth Chamber),

composed of M. Vilaras, President, M.E. Martins Ribeiro and K. Jürimäe, Judges,

Registrar: K. Andova, Administrator,

having regard to the written procedure and further to the hearing on 15 November 2005,

gives the following

Judgment

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. Dismisses the action;

2. Orders the applicant to pay the costs.

Legal context

A - Legislation relating to the system of preferential treatment

1. This case arose in the context of the Association Agreement establishing an Association between the European Economic Community (EEC) and the Republic of Turkey (the Association Agreement'), signed in Ankara by the Republic of Turkey, of the one part, and the Member States of the EEC and the Community, of the other part (the Contracting Parties'). The Association Agreement was approved by Council Decision 64/732/EEC of 23 December 1963 (JO 1964 217, p. 3685; English version published in OJ 1973 C 113, p. 1). It entered into force on 1 December 1964.

2. The aim of the Association Agreement, as set out in Article 2 in Title I, which is concerned with principles, is to promote the continuous and balanced strengthening of trade and economic relations between the Contracting Parties.

3. It involves a preparatory stage to enable the Republic of Turkey, in accordance with Article 3, to strengthen its economy with the aid of the Community, a transitional stage during which, in accordance with Article 4, a customs union is progressively to be established and economic policies more closely aligned, and a final stage which, in accordance with Article 5, is to be based on the customs union and to entail closer coordination of economic policies.

4. Under Article 7, the Contracting Parties are to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising under the Association Agreement and are to refrain from any measures liable to jeopardise the attainment of those objectives.

5. Articles 22 and 23 in Title III, which is concerned with general and final provisions, provide for the establishment of an Association Council to be composed, of the one part, of Members of the Governments of the Member States, the Council and the Commission and, of the other part, Members of the Turkish Government (the Association Council'), which, acting by unanimity, is to have the power to take decisions to achieve the objectives referred to in the Association Agreement. Article 25 gives the Association Council the power, on referral from any Contracting Party, to settle any dispute relating to the application or interpretation of the Association Agreement or to submit the dispute to the Court of Justice.

6. The final phase of the customs union came into force on 31 December 1995 (Articles 1 and 65(1) of Decision No 1/95 of the Association Council of 22 December 1995 on implementing the final

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phase of the customs union (OJ 1996 L 35, p. 1)) (Decision No 1/95' or the basic Decision').

7. Pursuant to Article 11 of the Association Agreement, the association scheme is to include agriculture and agricultural trade, subject to special rules and procedures which take account of the Community's common agricultural policy.

1. Legislation in force during the transitional stage

8. By Decision No 1/80 of 19 September 1980 on the development of the Association, the Association Council decided to abolish customs duties which were still applicable to imports into the Community of agricultural products originating in Turkey which it had not previously been possible to import into the Community free of customs duty.

9. In accordance with Article 1(1) of Council Regulation (EEC) No 4115/86 of 22 December 1986 on imports into the Community of agricultural products originating in Turkey (OJ 1986 L 380, p. 16), products originating in Turkey which are listed in Annex II to the EEC Treaty, other than those listed in the annex to that regulation, were put into free circulation in the Community free of customs duty. In accordance with Article 2(2) of Regulation No 4115/86, products originating in Turkey means products fulfilling the conditions laid down in Decision No 4/72 of the Association Council of 29 December 1972 on the definition of the concept of originating products' from Turkey for the implementation of Chapter I of Annex 6 to the Additional Protocol to the Association Agreement annexed to Regulation (EEC) No 428/73 of the Council of 5 February 1973 on the application of Decisions Nos 5/72 and 4/72 of the Association Council (OJ 1973 L 59, p. 73), as amended by Decision No 1/75 of the Association Council of 26 May 1975 annexed to Regulation (EEC) No 1431/75 of the Council amending Regulation No 428/73 (OJ 1975 L 142, p. 1).

10. Article 1 of Decision No 4/72 provides that the following are to be considered as originating products from Turkey:

(a) vegetable products harvested in Turkey,

...

(f) goods obtained in Turkey by working or processing the products referred to under (a) to (e), even if other products are used in their manufacture, on condition that products obtained outside Turkey or the Community are only used on an accessory basis in the manufacture'.

11. Commission Regulation (EEC) No 3719/88 of 16 November 1988 laying down common detailed rules for the application of the system of import and export licences and advance fixing certificates for agricultural products (OJ 1988 L 331, p. 1) is applicable to the system of certificates established by the rules laid down in Article 1 thereof. Article 28(4) of that regulation provides:

(4) Member States shall also forward to the Commission impressions of the official stamps and, where appropriate, of the embossing presses of authorities empowered to act. The Commission shall immediately inform the other Member States thereof.'

12. By Decision No 5/72 of 29 December 1972 on methods of administrative cooperation for implementation of Articles 2 and 3 of the Additional Protocol to the Association Agreement (OJ 1973 L 59, p. 74), the Association Council laid down the rule under which, in order to obtain preferential treatment, it was necessary to present a certificate issued at the request of the exporter by the customs authorities of the Republic of Turkey or of a Member State. For goods transported directly from Turkey to a Member State, this is the A.TR.1 movement of goods certificate (A.TR.1 certificate'), a specimen of which is attached to the decision (Article 2). That specimen was replaced by the form attached to Decision No 1/78 of the Association Council of 18 July 1978 amending Decision No 5/72 (OJ 1978 L 253, p. 2). That specimen was, in turn, slightly modified by Decision No 4/95 of the Association Council of 22 December 1995 amending Decision No 5/72 (OJ 1996 L 35, p. 48).

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13. Article 11 of Decision No 5/72 provides that the Member States and the Republic of Turkey are to assist each other, through their respective customs administrations, in checking the authenticity and accuracy of the certificates in order to ensure the proper application of the provisions of this Decision'.

14. Article 12 of Decision No 5/72 goes on to provide:

[The Republic of] Turkey, the Member States and the Community shall each take the steps necessary to implement this Decision.'

15. Article 2(3) of Regulation No 4115/86 provides that the methods of administrative cooperation for ensuring that imports of the products referred to in Article 1 benefit from the reduced customs duties are those laid down in Decision No 5/72, as last amended by Decision No 1/78.

2. Legislation in force during the final stage

16. Decision No 1/95 lays down detailed rules for the implementation of the final phase of customs union. Article 29 of that decision provides:

Mutual assistance on customs matters between the administrative authorities of the Parties shall be governed by the provisions of Annex 7, which on the Community side, covers those matters falling under the Community competence.'

17. With regard to mutual assistance on customs matters, Article 2(1) of Annex 7 to Decision No 1/95 provides:

The Parties shall assist each other, within their competence... in ensuring that customs legislation is correctly applied, in particular by the prevention, detection and investigation of operations in breach of that legislation.'

18. Article 3(6) of Decision No 1/95 provides that the Customs Cooperation Committee is to determine the methods of administrative cooperation.

19. Article 5(2) of Decision No 1/96 of the Customs Cooperation Committee of 20 May 1996 laying down detailed rules for the application of Decision No 1/95 (OJ 1996 L 200, p. 14) provides that the validation of the document necessary to enable the free circulation of the goods concerned causes a customs debt on importation to be incurred. In accordance with Article 6 of that decision, preferential treatment for agricultural products imported from Turkey is subject to the issue of documentary evidence in the form of an A.TR.1 certificate. A specimen of that certificate is produced in Annex I but Article 7(1) of that decision stated that it was possible for the forms shown in Decision No 5/72 to continue to be used until 30 June 1997.

20. Article 15 of Decision No 1/96 provides as follows:

In order to ensure the proper application of the provisions of the present Decision, the Member States and [the Republic of] Turkey shall assist each other, through their respective customs administrations and within the framework of mutual assistance provided for in Article 29 of and Annex 7 to the basic Decision, in checking the authenticity and accuracy of the certificates.'

21. Article 13(2) of Decision No 1/96 states:

... Box 12 of the extract shall show the registration number, date, office and country of issue of the initial certificate...'

22. Paragraph 12 of point II of Annex II to Decision No 1/96 states that the particulars to be entered in Box 12 of the A.TR.1 certificate are to be completed by the competent authorities.

23. Finally, Article 4 of Decision No 1/96 provides:

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Without prejudice to the provisions on free circulation laid down in the basic Decision, the Community customs code and its implementing provisions, which are applicable in the customs territory of the Community, and the Turkish customs code and its implementing provisions, which are applicable in the customs territory of [the Republic of] Turkey, shall apply in trade in goods between the two parts of the customs union under the conditions laid down in the present Decision.'

B - Customs legislation

1. Legislation on remission of customs duties

24. Article 239 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1) (the CCC') states, with regard to the possibility of remission of import duties:

Import duties... may be... remitted in situations... resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned. The situations in which this provision may be applied and the procedures to be followed to that end shall be defined in accordance with the Committee procedure.'

25. Article 905(1) of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Regulation No 2913/92 (OJ 1993 L 253, p. 1) (the CCC implementation regulation') provides as follows:

Where the decision-making customs authority to which an application for repayment or remission under Article 239(2) of the [CCC] has been submitted cannot take a decision on the basis of Article 899, but the application is supported by evidence which might constitute a special situation resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned, the Member State to which this authority belongs shall transmit the case to the Commission to be settled under the procedure laid down in Articles 906 to 909...'

26. Article 904(c) of the CCC implementation regulation provides:

Import duties shall not be repaid or remitted where the only grounds relied on in the application for repayment or remission are, as the case may be:

...

(c) presentation, for the purpose of obtaining preferential tariff treatment of goods declared for free circulation, of documents subsequently found to be forged, falsified or not valid for that purpose, even where such documents were presented in good faith.'

27. Article 236 of the CCC provides:

1. Import duties or export duties shall be repaid in so far as it is established that when they were paid the amount of such duties was not legally owed or that the amount has been entered in the accounts contrary to Article 220(2).

Import duties or export duties shall be remitted in so far as it is established that when they were entered in the accounts the amount of such duties was not legally owed or that the amount has been entered in the accounts contrary to Article 220(2).

No repayment or remission shall be granted when the facts which led to the payment or entry in the accounts of an amount which was not legally owed are the result of deliberate action by the person concerned.

...'

28. Article 220(2)(b) of the CCC provides that subsequent entry in the accounts of duty resulting

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from a customs debt is not to occur where the amount of duty legally owed failed to be entered in the accounts as a result of an error on the part of the customs authorities which could not reasonably have been detected by the person liable for payment, the latter for his part having acted in good faith and complied with all the provisions laid down by the legislation in force as regards the customs declaration.

2. Legislation on rules on origin

29. Article 20 of the CCC provides, inter alia:

1. Duties legally owed where a customs debt is incurred shall be based on the Custom s Tariff of the European Communities.

2. The other measures prescribed by Community provisions governing specific fields relating to trade in goods shall, where appropriate, be applied according to the tariff classification of those goods.

3. The Customs Tariff of the European Communities shall comprise:

...

(d) the preferential tariff measures contained in agreements which the Community has concluded with certain countries or groups of countries and which provide for the granting of preferential tariff treatment.'

30. Article 27(a) of the CCC provides as follows:

The rules on preferential origin shall lay down the conditions governing acquisition of origin which goods must fulfil in order to benefit from the measures referred to in Article 20(3)(d) or (e). Those rules shall:

(a) in the case of goods covered by the agreements referred to in Article 20(3)(d), be determined in those agreements.'

31. The CCC implementation regulation, in the version applicable to the present dispute (Article 93, amended and numbered Article 92 by Commission Regulation (EC) No 3254/94 of 19 December 1994 (OJ 1994 L 346, p. 1) (Article 93 of the CCC implementation regulation') provides:

1. The beneficiary countries shall inform the Commission of the names and addresses of the governmental authorities situated in their territory empowered to issue certificates of origin Form A, together with specimens of stamps used by those authorities. The Commission shall forward this information to the customs authorities of the Member States.

2. The beneficiary countries shall also inform the Commission of the names and addresses of the governmental authorities empowered to issue the certificates of authenticity referred to in Article 86, together with specimens of the stamp they use. The Commission shall forward this information to the customs authorities of the Member States.

3. The Commission shall publish in the Official Journal of the European Communities (C series) the date on which the new beneficiary countries referred to in Article 97 have met the obligations laid down in paragraphs 1 and 2.'

C - Legislation on the confidentiality of certain documents

32. Article 8(1) of Regulation (EC) No 1073/1999 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF) (OJ 1999 L 136, p. 1) provides as follows:

Confidentiality and data protection

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1. Information obtained in the course of external investigations, in whatever form, shall be protected by the relevant provisions.'

33. Article 9(2) of that regulation states:

Investigation report and action taken following investigations

...

2. In drawing up such reports, account shall be taken of the procedural requirements laid down in the national law of the Member State concerned. Reports drawn up on that basis shall constitute admissible evidence in administrative or judicial proceedings of the Member State in which their use proves necessary, in the same way and under the same conditions as administrative reports drawn up by national administrative inspectors. They shall be subject to the same evaluation rules as those applicable to administrative reports drawn up by national administrative inspectors and shall be of identical value to such reports.'

34. Article 8(1) of 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) provides:

Information communicated or acquired in any form under this Regulation shall be covered by professional secrecy and protected in the same way as similar information is protected by the national legislation of the Member State that received it and by the corresponding provisions applicable to the Community institutions.'

35. Article 4 of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43) provides:

Exceptions

1. The institutions shall refuse access to a document where disclosure would undermine the protection of:

(a) the public interest as regards

- public security,

- defence and military matters,

- international relations,

- the financial, monetary or economic policy of the Community or a Member State;

(b) privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data.

2. The institutions shall refuse access to a document where disclosure would undermine the protection of:

- commercial interests of a natural or legal person, including intellectual property,

- court proceedings and legal advice,

- the purpose of inspections, investigations and audits,

unless there is an overriding public interest in disclosure.'

Background to the dispute

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A - The contested importations

36. The applicant, CAS SpA, is a company incorporated under Italian law and a 95.1% subsidiary of Steinhauser GmbH (Steinhauser'), established in Ravensburg (Germany). The applicant's core business consists in processing imported fruit juice concentrates and it is also an importer of such products in Italy. It is essentially Steinhauser which maintains a business relationship with foreign suppliers.

37. Between 5 April 1995 and 20 November 1997, the applicant imported and put into free circulation in the Community apple and pear juice concentrates declared as being from and originating in Turkey. That type of product was imported into the Community using A.TR.1 certificates with the effect that those products qualified for the exemption from customs duties provided for by the Association Agreement and the Additional Protocol.

38. In accordance with Article 29 of Decision No 1/95, the customs services in Ravenna (Italy) carried out a post-clearance documentary check on the authenticity of A.TR.1 certificate D 141591 submitted by the applicant in the course of one of the import operations for the period from 5 April 1995 to 20 November 1997. In accordance with the relevant provisions, the request for verification of the authenticity of that certificate was sent to the Turkish authorities.

39. By letter of 15 May 1998, the Turkish authorities notified the Ravenna customs services that the checks carried out showed that that certificate was not authentic since it had not been issued by the Turkish customs authorities. They stated, moreover, that further checks were to be carried out.

40. Consequently, the Italian authorities carried out post-clearance checks on 103 A.TR.1 certificates submitted by the applicant in the course of various import operations.

41. By letter of 10 July 1998, the Permanent Representation of the Republic of Turkey to the European Union (the Turkish Permanent Representation') notified the Commission that 22 A.TR.1 certificates submitted by the applicant, listed in an annex to that letter and concerning exports by the Turkish company Akman to Italy, were false'. The Commission forwarded that letter to the Italian customs authorities by letter of 20 July 1998.

42. Between 12 and 15 October 1998 and between 30 November and 2 December 1998, the European Commission's Unit for the Coordination of Fraud Prevention ((UCLAF), predecessor to OLAF) carried out checks in Turkey.

43. By letter of 8 March 1999, the Turkish Permanent Representation notified the customs services in Ravenna that 32 A.TR.1 certificates submitted by the applicant (the certificates at issue'), including 18 of the certificates listed in the annex to the letter of 10 July 1998, had been neither issued nor validated by the Turkish authorities. Those certificates are identified in the annex to that letter.

44. The Italian customs authorities took the view that it was clear from all the correspondence exchanged among themselves, the Commission, UCLAF and the Turkish authorities that the latter considered 48 A.TR.1 certificates, including the certificates at issue, relating to exports to Italy by the applicant through the Turkish company Akman, to be either forged or irregular.

45. In the present case, the 32 certificates at issue (corresponding to customs duties totalling ITL 3 296 190 371 or EUR 1 702 340.25) were considered to be forged, given that they had been neither issued nor validated by Turkish customs offices. On the other hand, the 16 other certificates (corresponding to customs duties totalling ITL 1 904 763 758 or EUR 983 728.38) were classified as invalid, given that, whilst they had been issued by the Turkish customs authorities, the goods concerned did not originate in Turkey.

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46. Since all 48 certificates had been classified as either forged or invalid, the goods to which they related could not qualify for the preferential treatment accorded to imported Turkish agricultural products.

47. Accordingly, the Italian customs administration demanded the sum of ITL 5 200 954 129 or EUR 2 686 068.63 from the applicant by way of unpaid customs duties.

B - Criminal and administrative proceedings before the Italian and Community authorities

48. By letter of 28 March 2000 to the Ravenna customs services, the applicant, relying on Article 220(2)(b) and Articles 236 and 239 of the CCC, claimed that import duties should not have been entered in the accounts post-clearance and that the import duties claimed should be repaid. In support of its claim, the applicant pleaded its good faith, errors on the part of the competent authorities that could not have been detected and deficiencies attributable to those authorities.

49. By letter of 15 May 2000, the Italian customs authorities notified the public prosecution service in Ravenna of the facts surrounding the imports effected by the applicant using forged certificates. Having been apprised of those facts, the public prosecution service in Ravenna initiated an investigation.

50. By judgment of 20 December 2000, the Tribunale civile e penale (Civil and Criminal District Court) in Ravenna discontinued the criminal proceedings brought against Mr B. Steinhauser, the applicant's manager, as it considered that the charges brought against him had not been proved.

51. By letter of 30 November 2001, received by the Commission on 12 December 2001, the Italian Republic asked the Commission to decide whether it was appropriate to waive subsequent entry in the accounts of the import duties claimed from the applicant pursuant to Article 220(2)(b) of the CCC, or to repay those duties under Article 239 of the CCC.

52. In accordance with Articles 871 and 905 of the CCC implementation regulation, the applicant indicated that it had inspected the file the Italian authorities had sent to the Commission. The applicant also set out its position and comments, which were sent to the Commission by the Italian authorities in an annex to their letter of 30 November 2001.

53. By letter of 3 June 2002, the Commission requested certain additional information from the Italian authorities, which replied by letter of 7 June 2002.

54. By letter of 25 July 2002, the Commission informed the applicant of its intention not to consent to its claim. Before taking a final decision, however, the Commission invited the applicant to advise it of any observations it may have and to have access to the file so that it may inspect the non-confidential documents.

55. On 6 August 2002, the applicant's representatives consulted the administrative file at the Commission's offices. They also signed a declaration confirming that they had had access to the documents listed in an annex to that declaration.

56. By letter of 15 August 2002, the applicant submitted its observations to the Commission. It maintained, in particular, its position that the competent customs authorities had committed factual errors that it could not have detected, errors which it also likened to failings capable of giving rise to a special situation within the meaning of Article 239 of the CCC.

57. On 18 October 2002, the Commission adopted Decision REC 10/01 (the contested decision'), which was notified to the applicant on 21 November 2002.

58. Firstly, the Commission concluded that it was appropriate to enter in the accounts the import duties that were the subject-matter of the claim.

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59. Secondly, however, the Commission concluded that it was appropriate to repay import duties in respect of the part of the claim relating to the 16 invalid certificates since, in that regard, the applicant was in a special situation within the meaning of Article 239 of the CCC.

60. Thirdly, with regard to the 32 certificates at issue, the Commission concluded, on the other hand, that the circumstances relied on by the applicant could not give rise to a special situation within the meaning of Article 239 of the CCC. Consequently, in Article 2 of the contested decision, the Commission decided that it was not appropriate to repay the import duties relating to those certificates, amounting to EUR 1 702 340.25.

61. Lastly, by letter of 20 June 2003, the applicant made a request to the Commission for access to other documents in the file. The Commission granted that request by letter of 10 July 2003. However, the applicant did not consult the file further.

C - Certificate D 437214

62. By letter of 17 December 2002, the applicant pointed out to the Commission that A.TR.1 certificate D 437214, one of the certificates at issue, had not been classified as forged by the Turkish authorities but simply as invalid. The Commission sent that letter to the Italian customs authorities on 6 January 2003.

63. By letter of 24 January 2003, the Italian customs authorities, referring to the letter from the Turkish customs authorities of 8 March 1999 and a letter from UCLAF of 6 May 1999, stated that that certificate was forged.

64. By letter of 4 March 2003, the Commission requested the Italian customs authorities to notify the applicant of the outcome of the enquiries concerning A.TR.1 certificate D 437214. By letter of 18 March 2003 to the applicant, the Italian customs administration confirmed that that certificate was forged because it had not been issued by the Turkish authorities.

Procedure and forms of order sought by the parties

65. By application lodged at the Registry of the Court of First Instance on 29 January 2003, the applicant brought the present action.

66. Upon hearing the report of the Judge-Rapporteur, the Court decided to open the oral procedure. By way of measures of organisation of procedure, the parties were asked to produce certain documents and reply to certain written questions by the Court. The parties complied with those requests.

67. The par ties presented oral argument and their answers to the questions put by the Court at the hearing on 15 November 2005.

68. The applicant claims that the Court should:

- annul Article 2 of the contested decision;

- order the Commission to pay the costs.

69. The Commission contends that the Court should:

- dismiss the application;

- order the applicant to pay the costs.

Law

70. The applicant puts forward three pleas in law in support of its action, alleging, firstly, infringement of the rights of the defence, secondly, infringement of Article 239 of the CCC and, thirdly, infringement of Article 220(2)(b) of the CCC.

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A - The first plea in law, alleging infringement of the rights of the defence

1. Arguments of the parties

71. The applicant maintains that its rights of defence were infringed during the administrative procedure. It claims, in essence, that, although it had access to the file containing the documents on which the Commission based the contested decision, it did not have access to documents which had a decisive influence on the Commission's overall assessment of the situation. Moreover, according to the applicant, a number of documents that it was able to consult were incomplete. Finally, the examination of the file did not enable it to distinguish documents regarded as confidential from those not so regarded or to ascertain the criteria used to that end.

72. Firstly, the applicant submits that it was not given notice of the following documents in the file: (1) the complete reports of UCLAF's missions in Turkey; (2) all of the correspondence exchanged by UCLAF and the Commission with the Turkish Permanent Representation and the competent authorities in Turkey; (3) all of the correspondence between the Commission and/or UCLAF and the national customs authorities, in particular the Italian customs authorities; and (4) the minutes of the meetings of the Customs Cooperation Committee concerning the A.TR.1 certificates that were considered to be irregular or forged when fruit juice concentrates and other goods originating in Turkey were exported.

73. In its reply, the applicant submits, moreover, that it was not able to gather information on the UCLAF mission in Turkey during October 1998, to which the Commission alludes at recital 32 of the contested decision. According to the applicant, all that can be inferred from a consultation of the file is that a meeting took place between UCLAF and the Turkish Permanent Representation on 13 and 14 October 1998, that meeting having been referred to in a letter from UCLAF dated 21 October 1998. The applicant claims that it had not been aware, either, of the letters UCLAF sent to the Turkish Permanent Representation dated 1 and 9 December 1998 referred to by the Commission in its defence.

74. The applicant submits that the documents in question do not have a merely casual but, on the contrary, a direct and close connection with the question of whether the certificates at issue are indeed forged or simply irregular.

75. Secondly, the applicant challenges the Commission's argument that the fact that its representative had signed a declaration confirming that disclosure had been given of all the documents relating to the case confirmed that it had indeed had access to all the documents in the file. In that respect, the applicant states that that declaration is a standard form and that, unless he is apprised of all of the documents in the file, the person who consults it cannot in fact be satisfied that full disclosure has been given. The applicant thus claims that it had become aware of that declaration, which covered list of documents REC 10/01 and was annexed to the Commission's defence, only when that annex was disclosed.

76. Thirdly, the applicant maintains that a number of the documents to which it had access were incomplete and that it therefore did not have access to all the documents annexed to that declaration. On that basis, the applicant rejects the Commission's assertion that it was able to consult all the reports of the UCLAF mission in Turkey and claims that it had been able to consult only documents relating to the mission reports of 9 and 23 December 1998, consisting of two or three pages.

77. Fourthly, in its reply, the applicant disputes the Commission's argument that it did not, in any event, have right of access to certain documents, including UCLAF mission reports, since those documents were confidential. The applicant argues not only that those reports are not confidential, since the Commission has in any event failed to prove their confidentiality, but also that similar reports have been made available for consultation in comparable proceedings before the Court.

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78. It is apparent from the provisions of Regulation No 1073/1999 that investigation reports are non-confidential. According to the applicant, under Article 9(2) of that regulation, investigation reports constitute admissible evidence in administrative or judicial proceedings of the Member State in which their use proves necessary, in the same way and under the same conditions as administrative reports drawn up by national administrative inspectors, and the same should apply a fortiori to proceedings brought before the European courts.

79. Finally, the applicant states that, by letter of 20 June 2003, it made a further request for access to the file in accordance with Article 255 EC after the present proceedings had been initiated. However, in response to the Commission's written reply dated 10 July 2003, it did not consult the file since the Commission stated that the consultation would relate only to documents to which the applicant had already had access, in particular documents relating to the UCLAF mission reports.

80. The Commission essentially rejects the applicant's arguments.

81. Firstly, it submits that the contested decision is based exclusively on material that the applicant was able to consult, which had already been referred to in the Commission's provisional view expressed in its letter of 25 July 2002. Moreover, the Commission submits that, on 6 August 2002, the applicant had access to the file which was used as the basis for the adoption of the contested decision and that it expressly acknowledged by written confirmation that it had been able to consult all the documents directly or indirectly connected with the matter. The Commission states that the list of documents to which the applicant had access includes the UCLAF mission reports, the voluminous correspondence of UCLAF and various Turkish authorities, as well as the correspondence exchanged by the Commission and/or UCLAF with national customs authorities.

82. In its rejoinder, the Commission disputes the applicant's assertion that the file it consulted on 6 August 2002 did not contain the UCLAF mission reports but only documents relating to the mission reports. The Commission maintains that the documents in question were in fact brief original reports drawn up by UCLAF, dated 9 December 1998 (No 8279) and 23 December 1998 (No 8673), and not merely summaries.

83. Secondly, the Commission states that it is not required, acting on its own initiative, to grant access to all the context documents' which may only have some connection with the case at issue but, on the contrary, it is for the party concerned to request, where appropriate, access to such documents in accordance with Article 255 EC.

84. In the present case, the documents the applicant was unable to consult were context documents. The Commission observes that the further request to consult the file made by the applicant on 20 June 2003, that is, after the contested decision had been adopted, which was granted by letter of 10 July 2003, cannot have any bearing in law. Not only did the applicant fail to follow up that request but, in any event, the consequence of a request made after an administrative procedure has concluded and while proceedings in a case are pending cannot, a priori, , be that procedural rights were infringed during the administrative procedure preceding that request.

85. Thirdly, the Commission maintains that, in any event, the documents in question are not covered by the right of access to the file since they are confidential. In that connection, the Commission notes that the right of access to the file does not extend to access to confidential documents, such as UCLAF or OLAF reports, the Commission's correspondence with non-member States, minutes of meetings attended by non-member States or correspondence exchanged between the Commission and the authorities of the Member States.

86. Moreover, the Commission disputes the relevance of the applicant's interpretation of Article 9(2) of Regulation No 1073/1999. According to the Commission, that provision refers to the final report drawn up by UCLAF in accordance with Article 9(1) of the regulation, whereas Article

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8 of the regulation is concerned with the confidentiality and data protection of the documents drawn up by OLAF.

2. Findings of the Court

87. It is to be noted, at the outset, that observance of the right to be heard must be guaranteed in procedures for the remission of import duties, in particular in view of the power of assessment enjoyed by the Commission when it adopts a decision pursuant to the general equitable provision contained in Article 239 of the CCC (Joined Cases T186/97, T187/97, T190/97 to T192/97, T210/97, T211/97, T216/97 to T-218/97, T279/97, T280/97, T293/97 and T147/99 Kaufring and Others v Commission [2001] ECR II-1337, paragraph 152, the Turkish televisions judgment', and Case T329/00 Bonn Fleisch Ex- und Import v Commission [2003] ECR II-287, paragraph 45).

88. However, it is also to be noted that, in that context, the principle of respect for the rights of the defence implies only that the party concerned be placed in a position in which it may effectively make its views known as regards the evidence, including the documents used against it by the Commission as a basis for the decision. That principle therefore does not require the Commission, acting on its own initiative, to grant access to all the documents which may have some connection with the case at issue when an application for remission is referred to it. If the party concerned considers that such documents are relevant for establishing the existence of a special situation and/or the lack of deception or obvious negligence on its part, then it is for the party concerned itself to request access to those documents in accordance with the provisions adopted by the institutions under Article 255 EC (Case T205/99 Hyper v Commission [2002] ECR II-3141, paragraph 63, and Bonn Fleisch Ex- und Import v Commission , paragraph 46).

89. It is also to be noted, as regards the administrative procedure for remission of customs duties, that the Court has clearly stated that it is at the request of the party concerned that the defendant is required to provide access to all non-confidential official documents concerning the contested decision. If no such request is made, it follows that there is no automatic access to the documents held by the Commission (Case T42/96 Eyckeler & Malt v Commission [1998] ECR II-401, paragraph 81; Case T50/96 Primex Produkte Import-Export and Others v Commission [1998] ECR II-3773, paragraph 64; and Bonn Fleisch Ex- und Import v Commission , paragraph 46).

90. It is in the light of those principles that the plea in law alleging infringement of the rights of the defence must be examined.

91. It is clear from the outset that the applicant expressly acknowledges in its application that it had access to all the documents used by the Commission as the basis for its decision. However, it claims that did not have access to documents which had a decisive influence on the Commission's overall assessment of the situation. In that connection, it states that the documents that were presented to it when access to the file was granted are incomplete. The applicant thus claims that it was not able to consult the two UCLAF mission reports of 9 and 23 December 1998 in their entirety but only reports relating to the mission reports'. Similarly, it states that it was unable to consult the Community mission report of October 1998, referred to at recital 32 of the contested decision, or the letters from UCLAF dated 1 and 9 December 1998 to the Turkish Permanent Representation referred to by the Commission in its defence.

92. The documents to which the applicant refers are not expressly mentioned in the contested decision. That does not preclude the fact that the contested decision may have been based on some of those documents. However, it cannot be accepted that the same applies for all of the voluminous correspondence to which the applicant refers. They are therefore, at the very least as far as some of them are concerned, documents which simply relate to the background to the case at issue.

93. In particular, it cannot be accepted, and there is nothing in the contested decision to suggest

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otherwise, that the minutes of the meetings of the Customs Cooperation Committee concerning A.TR.1 certificates that were considered to be irregular or forged on the export of fruit juice concentrates and other goods originating in Turkey were used as a basis for the contested decision. The same conclusion can be drawn with regard to an opinion of the Ravenna customs services of 12 June 1998 referred to by the Commission in its defence, which the applicant claims it was unable to consult.

94. In any event, where documents which have not been used as the basis of a contested decision are not communicated, any failure to communicate them is irrelevant, given that such documents cannot, in any case, have any bearing on the contested decision. Accordingly, this plea in law, in so far as it concerns the failure to communicate such documents, must be rejected as irrelevant.

95. On the other hand, the same is not true of a failure to communicate documents used by the Commission as the basis for a contested decision.

96. When examining those documents, it is to be noted that, in the present case, the Commission notified the applicant by letter of 25 July 2002 of its provisional assessment that the requirements for granting remission of import duties were not fulfilled. It cannot therefore be disputed that, as a result of that letter from the Commission, the applicant was able, before the contested decision was adopted, to state its position and to make its views known on the evidence which, in the Commission's view, justified the rejection of its application for remission.

97. Indeed, the applicant does not dispute that fact but maintains that the principle of respect for the rights of the defence was breached to the extent that it was refused access to certain documents on which the Commission based its decision or, at the very least, to the extent that those documents were incomplete.

98. It is clear, however, that in response to the Commission's letter of 25 July 2002, the applicant's representative consulted the file relating to the contested decision at the Commission's offices on 6 August 2002. At that consultation, that representative signed a written declaration expressly confirming that access had been granted to all documents directly or indirectly connected with the matter at issue. Furthermore, a list was annexed to that declaration setting out all the documents which that representative had had access to.

99. That list refers to the UCLAF mission reports of 9 and 23 December 1998, bearing numbers 8279 and 8673 respectively. In response to a written question from the Court, the Commission lodged two reports bearing those numbers. At the hearing, the Commission informed the Court that those reports were, in fact, the complete brief reports, the first one, dated 9 December 1998, on the mission undertaken from 12 to 15 October 1998 (No 8279), and the second, dated 23 December 1998, on the investigative mission carried out between 30 November and 2 December 1998 (No 8673), and that no other report had been drawn up on the two UCLAF missions. The Court considers that the fact that the numbers on the first page of the reports are the same as the numbers that were indicated on the list annexed to the declaration of applicant's representative, dated 6 August 2002, demonstrates that, contrary to its assertion, the applicant did have access to the mission reports. With regard to the applicant's request for access to the report of the Community mission in October 1998, suffice it to state that such a report does not exist. Firstly, as the Commission stated at the hearing, report No 8279 is the only report that was drawn up in respect of the mission undertaken between 12 and 15 October 1998 and, secondly, no reference was made in the contested decision to such a report.

100. Next, with regard to the letters from UCLAF dated 1 and 9 December 1998 relied on by the applicant, it is to be noted, firstly, that the list of 6 October 2002 setting out the documents it had access to refers to letter No 8281 dated 9 December 1998 from UCLAF to the Turkish Permanent Representation. It must therefore be concluded that the applicant did indeed have access to that

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letter. Secondly, concerning the letter dated 1 December 1998, the Commission stated, in response to a written question from the Court, that that letter did not exist and that the reference in the defence to a letter from UCLAF dated 1 December 1998 was a mistake. That statement is confirmed by the list of 6 August 2002, which, for 1 December 1998, refers only to a letter from the Turkish Ministry of Justice to UCLAF.

101. As for the correspondence exchanged by the Commission and UCLAF with the Turkish authorities and the national customs authorities of the Member States, it need merely be observed that there is no evidence to suggest that the Commission based the contested decision on any documents other than those in the file to which the applicant had access at the consultation on 6 August 2002.

102. The applicant did not make any further request for access to other evidence in the file during the administrative procedure. With regard to the request for access made by the applicant after the contested decision had been adopted and the present proceedings initiated, that is clearly irrelevant for the purposes of dete rmining whether the applicant's rights of defence may have been adversely affected during the administrative procedure and can have no bearing on the legality of that decision. In any event, the Commission advised the applicant, by letter of 10 July 2003, that it was entitled to consult the documents in question in accordance with the request made under Article 255 EC. The applicant did not act in response to that invitation.

103. The first plea in law must therefore be dismissed.

B - The second plea in law, alleging infringement of Article 239 of the CCC

104. This plea is composed of four parts. The first part concerns incorrect classification of A.TR.1 movement of goods certificate D 437214. The second and third parts relate, respectively, to serious deficiencies attributable to the Turkish authorities and those attributable to the Commission. Lastly, the fourth part concerns lack of obvious negligence on the part of the applicant and the assessment of commercial risks.

1. A.TR.1 movement of goods certificate D 437214

(a) Arguments of the parties

105. The applicant claims that the Commission committed an error in the disputed part of the contested decision by including A.TR.1 certificate D 437214 among the certificates classified as inauthentic. According to the applicant, it is apparent from the evidence in the case-file that that certificate should have been regarded as merely invalid and that, as a consequence, the related import duties should have been repaid. A number of documents in the case demonstrate that the Turkish authorities did not classify certificate D 437214 as inauthentic. The applicant pointed out that error to the Commission by letter of 17 December 2002.

106. Firstly, the applicant maintains that only the letter from the Turkish customs authorities (Prime Minister, Undersecretariat for Customs) of 8 March 1999 to the Italian customs administration might support the argument that that certificate was inauthentic. However, that letter does not make it clear whether the certificate was irregular or inauthentic but simply states that it was not issued and endorsed by our customs office'.

107. Secondly, the applicant submits that that letter was, however, invalidated by the Turkish authorities, in particular in the letter from the Turkish Permanent Representation of 22 April 1999, which clearly states that the certificate in question [was] not correct and [was] not issued according to the rules', that is to say, it had been issued incorrectly.

108. In its reply, the applicant observes that the words not correct' clearly mean that the certificate in question was irregular. The addition of not issued according to the rules' can allow only one interpretation, namely that the Turkish customs authorities had completed and issued the certificates

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in contravention of the rules governing the origin of goods in Turkey. That argument is supported by the phrase it has been understood that these documents had been issued for transit trade', which appears in the same letter. The Turkish customs authorities therefore acknowledged that they had also issued movement of goods certificates under a transit procedure, namely in respect of apple juice concentrates from Iran which had not been processed under the inward processing procedure in Turkey.

109. Thirdly, the applicant notes that the Turkish Permanent Representation's letter of 22 April 1999 refers, in addition to A.TR.1 certificate D 437214, to two other movement of goods certificates, namely those bearing references C 982920 and C 982938. The Turkish Permanent Representation considered that those certificates [were] not correct and were not issued according to the rules', without making any distinction between them. The applicant claimed repayment of import duties relating to those two certificates. The Italian customs authorities classified them as invalid and they were included in the batch of certificates in respect of which repayment of duties was granted in the contested decision. The applicant claims that it can therefore see no reason why, from a legal or factual point of view, certificate D 437214 was assessed differently from certificates C 982920 and C 982938. Contrary to the Commission's assertion, the letter of 22 April 1999 did not make any express correction to the letter of 8 March 1999 since it did not expressly refer to it but merely referred to earlier correspondence.

110. Fourthly, the applicant submits that the accuracy of its argument is also confirmed by a letter dated 10 August 1999 from the Turkish Permanent Representation. Under point X at page 3 of that letter, it is again confirmed that the movement of goods certificates referred to in the letter of 22 April 1999, including certificate D 437214, were issued under the transit procedure in respect of apple juice not originating in Turkey. That letter does not, moreover, state that the certificates in question were inauthentic or forged. UCLAF's letter to the Turkish Permanent Representation of 9 December 1998 contains the same assessment, classifying A.TR.1 certificate D 437214 as not correct'.

111. Lastly, in the reply, the applicant disputes the Commission's argument that the letter from the Italian customs administration of 24 March 2003 confirms that the certificate in question was inauthentic. According to the applicant, in that letter, the Italian authorities refer only to the letter from the Turkish customs administration of 8 March 1999 without, however, commenting on the letter from the Turkish Permanent Representation of 22 April 1999, which was also annexed thereto. Moreover, a letter of 18 May 1999 from the Italian Finance Ministry, listed in an annex to the case-file, is in all likelihood concerned with the letter from the Turkish Permanent Representation of 22 April 1999 and with certificate D 437214, in that it states that it is an irregular certificate. The Italian customs authorities even made a further request to the Turkish customs administration for details concerning the classification of certificate D 437214, but the latter has not yet replied.

112. The Commission notes, firstly, that, in accordance with the rules applicable in the present case under the Association Agreement, it is the Turkish authorities which have competence to determine whether or not Turkish certificates of origin are authentic. In that connection, the Commission points out that the Court of First Instance held in Bonn Fleisch Ex- und Import v Commission , paragraph 77, that the Commission was entitled to accept the declarations of the Spanish authorities that extracts of import certificates were not authentic and that no further enquiry on its part was necessary. According to the Commission, if it can have faith in the declarations of the authorities of Member States concerning the authenticity of such documents, then that must apply all the more so with regard to the authorities of a non-member State, which is not a party to the EC Treaty and is not subject to the Commission's powers in that field.

113. Next, the Commission disputes the applicant's interpretation of the various items of correspondence

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that have been referred to and maintains that, since the certificate in question was classified as a forgery by the Turkish authorities, no fault can be attributed to it.

114. The Commission submits that the letter of 8 March 1999 from the Turkish customs administration must be read as meaning that the certificate at issue was considered to be a forgery because it had not been issued by the Turkish customs authorities. According to the Commission, at no time and in no document have the Turkish authorities reversed the decision of 8 March 1999 that the movement of goods certificate in question was not issued by their services.

115. Firstly, the Commission states that, in its letter of 22 April 1999, the Turkish Permanent Representation did not reverse the earlier decision establishing that the certificate was a forgery but simply stated that it was not correct and had not been issued in accordance with the applicable rules.

116. Secondly, the fact that that certificate was forged was confirmed by UCLAF in a letter of 6 May 1999 and by the Italian central administration responsible for customs in a letter of 18 May 1999, two letters which the Italian customs authorities refer to in a letter of 24 January 2003 to the Commission. The applicant was informed of those matters by letter of 18 March 2003.

117. Thirdly, in their letters of 7 June 2002 and 10 September 2003, the Italian customs authorities also confirmed to the Commission that the Turkish customs authorities had concluded that the certificate was forged.

118. Fourthly, the Commission states that, in its letter of 22 August 2003 to the Italian customs administration, the Turkish customs administration once again confirmed its conclusion of 8 March 1999 and stated that the certificate was forged. It was also stated that the competent controller of the Turkish customs administration had reconsidered the matter and concluded that the certificate was forged.

119. Lastly, the Commission stresses that the applicant's argument that the Turkish customs authorities also issued movement of goods certificates for transit trade is irrelevant. According to the Commission, the applicant is referring to incorrect movement of goods certificates, which are not the subject-matter of these proceedings. Moreover, the incorrect certificates the applicant refers to were not issued by the Turkish authorities for transit trade but, on the contrary, related to goods coming from transit trade.

(b) Findings of the Court

120. It is settled case-law that determination of the origin of goods is based on a division of powers between the authorities of the exporting country and those of the importing country, inasmuch as origin is established by the authorities of the exporting country and the proper working of that system is monitored jointly by the authorities concerned on both sides. That system is justified by the fact that the authorities of the exporting country are in the best position to verify directly the facts which determine origin (Joined Cases C-153/94 and C-204/94 Faroe Seafood and Others [1996] ECR I2465, paragraph 19).

121. That mechanism can function only if the customs authorities of the importing country accept the determinations legally made by the authorities of the exporting country (Faroe Seafood and Others , paragraph 20). The recognition of such decisions by the customs authorities of the Member States is necessary in order that the Community can, in turn, demand that the authorities of other countries with which it has concluded free-trade agreements accept the decisions taken by the customs authorities of the Member States concerning the origin of products exported from the Community to those non-member countries (Case 218/83 Les Rapides Savoyards [1984] ECR 3105, paragraph 27).

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122. In the present case, in order to determine whether the Commission was entitled to conclude that certificate D 437214 was forged, it is necessary to examine the correspondence it exchanged with the Italian customs authorities and the competent Turkish authorities. With regard to the part of the contested decision concerning the forged certificates, it is to be noted that the Commission based its decision essentially on the Turkish authorities' letter of 8 March 1999 to the Ravenna customs services.

123. Annexed to that letter is the list of the 32 certificates the Turkish authorities considered to have been forged, including certificate D 437214. The words used by the Turkish authorities in that letter, namely the certificates that have been listed in annex are not correct and were not issued and endorsed by our customs office', clearly show that they had come to the conclusion that the certificates listed had been forged.

124. It is clear, however, that a comparison between the wording of the letter of 8 March 1999 and the wording of subsequent communications from the Turkish authorities discloses ambiguities as to the classification of certificate D 437214. Thus, the letter from the Turkish Permanent Representation to UCLAF of 22 April 1999, which is written in English, refers to six certificates, including the certificate in question, classifying them as not correct and... not issued according to the rules'. According to that letter, those six certificates were issued for transit trade.

125. It is therefore apparent that the difference between the conclusions set out in the letter of 8 March 1999 and those of 22 April 1999 derives from the interpretation to be given to the words not correct ... and not issued according to the rules'. Even if the use of the expression not correct', which is repeated in UCLAF's letters of 9 December 1998, does not resolve the question of whether the certificates may have been forged, the fact remains that that expression could have been interpreted as meaning that the certificates in question had not been forged.

126. In the light of such ambiguity, it could not have been inferred with certainty from the information available to the Commission before the contested decision was adopted whether certificate D 437214 was forged or merely irregular. The Commission's arguments which rely on the content of the letters from the Italian authorities dated 24 January 2003 and 7 June 2002 cannot in any way affect that finding.

127. Firstly, the letter of 24 January 2003 refers to two items of correspondence, namely a letter from UCLAF of 6 May 1999 and a letter from the central customs directorate in Rome of 18 May 1999. It is clear that those two letters are based on the conclusions set out in the letter from the Turkish authorities of 22 April 1999. Next, the letter of 7 June 2002 evidently merely lists the certificates considered to have been forged on the basis, in particular, of the letter from the Turkish authorities of 8 March 1999, and does not add anything new. The applicant pointed out to the Commission, by letter of 12 November 2001, that it was apparent from the letter from the Turkish Permanent Representation of 22 April 1999 that certificate D 437214 should be classified as incorrect and not as forged.

128. It is clear from the foregoing that, in the light of the differences identified, the Commission was not in a position properly to conclude that certificate D 437214 had been forged prior to the adoption of the contested decision.

129. It is to be noted, however, that in response to a request made by the applicant in a letter of 17 December 2002, that is, after the contested measure had been adopted, the Commission once again questioned the Italian authorities on the classification of the certificate in question. The latter considered it necessary to seek further clarifications from the Turkish authorities. By letter of 22 August 2003, the Turkish authorities not only confirmed the conclusions set out in their letter of 8 March 1999 but also stated that their customs controller had concluded that

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the certificate had been forged, thus removing any doubt on that issue as far as certificate D 437214 was concerned.

130. It is apparent that it is only after the confirmation in the latter communication had been received that the Commission was in a position, on the basis of the evidence in the administrative file, to state with certainty that the certificate in question was a forgery. Consequently, in view of the foregoing factors, the Commission could not properly have refused repayment of customs duties relating to the goods covered by certificate D 437214 at the time when the contested decision was adopted, but should merely, in the light of those factors, have suspended repayment.

131. However, that consideration does not, of itself, suffice to annul the contested decision.

132. An applicant has no legitimate interest in the annulment of a decision on the ground of a procedural defect, where annulment of the decision can only lead to the adoption of another decision identical in substance to the decision annulled (see Case T-16/02 Audi v OHIM (TDI) [2003] ECR II-5167, paragraphs 97 and 98, and the case-law cited). In the present case, it is clear from paragraph 129 above that certificate D 437214 must be classified as a forgery.

133. The applicant cannot therefore be regarded as having any legitimate interest in the annulment in part of the contested decision in so far as such annulment can only lead to the adoption of another decision identical in substance. Accordingly, this part of the second plea in law must be rejected as ineffective.

2. Deficiencies attributable to the Turkish authorities

134. In essence, the applicant submits that the Turkish authorities are in serious breach of their obligations under the Association Agreement and its implementation provisions. Not only did they conceal the truth by classifying the 32 certificates at issue as forgeries but they also engaged systematically in unlawful conduct by issuing movement of goods certificates in respect of goods which were not of Turkish origin. According to the applicant, the system of preferential treatment established by the Association Agreement was misused with the aim of exporting significant quantities of goods originating in non-member countries to the European Union at preferential rates by presenting them as Turkish products via the issue of movement of goods certificates. That policy is apparent from the very high rate at which the number of Turkish imports and exports increased between 1993 and 1996. In the present case, the certificates at issue were authentic documents since they were registered and issued by the customs office in Mersin (Turkey).

135. The Commission essentially rejects the applicant's arguments and submits that the entire action is based on the assertion that the 32 certificates at issue are not forgeries but, on the contrary, were issued by the Turkish customs authorities in Mersin, which made untrue statements about them. According to the Commission, however, the applicant cannot adduce the slightest proof to substantiate that assertion, which is, moreover, rebutted by the clear and precise statements of the Turkish authorities.

(a) Specimens of customs stamps and signatures

Arguments of the parties

136. Firstly, the applicant maintains that the stamps and signatures applied to the certificates at issue demonstrate that they were in all likelihood issued and authenticated by the Turkish authorities.

137. According to the applicant, the Turkish central customs administration confirmed that it sent to the Commission specimen impressions of stamps, which were forwarded to all Community national customs authorities before 1995. In support of that assertion, the applicant states that the Italian Finance Ministry allowed it to take photocopies of five documents, which are also held by the Commission, attesting to the fact that the Turkish authorities sent copies of the specimens in question to

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the Italian authorities and to the Commissi on.

138. The Italian customs authorities, which therefore had copies of the original stamps, compared those with the stamps and signatures on the certificates at issue and, none the less, accepted the latter. Moreover, the copies of the certificates at issue, which are regarded as inauthentic or forged, cannot be distinguished from other certificates that were classified as being in order. Furthermore, the stamps used on the certificates or, at the very least, on the copies, were in parts badly printed and barely legible. The customs in Mersin confirmed to the applicant that the stamps they used were barely legible.

139. Secondly, the applicant states that the requirement for the Turkish authorities to send to the Commission specimens of the stamps and signatures used by their customs offices to endorse movement of goods certificates stems from both the system of preferential treatment established with the Republic of Turkey and Article 93 of CCC implementation regulation. Contrary to what the Commission contends, Article 4 of Decision No 1/96 refers to Article 93 of the CCC implementation regulation and amends it in so far as the words Form A' found there are to be replaced by the words A.TR.1'. There is therefore no need for the requirement to send specimens to be expressly set out in the decisions of the Association Council. The Commission is wrong to claim, with regard to rules on origin, that the reference to the Association Agreement and to the relevant provisions of the Association Council in Article 27(a) and Article 20(3)(d) of the CCC preclude the requirement to send those specimens.

140. Moreover, the requirement to send specimens not only applies in respect of certificates issued in accordance with the simplified procedure provided for in Article 12(5) of Decision No 1/96 but is also of general application and is the basis for checking the authenticity and accuracy of those certificates. That requirement also stems from Article 26 of Decision No 1/95 in that it seeks progressive improvements in the preferential arrangements for trade in agricultural products.

141. With regard to the Commission's argument that the Republic of Turkey is not a member of the Community and it is therefore within its sovereign power whether or not to impose such a communication obligation, the applicant submits that there are many other sovereign States with which it has been agreed that stamps and signatures are to be sent in the context of intra-administration cooperation. By way of example, the applicant refers to the Euro-Mediterranean Agreement concluded with the State of Israel on 21 June 2000 (OJ 2000 L 147, p. 1).

142. Lastly, the applicant states that if, in the context of certificates that were issued in accordance with the General Agreement on Tariffs and Trade (GATT) of 1994, the requirement to send the stamps and signatures of the national customs authorities to the Commission exists even within the European Union itself, with its customs union and single agricultural market, the same requirement should apply a fortiori, on the basis of the abovementioned provisions, to relations between the Community and the Republic of Turkey.

143. The Commission states, firstly, that the Turkish authorities were not required to send to it specimens of the stamps and signatures used by their customs offices. According to the Commission, Article 93 of the CCC implementation regulation is not applicable in the present case since, firstly, it concerns only Forms APR and certificates of origin Form A', which relate only to importation of goods originating in developing countries and, secondly, Article 20 of the CCC does not state that it is applicable, by analogy, under the Association Agreement.

144. Next, the Commission submits that Article 28(4) of Commission Regulation (EEC) No 3719/88 of 16 November 1988 laying down common detailed rules for the application of the system of import and export licences and advance fixing certificates for agricultural products (OJ 1988 L 331, p. 1), as interpreted in the judgment in Bonn Fleisch Ex- und Import v Commission , does not

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impose such a communication requirement either, since Article 1 of that regulation limits its field of application. In fact, the customs union and/or the Association Agreement are not mentioned in that regulation, whilst the decisions of the Association Council and/or Community regulations approving those decisions do not state that Regulation No 3719/88 is applicable by analogy in that context.

145. Moreover, the Commission considers that it is not possible to conclude from the analogy with the Mediterranean agreement linking the European Union with the State of Israel that Article 93 of the CCC implementation regulation is applicable. Indeed, the clear wording of the Association Agreement and the decisions of the Association Council preclude any such conclusion.

146. Furthermore, the Commission considers that the applicant disregards the fact that, under the system established by the Association Agreement, it is for the competent Turkish authorities and not the Community institutions to check A.TR.1 movement of goods certificates and ascertain whether they are inauthentic. According to the Commission, the Turkish authorities clearly stated on a number of occasions, in particular in the letter of 8 March 1999 referred to above, that the 32 certificates at issue were not authentic as they had been forged. The applicant's assumptions concerning the authenticity of the certificates at issue are therefore irrelevant.

147. Lastly, with regard to the applicant's assertions that the stamps are barely legible or that they are worn, the Commission submits that, to the extent that the applicant is referring to copies, it does not necessarily follow that the stamps used by the Turkish authorities on the originals were worn or illegible. In addition, even though the stamps may be old and their impressions barely legible, that does not in any way mean that the certificates in question were issued by the Turkish authorities.

Findings of the Court

- Preliminary observations

148. As a preliminary observation, it is well-established case-law that, in order to ascertain whether any failure by the authorities of a non-member country and/or the Commission to fulfil obligations is liable to constitute a special situation within the meaning of Article 239 of the CCC, the true nature of the obligations imposed on those authorities and the Commission by the applicable legislation must be examined for each case at issue (Hyper v Commission , paragraph 117).

149. The applicant's argument is essentially based on the proposition that the Turkish authorities did in fact issue and endorse the certificates at issue. The various failings alleged by the applicant against the Turkish authorities are circumstantial factors indicating that its proposition is well founded. The applicant thus argues that the special situation it is placed in is a result of all the circumstances of the case, and in particular those relating to the deficiencies it attributes to the Turkish authorities.

- Substance

150. With regard to the failings attributed to the Turkish authorities in relation to stamps and signatures, the applicant's arguments claiming that the stamps and signatures on the certificates at issue are original are irrelevant. It lies within the exclusive competence of those authorities to determine whether documents they have issued are original or forged, as pointed out at paragraphs 120 and 121 above. In the present case, the Turkish authorities concluded that the certificates at issue were forged. Therefore, even if the original stamps held by the customs authorities in Mersin were barely legible, the fact that the stamps on the certificates at issue are also barely legible is irrelevant. The same conclusion is to be drawn with regard to the applicant's arguments

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relying on the fact that the copies of the certificates at issue in its possession are similar to certificates that have not been forged.

151. Lastly, the applicant's argument that the fact that the Italian customs authorities compared the specimen impressions of stamps it held with the certificates at issue before accepting them allows the conclusion that the latter were authentic must also be rejected. According to established case-law, the person liable cannot entertain a legitimate expectation with regard to the validity of certificates by virtue of the fact that they were initially accepted by the customs authorities of a Member State, since the role of those authorities in the initial acceptance of declarations in no way prevents subsequent verifications from being carried out (see Faroe Seafood and Others , paragraph 93, and the case-law cited).

152. The applicant has therefore been unable to demonstrate by its arguments concerning this issue that there are grounds capable of constituting a special situation and, accordingly, those arguments must be rejected.

(b) The registration of the certificates by the Turkish authorities

Arguments of the parties

153. The applicant claims that the fact that the certificates at issue were officially registered confirms that they are authentic. The applicant states that the customs office in Mersin has a register containing the registration numbers of the 32 certificates at issue. In support of that assertion, the applicant states that its representatives saw those records at the Mersin customs office and asked a Turkish official employed there to provide them with a copy. Although initially willing to comply with that request, that official subsequently refused after receiving threats.

154. With regard to the requirement on the part of the Turkish authorities to enter A.TR.1 certificate numbers in customs registers, the applicant rejects the Commission's argument that such a requirement was not imposed by any decision of the Association Council. According to the applicant, it is a matter for the Turkish domestic legal system to determine whether such numbers are to be recorded. It is so obvious that such records should be kept that no decision of the Association Council is required.

155. However, proper mutual assistance not only requires A.TR.1 certificates to be registered but also for them to be filed in Turkey. In this connection, the applicant refers to Article 7(2) of Annex 7 to Decision No 1/95, which provides that requests for assistance are to be executed in accordance with the laws of the requested party. That provision also requires the Turkish customs authorities to register the certificates they issue by recording, at the very least, the information that must be shown in Box 12 of A.TR.1s. Cooperation between the Turkish and Community authorities concerning preferential arrangements is based primarily on registration of certificates, without which it would be quite impossible to provide information as to their authenticity and accuracy.

156. Moreover, according to the applicant, Article 8(1) of Decision No 1/96 requires A.TR.1 movement of goods certificates to be endorsed by the customs authorities of the exporting State. Paragraph 12 of point II of Annex II to Decision No 1/96 requires Box 12 to be completed by the competent authorities. In the present case, Box 12 on each of the 32 A.TR.1s at issue bears not only a stamp accompanied by a signature but also a special registration number under a specific date, which must be transferred to a register kept by the competent customs authorities.

157. Finally, the applicant maintains that an examination of the 32 certificates at issue shows that they correspond with the specimen that was to be followed at that time (the second paragraph of Article 10(2) of and Annex I to Decision No 1/96). In this instance, the certificates refer in the bottom left-hand margin to an approved printer and bear the printer's name, address and distinguishing

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mark in the form of a serial number so that they can be identified. As for the Commission's argument that those responsible for the forgery could have followed the numbers on original certificates as closely as possible, the applicant states that that is pure speculation.

158. The Commission observes, as a preliminary point, that neither the Association Agreement nor the decisions of the Association Council required registers to be kept for the entry of customs certificates.

159. Even if it were accepted that such registers existed, it is conceivable that the Turkish customs authorities issued the applicant with 32 A.TR.1 certificates in respect of batches other than the supplies at issue. It is therefore possible that forgers made copies of 32 authentic certificates which were not related to the supplies at issue delivered to the applicant so that they could subsequently be used in respect of those supplies.

160. Lastly, the Commission states that the applicant's assertion that the forged certificates correspond with the lawful specimens is irrelevant as the latter are a matter of public knowledge. As for the assertion that the certificates at issue also bore the names, addresses, distinctive particulars and serial numbers of the approved printers in Turkey, the Commission submits that only a few of the 32 certificates at issue contained such particulars and that it is difficult clearly to determine whether those printed particulars in fact give the actual particulars of the printers or whether those details have simply been made up. The Commission observes that, even if they were the details of approved printers, it could equally well be supposed that a sufficiently large number of authentic certificates from approved printers were in circulation, enabling a forger to obtain a specimen or a copy in order to make a forgery.

Findings of the Court

161. With regard to the registration of certificates by the Turkish authorities, it is to be observed that neither the Association Agreement nor the implementation provisions expressly provide that such registers are to be kept. However, paragraph 12 of Point II of Annex II to Decision No 1/96 requires the document number to be entered in Box 12 of A.TR.1 certificates. In addition, Article 13 of that decision provides that, where a certificate is divided, Box 12 of the extract is to show, inter alia, the registration number of the initial certificate. It is therefore possible for A.TR.1 certificates to be registered by the authorities issuing them, although the applicant has failed to adduce any evidence capable of demonstrating that such registers exist.

162. Nevertheless, even if it were accepted that the numbers in Box 12 of the certificates at issue were recorded in registers held by the Turkish customs offices, that would not make them authentic certificates. As the Commission rightly observed, forgers would have every interest in using on forged certificates a registration number which corresponded with a lawful certificate.

163. The applicant has not adduced any conclusive evidence establishing that the numbers recorded in those registers correspond with the certificates at issue. It merely states that its representatives observed that such registers existed and proposes to adduce their evidence.

164. It follows that the applicant's arguments are without merit and must therefore be rejected.

(c) The assistance provided by the Turkish customs authorities

Arguments of the parties

165. The applicant claims that it would have been impossible to obtain an A.TR.1 certificate to accompany the goods in question without the assistance of the Turkish customs authorities. The relevant legislation to a large extent guards against the risk of misuse of A.TR.1 certificates; not only are such certificates endorsed by the customs authorities of the exporting State and, at the same time, registered, but also the goods to which they relate are checked to ensure that

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those goods are actually exported. A.TR.1 certificates are made available to the exporter until the goods have been exported and it is only in exceptional circumstances that a certificate may be issued after exportation (see Article 8(1) of Decision No 1/96 and Article 4(1) of Decision No 5/72). Those provisions ensure that when an A.TR.1 certificate is made available to the exporter, the competent customs authorities still have the opportunity to verify whether it corresponds with the origin of the goods.

166. The Commission counters by saying that the applicant's arguments concerning the assistance provided by the Turkish authorities in issuing the certificates at issue are not relevant. The Commission states that it is undisputed that legislation should preclude A.TR.1 certificates being presented in respect of products that are not Turkish in origin. In the present case, the fact that A.TR.1 certificates were presented in respect of the exportations at issue does not mean that there was collusion with the Turkish customs authorities.

Findings of the Court

167. With regard to the argument concerning the assistance provided by the Turkish authorities, it is sufficient to observe that the certificates at issue have proved to be forged. Presentation of documents which prove to be forgeries does not of itself permit it to be concluded that there was some kind of collusion between the exporters and the customs authorities which issued them.

168. That argument is therefore without foundation and must consequently be rejected.

(d) Infringement of the rules on administrative assistance

Arguments of the parties

169. The applicant submits, firstly, that the Turkish customs authorities are under a duty to provide administrative assistance in accordance with the implementation provisions of the Association Agreement. In that regard, the applicant relies on Article 15 of Decision No 1/96 and Article 26 of and Annex 7 to Decision No 1/95. As to the Commission's argument that Decisions Nos 1/95 and 1/96 applied only with effect from 31 December 1995, the applicant states, firstly, that the administrative assistance scheme was already applicable by virtue of previous decisions and, secondly, that Decisions Nos 1/95 and 1/96 laid down a formal right which also applied with regard to t he past.

170. In the present case, the Turkish customs authorities breached the obligation to provide swift and effective assistance in the investigation into the movement of goods certificates and, in particular, their obligation swiftly to communicate precise information as to the authenticity of the certificates at issue. As a result of those breaches, it is justifiable to consider it highly likely that they were involved in issuing those certificates.

171. Next, the applicant sets out the principles which the Turkish authorities would appear to have followed in order to classify A.TR.1 certificates as irregular or forged. Thus, fruit juice concentrates originating in non-member countries which were processed in Turkey under the inward processing procedure and then exported were judged to be irregular as they were not properly endorsed. On the other hand, A.TR.1 certificates issued in respect of fruit juice concentrates under the transit trade procedure in Turkey were considered to be forgeries. That distinction can be discerned in the letters from the Turkish Permanent Representation of 10 July 1998 and 1 October 1999 addressed, respectively, to the Commission and OLAF, and in the letter of 12 October 1999 which UCLAF sent to the Guardia di Finanza (body responsible for the prevention of infringements of a financial nature). The applicant's contention is borne out by the UCLAF mission report of 21 December 1998, which states that the exporters were not the only ones responsible for the situation and that in-depth enquiries at the Mersin office were necessary.

172. In order to demonstrate the lack of cooperation on the part of the Turkish authorities in

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providing administrative assistance, the applicant refers, firstly, to a letter of 9 January 1998 from the Turkish Permanent Representation to UCLAF in which the Turkish authorities stated that there was no need, at that time, for the UCLAF representatives to go to Turkey. The applicant disputes the Commission's assertion that that letter was not concerned with the export of apple juice concentrates.

173. Secondly, the applicant maintains that the letter from the Turkish Permanent Representation of 10 July 1998, referred to at paragraph 41 above, did not state whether, according to the particulars that must be entered in Box 14 of all A.TR.1 certificates, the 22 certificates it mentions were inauthentic or irregular, but merely describes them as false', a word encompassing both possibilities. The applicant submits that, although Box 14 of each A.TR.1 certificate is headed Verification' and Box 15 Results of verification', the documents relating to the specific response to the requests for verification of the certificates at issue were not produced.

174. Thirdly, the applicant states that, at point C of a letter of 26 August 1999 addressed to the Customs Police in Cologne (Germany), the Commission referred to the fact that OLAF was to ask the Turkish authorities to clarify, in relation to each invalid certificate, whether it was forged or an irregular certificate. The applicant states, however, that it is unaware whether that request was made.

175. With regard to the Turkish authorities' contradictory assertions, the applicant submits that certificates which were identical in content were judged, in certain cases, to be in order and, in other cases, to be irregular and, lastly, that certificates which had previously been classified as forgeries were subsequently classified as irregular. The list of documents annexed by the Commission to its defence show that 28 letters were exchanged between 1998 and 1999 with the Turkish authorities without it being possible definitively to establish the facts and that the correspondence with the Turkish Permanent Representation ceased in 1999, the Turkish authorities having refused to cooperate in any way with the Commission as of 2000.

176. By way of example, the applicant refers to A.TR.1 certificate D 437214, which was described as a forgery in the letter of 8 March 1999 and subsequently as irregular.

177. Similarly, between 16 July and 27 September 1999, A.TR.1 certificate D 412662 was, in three separate communications, classified by the Turkish authorities, in turn, as not correct, partially correct and, finally, authentic (letters of 16 July, 19 August and 27 September 1999).

178. Moreover, A.TR.1 certificate D 141591 was initially classified as a forgery (letter of 15 May 1998), and then as not correct (letter of 19 August 1999) on the basis of the fact that the goods to which it related were not Turkish in origin. According to the applicant, A.TR.1 certificate D 141591 must be likened to A.TR.1 certificates C 982920 and C 982938, which were classified as not correct, and in relation to which the Commission abandoned any claim to post-clearance recovery of customs duties. The applicant's response to the Commission's assertion that the Ravenna customs services stated, in an opinion of 12 June 1998, that A.TR.1 certificate D 141591 was a forgery is to say that it was not able to consult that document in the course of the procedure for access to the file.

179. The fact that the information provided was contradictory was confirmed by the Tribunale civile e penale in Ravenna. The applicant submits that the public prosecution service in Verona (Italy) also terminated the criminal investigation concerning the applicant, having concluded, inter alia, that the repeated requests of the police for evidence remained unanswered. According to the applicant, the public prosecutor with competence in the matter in Verona asked the Guardia di Finanza to state on the basis of which documents and evidence the certificates issued by the Turkish authorities were considered substantively to be forged, but the Italian authorities were not able to obtain

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any response.

180. Furthermore, the applicant considers that the fact that the Turkish customs authorities accepted that, of the 103 certificates that were checked, 17 - or 16 if A.TR.1 certificate D 437214 is excluded - were irregular means that they knowingly wrongly endorsed them and, therefore, that fact is sufficient to call into question the quality control for those certificates and the accuracy of the information provided by way of mutual administrative assistance.

181. In that regard, the applicant draws a parallel with the cases which gave rise to the Turkish televisions judgment, with which the present case, contrary to the Commission's assertions, is closely connected. Such a connection is to be found, inter alia, in the fact that the Turkish authorities never stated that they had been duped by third parties and in the fact that, as a result of their contradictory statements, they prevented facts being established.

182. With regard to the Commission's argument that the applicant was attempting to sow the seeds of confusion by referring to the Turkish authorities' statements concerning the certificates considered to be irregular which are not the subject of the present case, the applicant claims that the contradictory nature of the information provided by various Turkish authorities on certificates other than those at issue is essential for the analysis of all the Turkish authorities' statements, including those relating to the certificates at issue.

183. Lastly, with regard to the Commission's argument that certain communications from the Turkish authorities were only interim conclusions, the applicant submits that the provisions on mutual assistance do not envisage the communication of either interim conclusions or provisional reports.

184. The Commission rejects the applicant's assertions seeking to establish that the Turkish authorities breached their obligation to cooperate in a number of respects and disputes that those authorities made contradictory statements.

185. With regard to the obligation to cooperate, the Commission observes, firstly, that Decisions Nos 1/95 and 1/96, which the applicant relies on as the basis of a mandatory obligation to cooperate on the part of the Turkish authorities, were in force only at the final stage of the association scheme and did not apply to the certificates at issue, which were issued during the transitional stage. In that respect, those certificates are covered only by Article 2(3) of Regulation No 4115/86 and Article 11 of Decision No 5/72, as amended by Decision No 1/78, as previously set out at paragraph 12 above.

186. Next, the Commission submits that the analogy drawn with the Turkish televisions judgment is not relevant in the present case, which is based on totally different facts. The Commission points out that the cases which gave rise to that judgment did not concern forged certificates but certificates issued by the Turkish authorities which had proved to be invalid since they did not meet the statutory requirements. In that judgment, the Court found that the Turkish authorities had delayed in clarifying the situation, since their own infringements became clear when they did cooperate. In the present case, it is not possible that the Turkish authorities intended to cover up any infringements on their part since they were not involved in issuing the certificates at issue. Moreover, the Court did not hold that a lack of cooperation on the part of the Turkish authorities was a significant pointer to their involvement in unlawful activities, as the applicant maintains.

187. Moreover, as regards the applicant's argument that the Turkish authorities knew that they had wrongfully issued 16 or 17 A.TR.1 certificates, the Commission maintains that it is of no relevance since those certificates are not the subject-matter of these proceedings and the relevant import duties have already been repaid to the applicant in accordance with Article 239 of the CCC. On the contrary, the fact that the Turkish authorities acknowledged that they had knowingly wrongfully issued 16 or 17 certificates indicates that they helped to clarify the facts without any concern

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for their reputation and constitutes evidence of the credibility of their statements concerning the inauthenticity of the certificates at issue.

188. Furthermore, with regard to the applicant's argument that the Turkish authorities failed to complete Boxes 14 and 15 of the certificates at issue, the Commission submits that those boxes were provided solely for cases where checks are carried out on the content of the certificates, that is, the actual origin of the goods to which they relate. Since the certificates at issue were forged, the Turkish authorities had no reason subsequently to authenticate them by completing Boxes 14 and 15.

189. Lastly, the Commission takes issue with the applicant's proposition that the Turkish authorities' statement in the letter of 9 January 1998 to UCLAF that it was not necessary for UCLAF to undertake an investigation in Turkey constitutes evidence of their complicity. According to the Commission, that letter does not refer to the post-clearance checks of the certificates at issue, which, at that time, had not yet been carried out. In addition, the Commission observes that, after preliminary ad hoc investigations had been undertaken, UCLAF made an inspection visit to Turkey in December 1998 and, moreover, the investigations very quickly made it possible for it to be stated, as of 8 March 1999, that the certificates at issue were not authentic because they had been forged.

190. Secondly, the Commission maintains that the applicant's assertions that the Turkish authorities made contradictory statements are equally devoid of relevance.

191. The Commission states, firstly, that the correspondence referred to by the applicant concerns certificates considered to be invalid but none the less authentic, which are not at issue in the present case. Next, it contained interim conclusions communicated during the initial stage of the investigation, which could only be provisional. The Turkish authorities never reversed their conclusion set out in the letter of 8 March 1999 that the certificates at issue were forgeries because they had not been issued by them.

192. Lastly, with regard in particular to the applicant's assertions concerning certificate D 141591, the Commission maintains that they are not relevant since that certificate is not on the list of forged certificates which is referred to in the letter from the Turkish authorities of 8 March 1999 and is therefore not the subject-matter of these proceedings. The Commission observes, however, that by letter of 3 June 2002 it specifically asked the Italian customs authorities whether the certificate in question was forged or simply inaccurate as to its content. By letter of 6 June 2002, forwarded to the Commission by letter of 7 June 2002, the Ravenna customs services informed their superiors in Bologna and Rome that the movement certificate had been classified as a forgery by the Turkish authorities in a memorandum of 15 May 1998. The fact that it was a forgery was also confirmed by UCLAF following an investigative mission to Ankara in October 1998. Moreover, the Ravenna customs services stated that the applicant had neither appealed against the tax that was subsequently levied following the finding of forgery nor submitted a claim for reimbursement, thus clearly acknowledging that that certificate was a forgery.

Findings of the Court

193. It is to be noted that the relevant legislation applicable to the facts of the case provides that the parties to the Association Agreement are to assist each other in ensuring that customs legislation is correctly applied. Mutual assistance is directed in particular at ensuring that the authenticity and accuracy of movement of goods certificates are checked (as regards the transitional stage of customs union, see Article 2(3) of Regulation No 4115/86 and Article 11 of Decision No 5/72, as amended by Decision No 1/78; as regards the final stage of customs union, see Article 2 of Annex 7 to and Article 29 of Decision No 1/95 and Article 15 of Decision No 1/96).

194. Firstly, with regard to the applicant's argument that failure by the Turkish authorities to

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provide swift and effective assistance to the investigation suggests that they were implicated in the preparing and issuing of the forged certificates, it is to be noted, firstly, that the post-clearance checks of the certificates relating to importations effected by the applicant were triggered by the letter of 15 May 1998 from the Turkish authorities to the Ravenna customs services stating that certificate D 141591 was a forgery. Following that discovery, UCLAF undertook an initial investigative mission in Turkey during the period from 12 to 15 October 1998, that is, barely five months after information had been received from the Turkish authorities. A second mission was undertaken during the period from 30 November to 2 December 1998. According to the applicant, a letter from the Turkish authorities of 9 January 1998 stating that that there was no need for a UCLAF mission is an indication of their failure to cooperate. However, it is not disputed, firstly, that the investigations into the certificates at issue were triggered only after 15 May 1998 and, secondly, that the UCLAF missions were undertaken within a reasonable period following the discovery of the initial forgery.

195. Moreover, the Turkish authorities examined a very large number of certificates - running to several hundred, 103 of which had been presented by the applicant - but the list of certificates considered by those authorities to be forged was sent to the Ravenna customs services by letter of 8 March 1999, that is, less than three months after the second UCLAF mission to Turkey had concluded.

196. Lastly, the voluminous correspondence between the Community authorities and the Turkish authorities concerning the certificates at issue must be noted. In that regard, the applicant's claim alleging that the Turkish authorities, and in particular the Turkish Permanent Representation, refused to cooperate with the Commission as of 2000 is not in any way substantiated. In the same way, the wording of the decision of the public prosecutor of Verona terminating the investigation opened against the applicant does not permit the latter to draw any inferences that are valid in the present case. In fact, in that decision, the competent prosecutor merely refers to the difficulties experienced in obtaining evidence but does not, however, identify who is responsible for those difficulties. Accordingly, that argument is unfounded and must be rejected.

197. Secondly, the applicant claims that, by providing contradictory information on the checks carried out on the accuracy and authenticity of movement certificates, the Turkish authorities made it impossible for the facts to be established. In that connection, the applicant refers to three specific certificates, namely A.TR.1s D 437214, D 141591 and D 412662, which were attributed different classifications in successive communications from the Turkish authorities.

198. It is true, as the Commission observes, that only A.TR.1 certificate D 437214 is included among the certificates at issue, the two others not being the subject of these proceedings. However, it is equally to be noted that the applicant relies on any contradictions there may be concerning the three certificates in question with a view to demonstrating that the checks carried out by the Turkish authorities were insufficiently rigorous in relation to all the movement certificates presented. Given that a procedure that makes inadequate provision for the checking of the accuracy of certificates may constitute a serious breach on the part of the Turkish authorities of their obligations under the Association Agreement, it is necessary to consider whether the applicant's assertions are relevant also in relation to the certificates which are not at issue in the present case.

199. With regard to certificate D 141591, it is apparent from the correspondence in the file that, initially, the Turkish authorities classified it as a forgery and, subsequently, as incorrect. It was the awareness of that ambiguous classification that led the Commission on 3 June 2002 to seek clarification. It is clear from the reply to that request, provided by the Italian authorities by letter of 7 June 2002, that the finding that the certificate in question had been forged was subsequently confirmed by the Turkish authorities in their letter of 8 March 1999, which communicated

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the final conclusions of the investigations carried out in Turkey. It is also clear from that letter of 7 June 2002 that the finding that that certificate had been forged was also based on the conclusions of the investigative mission carried out by UCLAF in Turkey in October 1998. It must therefore be concluded that any contradictions there may have been concerning the classification of that certificate may be disregarded as of October 1998 and that, as of 8 March 1999, there was no longer any doubt that it was inauthentic. Lastly, it is to be noted that that certificate is not one of the certificates at issue in the present case. The applicant has neither appealed against the duties that were levied following the finding of forgery nor applied for repayment of the duties paid, implicitly acknowledging that the certificate in question was inauthentic.

200. With regard to certificate D 412662, by letter of 16 July 1999, the Turkish authorities classified it as incorrect on the basis of the fact that the goods to which it related did not originate in Turkey. Subsequently, the Turkish authorities informed OLAF, by letter of 10 August 1999, that they had made an error and that the certificate in question should be classified as partially incorrect since only part of the goods to which it related were not of Turkish origin. That conclusion was confirmed by a letter of 19 August 1999 to the Ravenna customs services. It is apparent from these three communications that the Turkish authorities did not contradict themselves in the course of administrative cooperation with the Community authorities but that they simply supplemented and partially amended the initial communication of 16 July 1999.

201. The contradiction identified by the applicant is a result of a subsequent communication of 27 September 1999 addressed to its parent company, Steinhauser, in which the Turkish authorities state that certificate D 412662 is correct. It is to be noted, firstly, that that letter was not sent in the context of cooperation between customs administrations and does not therefore constitute an official outcome of the procedure for checking movement of goods certificates. Moreover, it is possible that the Turkish customs authorities may not have been particularly zealous in their dealings with the applicant and thus failed to inform it that the certificate in question was only partially correct. It is therefore to be concluded that the applicant cannot draw from this any inferences that are valid in the present case. That conclusion is not altered by the fact that, in its judgment of 20 December 2000, the Tribunale civile e penale in Ravenna referred to the error committed by the Turkish authorities in the initial classification of that certificate.

202. With regard to certificate D 437214, it emerges from the considerations set out at paragraph 120 above and those to follow that, at a certain point, the Turkish authorities would appear to have reversed their initial conclusion that that certificate was a forgery. It is to be observed, however, that such a contradiction does not emerge clearly due to the lack of precision in the words used in the written communications of the Turkish authorities. Moreover, the ambiguous information sent by the Turkish authorities was the subject of a request for clarification by the Commission. However, a subsequent check made it possible to confirm beyond any possible doubt that the initial classification of that certificate was correct and that it was indeed a forgery.

203. It is apparent from the foregoing that the contradictions alleged by the applicant do not permit the conclusion that the procedure implemented by the Turkish authorities for checking the authenticity of certificates was manifestly irregular. The ambiguities that arose in the course of cooperation between customs authorities concerned only two certificates, namely, A.TR.1s D 437214 and D 141591. Furthermore, the ambiguous statements concerning the classification of those certificates were the subject of requests for clarification and it was ultimately possible for them to be classified with certainty. In relation to the overall number of certificates checked, the Turkish authorities made specific ambiguous statements concerning only a very small percentage of these. Consequently, those statements, which were subsequently clarified, cannot of themselves be regarded as constituting serious failures on the part of the Turkish authorities to fulfil the obligations of administrative assistance arising under the Association Agreement and its implementation

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provisions. Accordingly, no failure of that kind can be attributed to the Turkish authorities.

204. Thirdly, concerning the applicant's argument that the Turkish authorities failed to complete Boxes 14 and 15 of the movement certificates, it suffices to point out that those boxes relate to checks on the actual origin of the goods and to whether the goods correspond with what is stated on the certificate. Since the Turkish authorities had concluded that the certificates were forged, they were not required to complete Boxes 14 and 15 since the question whether goods correspond with inauthentic documents cannot, by definition, arise.

205. Finally, the applicant posits a theory as to the method adopted by the Turkish authorities in classifying certain certificates as incorrect and other, albeit identical, certificates as forged. The applicant's argument is not at all substantiated, with the effect that it must be rejected for lack of evidence.

206. In the light of the foregoing, all of the applicant's arguments relating to alleged infringements by the Turkish authorities of the rules on administrative assistance must be rejected as unfounded.

(e) Additional factors

The applicant's arguments

207. The applicant states that other factors demonstrate further failures on the part of the Turkish authorities, the effect of which is to place it in a special situation.

208. Firstly, the applicant contends that the individual failure on the part of the customs authorities in Mersin was the consequence of a general structural failure on the part of the Turkish authorities. In support of those contentions, it puts forward, firstly, the fact that, at a meeting in Ankara with an official of the Turkish central customs administration, its representative, Mr Nothelfer, was informed that a criminal investigation had been ordered in order to verify all movement of goods certificates. With regard to the Commission's argument that such a criminal investigation only enhanced the credibility of the Turkish customs administration, the applicant observes that the Commission should have known that that was merely one of the excuses provided by that administration to give the impression that action had been taken. The certificates issued were not, in fact, subject to any criminal investigation.

209. Next, it is apparent from what was said at another meeting that took place between the applicant's representatives and Mr Dogran of the Turkish Prime Minister's Office of Economic Affairs that the Republic of Turkey was essentially concerned with the economic development of its undertakings and was unaware of the content and importance of the rules on preferential treatment and the origin of goods. Such an attitude echoed the findings made in the cases which gave rise to the Turkish televisions judgment and it was only subsequently that UCLAF informed the Turkish authorities of the importance of the obligation to comply with the rules governing preferential arrangements. In that regard, the applicant states in its reply that, contrary to what the Commission asserts, the Turkish Prime Minister's Office should have been aware of the conditions for issuing movement certificates.

210. Secondly, the applicant states that it lodged a complaint against Mr Akman, the manager of the company of the same name, through a lawyers' office in Ankara. However, the public prosecutor in Mersin stayed the proceedings in 2001 and the applicant's representatives have yet to be informed of the reasons for this, in spite of repeated requests. The applicant assumes that it was concluded that the 32 A.TR.1 certificates at issue had been endorsed with authentic Turkish customs authorities' stamps and, as a consequence, the competent prosecutor received an order from Ankara to terminate the proceedings.

211. In its reply, the applicant rejects the Commission's argument that the criminal proceedings

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against Mr Akman were terminated because he had no part in the forgeries. The applicant submits, firstly, that it is not certain whether those proceedings were in fact actually initiated. Next, the applicant observes that, if there had been forgery, Mr Akman would have been the principal beneficiary. Finally, the applicant submits that it is apparent from the UCLAF mission report of 23 December 1998 that Commission officials met Mr Bolat of the Mersin public prosecutor's office, who provided them with a copy of all the certificates on which Mr Akman's name appeared. According to the applicant, the Commission did not receive a reply to the request it made at that meeting to be kept informed of the result of the investigations.

212. Thirdly, the applicant states that the Commission would appear to have gone as far as it was possible' with its investigations in Turkey into how the certificates at issue had been issued. The applicant states that UCLAF was not able to consult the customs records at the Mersin office or speak to the competent officials. According to the applicant, the reason why UCLAF was not able to carry out a more thorough investigation is that it would have revealed that a large number of products originating in non-member countries had, for reasons of economic development, and with collusion at the highest political level in Turkey, been exported from Mersin into the European Community using A.TR.1 certificates.

213. The Commission rejects, firstly, the arguments put forward by the applicant concerning its discussions with the Turkish authorities. The Commission submits that the admission by the central customs administration in Ankara that all A.TR.1 certificates had been the subject of a criminal investigation enhanced the credibility of the conclusions set out in the abovementioned letter of 8 March 1999 that those certificates had not been issued by the Turkish customs authorities. Moreover, the Commission submits that the applicant's claim that Mr Dogran was unaware of either the content or the importance of the rules on origin and on preferential treatment is equally devoid of relevance since Mr Dogran, who was a member of the department responsible for economic affairs in the Turkish Prime Minister's Office, was not required to know those rules.

214. Secondly, the Commission states that the fact that the criminal proceedings brought against Mr Akman were stayed may be due to the fact that he had acted in good faith and was not involved in the forgeries. Furthermore, there are very few penal procedure codes which require reasons to be given to the complainant why an investigative procedure is to be stayed.

215. Thirdly, with regard to the applicant's assertion that the Commission and UCLAF pursued their investigation only as far as it was possible' due to a lack of cooperation from the Turkish authorities, the Commission states that the latter cooperated fully and that UCLAF was able properly to carry out its investigations in Turkey and did not discover any false declarations, as evidenced by the mission reports of 9 and 23 December 1998.

Findings of the Court

216. Firstly, the applicant's assertions concerning the content of its representatives' discussions with Mr Dogran of the Turkish Prime Minister's Office of Economic Affairs are of no relevance. Indeed, the question whether an official such as Mr Dogran was aware of the rules governing preferential treatment and the issuing of movement certificates cannot have any bearing on the facts of the case. Likewise, as regards the applicant's claim that an official of the Turkish central customs administration stated that a criminal investigation had been ordered to verify movement certificates, it is sufficient to note it is not only irrelevant but also unsubstantiated.

217. Next, the applicant's arguments relating to the staying of the criminal proceedings against Mr Akman, the manager of the Turkish company of the same name, ordered by the public prosecutor in Mersin, cannot be accepted either. Even if it were to be established that the applicant was not informed of the underlying reasons for that stay, that would not, in any event, permit the conclusion

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that its complaint came to nothing because the public prosecutor in Mersin realised that the certificates at issue were not forged. It is to be noted in that regard, firstly, that that is a matter of Turkish criminal law and, secondly, that the applicant did not even attempt to demonstrate that it was entitled, in its capacity as a complainant and under the Turkish law applicable, to be informed of the grounds on which the order to terminate the proceedings was based. In the same way, the applicant has failed to adduce any evidence to enable it to be established that the Turkish authorities did not respond to the Commission's request to be kept informed of the results of the criminal investigations.

218. Lastly, the applicant's argument that, in its investigations in Turkey, UCLAF came up against a number of obstacles created by the Turkish authorities is not in any way substantiated. In fact, the applicant has not put forward any evidence to enable it to be concluded that UCLAF was not able to carry out a thorough investigation, in particular into the customs administration in Mersin. The alleged lack of cooperation is, moreover, contradicted by the content of the mission reports of 9 and 23 December 1998, which set out the cooperation given by the Turkish authorities.

219. In the light of the foregoing, it must be concluded that none of the factors relied on by the applicant is capable of constituting a serious failure on the part of the Turkish authorities to fulfil their obligations under the Association Agreement and its implementation provisions.

220. It follows from the foregoing that the second part of the second plea in law must be rejected as unfounded.

3. Failings attributable to the European Commission

221. The applicant states, in essence, that the Commission seriously failed to discharge its duty to protect both the applicant and the other importers concerned. The failings attributable to the Commission derive from: (1) the failure to supervise and monitor the Turkish authorities' implementation of the system of preferential treatment; (2) the failure to send to national customs authorities specimens of stamps and signatures used by the Turkish authorities; (3) breach of the obligation to warn importers in good time; and (4) an incorrect assessment of the facts during the investigations carried out in Turkey.

(a) Failure properly to monitor the system of preferential treatment

Arguments of the parties

222. Firstly, the applicant submits that the Turkish authorities did not understand the rules on the origin of goods. In support of that submission, it refers to the observations made by its representatives at their meetings in Ankara and in Mersin with the Turkish authorities. According to the applicant, whenever an A.TR.1 certificate was issued, consent of various kinds was issued by the Turkish Prime Minister's Office for Economic Affairs. Moreover, also in other cases, the competent Turkish authorities endorsed A.TR.1 certificates without taking account of the origin of the goods, clearly unaware that such practices were unlawful. In that regard, the applicant draws a parallel with the cases which gave rise to the Turkish televisions judgment, in which the Court found that, during a period almost identical to that covering the facts in the present case, the competent Turkish authorities had failed to observe the customs legislation applicable, with a view to taking advantage of the nascent customs union with the European Community in order to benefit their own economy.

223. According to the applicant, the provisions on the preparation and issue of A.TR.1 movement of goods certificates are today essentially applied correctly and more strictly. That change came about, however, only after the investigations carried out by UCLAF in Turkey and, no doubt, also as a result of discussions between the Commission and the Turkish authorities following the cases which gave rise to the Turkish televisions judgment, and as a result of the present case.

224. Secondly, the applicant submits that the Commission failed to ensure that the rules applying

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under the Association Agreement were observed, which it was required to do under Article 211 EC and in accordance with the principle of sound administration. The Commission is under a special duty to monitor preference agreements and origin agreements concluded between the Community and non-member countries.

225. The applicant points out that Article 26 of Decision No 1/95 expressly provides that it is necessary to ensure the effective functioning of the customs union and improvements in the preferential arrangements, the Association Council itself having undertaken regularly to examine the improvements made to those arrangements. Moreover, in establishing the customs union, the Commission was to be in constant contact with the competent authorities in Turkey through the intermediary of the Association Council and the Customs Committee, on which it was represented. The essential purpose of those bodies should have been to ensure that the provisions relating to the origin of goods were understood, properly introduced and continuously monitored in Turkey.

226. The applicant states that, by neglecting to refer in reasonable time to the Customs Cooperation Committee in order to clarify the situation and to take measures to ensure compliance by the Turkish customs administration with decisions of the Association Council, the Commission failed to discharge its duty of diligence. In that regard, the applicant states that it does not understand the Commission's argument that the Association Council and the Joint Customs Committee could act only by unanimous decision. Given that the Association Council makes decisions which the Turkish and European customs administrations are obliged to comply with, the Commission's serious failure derives, firstly, from the fact that it did not apprise itself of whether the decisions of the Association Council were being complied with, either within the Customs Committee or in Turkey, and, secondly, the fact that it failed to take the opportunity presented by the cases which gave rise to the Turkish televisions judgment to make more rigorous checks, as of 1993 or 1994, to ensure that the rules on the origin of agricultural products were being complied with.

227. Thirdly, the applicant adds that the Commission had a greater duty of diligence with regard to the Republic of Turkey, on account in particular of the previous failings by the Turkish authorities established in the Turkish televisions judgment. Moreover, the applicant submits that exports of Turkish goods to the Community increased greatly during the period that coincided with the importations at issue. The Commission was not in a position to accept that significant increase in exports without requiring, firstly, specimen stamps and signatures to be produced and, secondly, certificates of origin to be adequately checked as part of the monitoring procedure.

228. Furthermore, the fact that contradictory and misleading information was sent in the course of that monitoring procedure should have required the Commission to carry out further checks. Lastly, that requirement to monitor was made even more pressing on account of the fact that the Turkish authorities did not use the reverse side of the A.TR.1 certificates to give a clear response as to whether they were valid.

229. Firstly, the Commission disputes the analogy drawn with the cases giving rise to the Turkish televisions judgment in its entirety. The Commission submits, firstly, that there is a major difference between the present case and those cases, namely that the present case is concerned with forgery by third parties of certificates of origin in which the Turkish authorities had no involvement. The Turkish authorities' failure to provide information and to comply with the rules are therefore not relevant since those authorities were not involved in the forgery of the 32 certificates at issue. However, the Commission considers it necessary, in order to demonstrate the error of the applicant's case, to set out the differences between the present case and the facts underlying the Turkish televisions judgment.

230. Thus, according to the Commission, it is noted in the Turkish televisions judgment (paragraph 261) that the Turkish authorities had waited more than 20 years before transposing the provisions

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in the Association Agreement and the Additional Protocol relating to the compensatory levy. Moreover, the Commission had not properly monitored that transposition. On the contrary, in the present case, the certificates of origin in question were forged without any involvement on the part of the Turkish authorities. Next, in the same judgment (paragraph 262), the Court found that the relevant decisions of the Association Council had not been published in the Official Journal, whereas in the present case all the relevant measures were properly published. Lastly (paragraph 263), the Commission reacted only four years after the first complaint had been lodged concerning problems relating to the implementation of the provisions in question, whereas, in the present case, the Commission did not delay in taking action in relation to the Turkish authorities.

231. Secondly, the Commission submits that the voluminous correspondence exchanged with the competent Turkish authorities together with the fact that UCLAF carried out an investigative mission in Turkey a relatively short time after the initial suspicions of forgery had arisen demonstrate in themselves that the Commission did not fail to discharge its duty to examine and monitor the preferential arrangements.

232. Thirdly, the Commission states that the applicant failed to have regard to the fact that, under the Association Agreement and the relevant decisions of the Association Council and the Joint Customs Committee, it was the Republic of Turkey and not the Commission which had competence to ensure that the rules on origin were complied with in Turkey. The Commission states that, whilst it did not in any case let the Republic of Turkey act as it saw fit, it merely sought the views of the Turkish Government and, where necessary, carried out on-the-spot checks. Similarly, the Association Council and the Joint Customs Committee - even if they had had competence in the matter, which was not the case - were joint bodies which could act only by unanimity (Article 23(3) of the Association Agreement) and therefore the Commission could not in those fora have imposed any decision against the will of the Turkish representatives. Nevertheless, all the decisions of the Association Council were implemented and spot checks were carried out on the customs administrations of the Member States. Moreover, the Commission states that it properly apprised the Turkish authorities of all the problems that arose concerning the preferential arrangements and that those authorities clarified all the circumstances.

233. Lastly, with regard to the applicant's argument that the Turkish authorities' contradictory statements concerning the certificates at issue would have justified more rigorous monitoring on its part, the Commission states that, as there were no contradictory statements, that argument is not relevant.

Findings of the Court

234. With regard to the alleged failures relating to the supervision and monitoring of the implementation of the Association Agreement, it is to be noted that, pursuant to Article 211 EC and the principle of good administration, the Commission had a duty to ensure the proper application of the Association Agreement (see the Turkish televisions judgment, paragraph 257, and the case-law cited). That duty also resulted from the Association Agreement itself and the various decisions adopted by the Association Council (the Turkish televisions judgment, paragraph 258).

235. In the present case, the applicant has failed to demonstrate that the Commission did not do what was necessary to ensure the proper implementation of the Association Agreement.

236. Firstly, as regards the applicant's argument that the Turkish authorities did not understand the rules on the origin of goods that could benefit from the preferential tariff measures, it suffices to state that it is irrelevant, since the certificates at issue were not issued by those authorities. As is apparent from paragraph 150 et seq., the applicant has not been able to establish that the Turkish authorities were involved in issuing those certificates.

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237. Next, with regard to the applicant's argument that the Commission should have carried out more rigorous checks on the implementation by the Republic of Turkey of the rules on issuing certificates of origin on account, firstly, of the considerable increase in imports from Turkey and, secondly, of the findings in the cases which gave rise to the Turkish televisions judgment, it suffices to point out that that argument is also irrelevant.

238. The applicant relies on general assertions referring to systematic infringements of the Association Agreement by the Turkish authorities without, however, substantiating these. Moreover, the applicant cannot, by references to the findings made by the Court in the Turkish televisions judgment, validly reach the general conclusion that the entire procedure of the Turkish authorities for issuing movement certificates systematically infringed the rules on origin. Even if it were conceded that the Commission was required to carry out more rigorous monitoring of the implementation of the Association Agreement, it must be noted, as is apparent from paragraph 194 above, that UCLAF conducted investigations in Turkey as soon as the initial indications arose that movement certificates had been forged and, accordingly, the Commission did in fact ensure that the Association Agreement was properly implemented.

239. The applicant's arguments concerning the Commission's obligation to refer to the Association Council or the Customs Union Joint Committee, which was established by Article 52 of Decision No 1/95, are irrelevant. In fact, under Article 22 of the Association Agreement, the main task of the Association Council is to adopt the measures necessary to ensure the smooth functioning of that agreement and compliance with it by the Contracting Parties (Turkish televisions judgment, paragraph 274). Similarly, under Article 52(1) of Decision No 1/95, the task of the Customs Union Joint Committee is to ensure the proper functioning of the customs union, inter alia by formulating recommendations to the Association Council. Moreover, Article 52(2) of Decision No 1/95 provides that the Contracting Parties are to consult within the Joint Committee on any point relating to the implementation of that decision which gives rise to a difficulty for either of them.

240. Clearly, in the light of the foregoing, the applicant has not been able to establish that the Commission encountered difficulties concerning the administrative assistance agreed upon with the Republic of Turkey which would have justified discussion within those bodies of the adoption of specific measures to combat such difficulties. With regard in particular to the ambiguous statements made by the Turkish authorities concerning three movement certificates, it is sufficient to observe that it is apparent from paragraph 203 above not only that those certificates were not of such a kind as to call into question the validity of the monitoring procedure but also that the Turkish authorities cooperated with the Commission when it requested clarifications concerning those certificates.

241. With regard to the analogy the applicant attempts to draw with the facts which gave rise to the Turkish televisions judgment, it is to be noted that those facts are not comparable with the facts under examination in the present case. Indeed, in the cases which gave rise to the Turkish televisions judgment, the Court found that the Turkish authorities were responsible for serious deficiencies, including, in particular, the failure to transpose the provisions of the Association Agreement, which affected all exports of television sets from Turkey. Those deficiencies contributed to the occurrence of irregularities in connection with exports, placing exporters in a special situation within the meaning of Article 239 of the CCC (Turkish televisions judgment, paragraphs 255 and 256).

242. In the present case, it has not been established that there were such deficiencies affecting all exports of fruit juices as far as the certificates at issue are concerned. It is to be noted that the deficiencies of the Turkish authorities set out in the contested decision that might constitute a special situation concern solely the movement certificates presented by the applicant which had been incorrectly issued by the Turkish customs administration. It is in relation to those certificates that the Commission considered that the competent Turkish authorities knew or should have known

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that the goods in respect of which they issued certificates of origin did not meet the requirements necessary to qualify for preferential treatment. On the other hand, as stated above, no deficiency on the part of the Turkish authorities contributed to the drawing-up of the 32 certificates at issue.

243. In the light of the foregoing, the applicant's arguments must be rejected as unfounded.

(b) Failure to send specimen stamps and signatures

Arguments of the parties

244. The applicant states that, by failing to send to the Member States, and in particular the Italian Government, specimens of the stamps and signatures used by the Turkish customs offices of export, in particular those in Mersin, the Commission was in serious breach of its duty to importers such as the applicant. According to the applicant, Article 93 of the CCC implementation regulation, which also applies in the context of the Association Agreement by virtue of Article 20 of the CCC, required the Commission to ensure that the Turkish customs administration sent those specimens to it.

245. The applicant submits that the Turkish authorities acknowledged that they were under an obligation to send such specimens to the Commission and stated that they had in fact at least sent the stamps used in Mersin. That failure was all the more serious since the official stamps used by the Mersin customs office were very worn and the impression was therefore very faint. The applicant points out that stamps and signatures are the vital means of establishing, including within the Community, whether or not the Turkish customs administration had a part in issuing the certificates at issue and at the same time facilitate improved monitoring of certificates presented by importers.

246. In the present case, the competent Italian customs authorities would have been in a better position to make comparisons if the Commission had sent to them all the stamps and specimen signatures of the Mersin customs office and had ensured that the stamps were renewed within the specified period. In effect, either the complaint alleging forgery would not have been made or, if there had been forgery, it could have been discovered and investigated at the time of the initial importations at issue.

247. The Commission simply states that the Republic of Turkey was not required to send to it the original signatures and stamps of the Mersin customs authorities on account of the fact that, as it explained previously (see paragraph 143 above), Article 93 of the CCC implementation regulation is not applicable in the present case.

Findings of the Court

248. The applicant charges the Commission with having breached its obligations under the applicable legislation by failing to send to the Italian customs authorities specimens of the stamps and signatures used by the Turkish customs administration. The Commission thereby facilitated the movement of forged certificates. The question therefore arises whether the Commission was required to obtain the specimens in question and subsequently to send them to the customs authorities of the Member States.

249. Contrary to what the applicant claims, Article 93 of the CCC implementation regulation is not applicable in the present case. That article did not therefore require either the Turkish authorities to send specimens of the stamps and signatures used by their customs offices or the Commission to forward them to the Member States. That conclusion follows from the position of Article 93 in the scheme of the CCC implementation regulation, namely under Subsection 3, entitled Methods of administrative cooperation', of Section 1, entitled Generalised system of preferences', of the chapter dealing with the preferential origin of goods. That chapter forms part of Title IV of

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the CCC implementation regulation, which is concerned with the origin of goods. As is clear from Article 67, read in conjunction with Article 93, of the CCC implementation regulation, the latter provision lays down methods of administrative cooperation applying to trade between the Community and developing countries to which the Community grants tariff preferences. It is therefore clear that Article 93 of the CCC implementation regulation does not affect goods originating in Turkey.

250. Moreover, it can be concluded from Article 20(3)(d), read in conjunction with Article 27(a), of the CCC that, in agreements establishing systems of preferential tariff treatment concluded between the Community and non-member countries, rules on the origin of goods are to be determined in those agreements themselves. In the present case, it is clear that the Association Agreement establishes such a system. It is to be observed that neither the agreement in question nor the decisions of the Association Council implementing its provisions laid down any obligation for specimens of stamps and signatures to be sent from one Contracting Party to another.

251. As for the final stage of customs union, that is, the period after 31 December 1995, Article 29 of Decision No 1/95 provides that mutual assistance between the customs authorities of the contracting parties is governed by the provisions in Annex 7 thereto, which, as far as the Community is concerned, cover matters falling within its competence. The provisions in Annex 7, which lay down exhaustive rules on the methods of administrative cooperation, do not make any reference whatsoever to any obligation to send specimen stamps and signatures. Moreover, Decision No 1/96 of the EC-Republic of Turkey Customs Cooperation Committee, which sets out the implementation provisions for Decision No 1/95, does not impose such an obligation either.

252. That finding is not affected by the applicant's argument that Article 4 of Decision No 1/96 refers to Article 93 of the CCC implementation regulation. Article 4 merely establishes that Community and Turkish customs legislation is to apply in trade in goods between the two parties, in their respective territories, under the conditions laid down in Decision No 1/96. Chapter 2 of that decision, entitled Provisions concerning the administrative cooperation for the movement of goods', sets out the basic conditions and formal requirements to be satisfied by movement of goods certificates issued in commercial trade between the Community and the Republic of Turkey but does not, however, impose an obligation to send stamps and signatures. Moreover, Article 15 of Decision No 1/96 provides that the authenticity and accuracy of certificates are to be checked within the framework of mutual assistance provided for in Article 29 of and Annex 7 to Decision No 1/95.

253. Finally, the only situation in which such a requirement to send the specimens in question is expressly provided for is under the simplified procedure for the issue of certificates (see Article 12(5)(b) of Decision No 1/96 and Article 9a(5)(b) of Decision No 5/72, as amended by Decision No 2/94). Under the provisions applicable, certificates issued in accordance with the simplified procedure must specifically make reference to the simplified procedure (see Article 9a(6) of Decision No 5/72, as amended by Decision No 2/94). The certificates at issue do not mention the simplified procedure at all.

254. With regard to goods imported during the transitional stage of customs union, that is, up to 31 December 1995, neither Decision No 5/72 nor Decision No 4/72 lays down an express requirement that specimen stamps and signatures are to be sent.

255. Clearly, during the entire period covering the importations in question, the Republic of Turkey and the Commission were not under any obligation to send specimens of the stamps and signatures used by their customs authorities. Accordingly, the Commission could not have been required to send the specimens in question to the customs authorities of the Member States.

256. That finding is not affected by the applicant's argument concerning the applicability of Regulation

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No 3719/88. In that connection, it is sufficient to observe that Article 1 of Regulation No 3719/88, concerning its scope, provides that the regulation applies to certificates provided for in regulations that are specifically listed in that article. Clearly, neither the Association Agreement nor its implementation provisions are referred to. Similarly, none of the relevant provisions for the implementation of the Association Agreement refers to that regulation.

257. Since the Commission is not under any actual obligation to send specimens of stamps and signatures to the Member States, it must be concluded that this complaint is unfounded.

258. In any event, this complaint is also irrelevant since, as the Commission observed at the hearing, the Republic of Turkey sent the stamps used for A.TR.1 certificates voluntarily.

259. This complaint must therefore be rejected.

(c) Breach of the obligation to warn importers in good time

Arguments of the parties

260. The applicant criticises the Commission for having breached its obligation to warn importers in good time deriving from the De Haan case-law (Case C-61/98 De Haan [1999] ECR I5003, paragraph 36). That case-law imposed on the Commission an obligation to warn importers in good time where it has been informed of irregularities concerning imports of goods from a non-member country. The applicant acknowledges that, in Hyper v Commission , paragraph 126, the Court of First Instance held that, as there is no such provision in Community law, there is no obligation to warn importers of any doubts as to the validity of customs transactions effected by those importers under the system of preferential treatment. However, such an obligation arises where the Commission obtains specific information on a failure to comply with the rules on origin in an exporting country, even if it does not take steps immediately.

261. In the present case, in 1994 or 1995, the European Parliament drew the Commission's attention to irregularities concerning certificates of origin issued in Turkey relating to a number of products, including fruit juice preserves. However, the Commission did nothing about this for years, taking steps only after 20 years in the case of Turkish television sets (the Turkish televisions judgment, paragraphs 261 and 262), and even then only after UCLAF had been established and carried out its first on-the-spot investigations.

262. Moreover, the applicant submits that it is clear from the content of a letter from UCLAF of 9 December 1998 to the Coordination Directorate of the European Community in Ankara that the Commission undoubtedly knew as of 1993 that apple juice concentrates were being exported to the European Union with the aid of illegal certificates of origin. In any event, the Commission should have known as a result of the 1993 mission report, which was lodged in connection with the cases which gave rise to the Turkish televisions judgment, that similar infringements of the rules on origin were being committed in exports from Turkey of other products, such as fruit juices.

263. Lastly, the applicant submits that, along with the requirement to issue a warning, the Commission was required to provide national authorities with the means to enable them to check the authenticity of certificates issued by the Turkish authorities, in the same way as was done recently in the case of imports of sugar from Serbia and Montenegro (Notice to importers, OJ 2003 C 177, p. 2).

264. The Commission observes, as a preliminary point, that it was not under any obligation to warn importers in good time. The Commission refers, firstly, to the principles laid down in that regard by the Court of First Instance in Hyper v Commission , paragraphs 126 to 128, according to which there is no provision in Community law which expressly obliges the Commission to warn importers of doubts as to the validity of customs transactions effected by those importers under the system of preferential treatment. As the Court also stated in Hyper v Commission, the Commission can

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be obliged, by virtue of its general duty of diligence, to issue a general warning to Community importers only when it has serious doubts as to the legality of a large number of exports effected under a system of preferential treatment.

265. In the present case, the Commission argues that, contrary to the applicant's assertions, the Commission did not have serious doubts of that nature in 1993 and that it was only as of 1998, after an investigation procedure had been initiated, that it had available to it more specific information on incorrect and forged certificates. With regard to the alleged warning from the European Parliament, the Commission observes that the applicant cannot refer to a single European Parliament resolution on that matter that was published in the Official Journal. Moreover, the Commission states that, firstly, the purpose of parliamentary questions is not to provide the Commission with information but, on the contrary, to seek information from it and, secondly, the applicant did not even state that the European Parliament had taken a view on whether certificates of origin relating to imports of apple juice from Turkey had been forged.

266. Next, the Commission disputes any analogy between the facts in the present case and those in De Haan. In that case, according to the Commission, the competent Netherlands customs authorities were already aware of, or at least seriously suspected, fraud even before the customs transactions giving rise to the import levy had been effected. In the present case, on the contrary, the first suspicions as to the inauthenticity or invalidity of the certificates of origin arose only after the importations at issue had been carried out. The applicant's last importations were carried out on 20 November 1997, whereas the Commission and the Italian customs authorities became aware of the first indications of irregularities only during 1998.

267. Moreover, the Commission states that, even if it had been under an obligation in the present case to warn importers in good time, its failure to issue a warning would not have caused the damage alleged by the applicant, namely that it incurred import duties, since its importations had already ceased by the time the Commission could have begun to warn it. The Commission states that the applicant's argument amounts to an assertion that the Commission should in a general manner have suspected the Republic of Turkey of infringing the Association Agreement, which is not a task that can fall to it.

268. Lastly, the Commission rejects the analogy with the situation concerning imports of sugar from Serbia and Montenegro. The Commission's warning to importers in that case was issued expressly on account of deficiencies in administrative cooperation with the authorities of Serbia and Montenegro. That is not the case with the Turkish authorities, which, on the contrary, cooperated fully with the Commission.

Findings of the Court

269. The applicant criticises the Commission for failing in its duty to warn importers in good time when it was aware of irregularities concerning exports of products originating in Turkey.

270. It is to be noted that, according to well-established case-law, there is no provision in Community law which expressly obliges the Commission to warn importers of doubts as to the validity of customs transactions effected by those importers under the system of preferential treatment (De Haan , paragraph 36, and Hyper v Commission , paragraph 126).

271. It is true that in paragraph 268 of the Turkish televisions judgment the Court found that such an obligation on the Commission may, in certain specific cases, be inferred from its general duty of diligence toward traders. In the cases giving rise to that judgment, the Commission was aware of the fact that, or seriously suspected that, the Turkish authorities had made serious errors in their application of the Association Agreement (in particular, by failing to transpose the legislation on the compensatory levy) and that those errors affected the validity of all exports of television

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sets to the Community.

272. However, it is to be noted that the Court also held in Hyper v Commission that the Commission can be obliged, under its general duty of diligence, to issue a general warning to Community importers only when it has serious doubts as to the legality of a large number of exports effected under a system of preferential treatment (Hyper v Commission , paragraph 128).

273. In the present case, the applicant has failed to demonstrate conclusively that the Turkish authorities made serious errors affecting all exports of fruit juice concentrates which contributed to the movement of forged certificates. As is apparent from paragraph 242 above, no analogy can therefore be drawn with the facts which gave rise to the Turkish televisions judgment.

274. Moreover, at the time of the importations at issue, the Commission could not have entertained serious doubts concerning imports of fruit juice concentrates from Turkey. It is clear from the correspondence exchanged by the Commission, the Italian authorities and the Turkish authorities that it was only as of the end of 1998, after the Italian customs authorities had discovered the first forged certificate and an investigation procedure had been initiated, that the Commission was in a position to be aware of the existence of forged certificates. Therefore, as the Commission rightly observes, even if the Commission had been required to issue a warning to importers as soon as the initial doubts arose as to the legality of the certificates at issue, it would not have been able to avert the damage suffered by the applicant, given that the last of the importations at issue was effected on 20 November 1997.

275. The applicant has not substantiated its argument that the Commission undoubtedly knew, as of 1993 or 1994, that fruit juice concentrates were being exported from Turkey by means of illegal movement certificates and that argument must therefore be rejected.

276. The same applies to the argument concerning the alleged warning from the European Parliament enjoining the Commission to investigate irregularities in movement certificates issued by the Republic of Turkey affecting a large number of products. In the absence of evidence, that argument must be rejected.

277. Also to be rejected is the applicant's assertion that the Commission should have known, as a result of the UCLAF mission report in the cases which gave rise to the Turkish televisions judgment, that similar infringements of the rules on origin had been committed in relation to exports of other products, such as those in the present case. Firstly, the applicant fails to substantiate that assertion and, secondly, the facts investigated by UCLAF in the course of that mission were not connected with certificates that had been forged by a third party but, rather, with certificates unlawfully issued by the Turkish authorities.

278. Furthermore, with regard to the applicant's assertion that it is clear from the content of a letter of 9 December 1998 to the Coordination Directorate of the European Community in Ankara that the Commission knew, as of 1993, that apple juice concentrates were being exported with the aid of illegal certificates of origin, it is to be noted that that letter, which was lodged by the Commission in response to a written request from the Court, does not contain anything to substantiate that assertion. In fact, in that letter, the Commission requests verification of all exports of fruit juice concentrates for the period from 1993 to 1998 inclusive, but does not, however, express any view as to when it had become aware of the existence of irregularities.

279. Finally, the analogy with the warning issued by the Commission to importers in the context of imports of sugar from Serbia and Montenegro is irrelevant. That warning was based, firstly, on the fact that there were well-founded suspicions that fraud was being perpetrated on a massive scale and, secondly, on deficiencies in administrative cooperation with the competent authorities. However, in the present case, the applicant has not been able to establish similar facts.

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280. It follows from the foregoing that the Commission did not breach its obligations by failing to warn the applicant, before the importations at issue were effected, of doubts it may have had as to the legality of the certificates at issue.

281. It follows that this complaint is unfounded and must therefore be rejected.

(d) Incorrect assessment of the facts during the investigations carried out in Turkey

Arguments of the parties

282. The applicant submits that it is apparent from the defence that the Commission did not properly investigate the facts during the mission carried out in December 1998, or that it was not able to carry out a proper investigation as a result of a lack of cooperation on the part of the Turkish authorities, or that it refuses to disclose the results of any such investigation. According to the applicant, the provisions on mutual assistance, in particular Articles 3, 6, 7 and 8 of Annex 7 to Decision No 1/95, provide the Commission with an adequate legal basis for conducting an investigation enabling it properly to establish the facts. The Commission would thus have been able to establish whether the certificates at issue had been issued by the Turkish authorities, registered with the Mersin customs office and bore the latter's stamps, in the same way as if a criminal investigation had been undertaken in respect of any persons responsible for the forgeries. By failing to do so, the Commission committed a serious error.

283. The Commission submits that, contrary to the applicant's assertions, it carried out a proper examination and assessment of all the relevant facts. The applicant fails generally to have regard to the fact that the Republic of Turkey is not a Member State of the Union and that, accordingly, the Commission does not have any powers in Turkey other than those expressly conferred on it by that country.

Findings of the Court

284. With regard to the alleged deficiencies attributable to the Commission resulting from the fact that UCLAF failed to conduct a proper investigation in Turkey, it suffices to state that the applicant is not able to substantiate its argument. Moreover, there is no provision applicable in the present case which obliged UCLAF to adopt the methods of investigation advocated by the applicant. Lastly, even if it were accepted that UCLAF did not carry out a full investigation in the course of its missions in Turkey, the applicant has failed to demonstrate the need for such an investigation by adducing evidence capable of calling into question the validity of the checks carried out by the Turkish authorities on the accuracy of the certificates at issue.

285. Accordingly, the applicant's complaints concerning the alleged deficiencies attributable to the Commission are unfounded and must therefore be rejected.

4. Lack of obvious negligence on the part of the applicant and the assessment of risks

(a) Arguments of the parties

286. Firstly, with regard to lack of negligence on its part, the applicant begins by stating that, in the contested decision (points 53 to 56), the Commission rightly concluded that it had acted in good faith and taken all due care in relation to the A.TR.1 certificates considered to be illegal. The same conclusions apply with regard to the certificates at issue since there is no apparent difference between them and the certificates considered to be illegal. Furthermore, in the contested decision, the Commission did not, rightly, criticise the applicant in any way for failing to act prudently and with due care also in relation to the certificates at issue.

287. Next, the applicant denies that it displayed obvious negligence by failing to ensure that the certificates at issue that were used in the course of its trade relations were authentic and

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valid. The applicant states that there were no signs to prompt fears that certificates may have been forged or to lead it to believe that the Turkish authorities were issuing A.TR.1 certificates in relation to goods which were not of Turkish origin. It concluded that the Turkish authorities had, over a long period of time, seriously infringed the rules on certificates of origin only as a result of meetings its representatives held in Turkey, correspondence exchanged by the Commission and the Italian authorities with the Turkish authorities, and the partial access it had to the file.

288. Moreover, the applicant submits that the import transactions effected with the Turkish company Akman were normal business transactions. According to case-law, where imports form part of normal trade practice, it is for the Commission to prove that importers are guilty of obvious negligence (Eyckeler & Malt v Commission , paragraph 159, and the Turkish televisions judgment, paragraph 297).

289. Lastly, in its reply, the applicant disputes the Commission's argument that, were the Court to find that the applicant was in a special situation, the Commission would have to carry out a new assessment as to whether there was no obvious negligence on the part of the applicant. According to the applicant, since the Commission did not adopt a position in the defence on the conditions pertaining to it in the application of Article 239 of the CCC, it is now barred from availing itself of that argument not only in the present proceedings but also in the event that the present action is held to be well founded. Moreover, the applicant considers that if the Commission had concluded in its rejoinder that there had been obvious negligence, either such an argument should have been rejected on the ground that it is time-barred or the applicant should have been given the opportunity to submit further observations. Any other solution would confer an unfair advantage upon the Commission.

290. Secondly, concerning the assessment of risks, the applicant states that it is clear from the circumstances that have been set out that both the Commission and the Turkish authorities were in serious breach of their obligations and thereby contributed to the fact that allegedly forged but, in reality, irregular certificates were stamped and issued. Those breaches created a situation which was no longer within the realm of normal risk to be borne by any importer but which, on the contrary, justified the conclusion that the applicant was in a special situation within the meaning of Article 239 of the CCC.

291. Moreover, the Commission must, when exercising its powers under Article 239 of the CCC, take account not only of the Community interest in ensuring that the customs provisions are respected, but also of the interest of an importer acting in good faith not to suffer harm which goes beyond its normal commercial risk (Eyckeler & Malt v Commission , paragraph 133, and Hyper v Commission , paragraph 95).

292. Firstly, the Commission submits that the part of the contested decision dealing with the certificates at issue which were considered to be forged does not refer at all to the issue of due care or negligence on the applicant's part. According to the Commission, that issue ceased to be relevant once it had been established that there was not a special situation within the meaning of Article 239 of the CCC, in conjunction with Article 905 of the CCC implementation regulation. However, the Commission states that if the Court were to find in the present case that there was a special situation, the Commission would have to carry out an assessment of the factual conditions for the application of Article 239 of the CCC, since the parts of the contested decision (recital 52 et seq.) dealing with the applicant's due care and good faith in relation to the certificates considered to be illegal are not necessarily transposable.

293. Next, the Commission submits that, were they to be true, the applicant's arguments concerning serious errors by the Turkish authorities would disclose a breach of the duty to exercise due care

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or obvious negligence on the part of the applicant, such as to exclude any reimbursement under Article 239 of the CCC. If the applicant had suspected the Turkish authorities of serious infringements of the rules on certificates of origin, it should have ensured that the certificates it used in its trade relations were authentic. It was only as of April 1999, that is, almost two years after the last importations at issue had been carried out, that the applicant apprised itself of the manner in which the Republic of Turkey implemented the system of preferential treatment.

294. Lastly, with regard to an examination of the risks, the Commission submits that it is clear from its account that the applicant presented forged certificates of origin, which the Turkish authorities were not involved in producing. In accordance with Article 904(c) of the CCC implementation regulation, that situation does not constitute a special circumstance within the meaning of Article 239 of the CCC but, rather, the realisation of a normal commercial risk against which the applicant should have taken out insurance. The Commission therefore considers that the applicant has not suffered unacceptable discrimination in comparison with other importers.

(b) Findings of the Court

295. The Commission rejected the application for remission of import duties on the ground that the circumstances relied on... [could] not in [its] view... give rise to a special situation within the meaning of Article 239 of... Regulation No 2913/92 with regard to that part of the application relating to forged certificates' (recital 39 of the contested decision). As the Commission correctly observes in its written pleadings, in order to conclude that there was not a special situation, it did not, in the part of the contested decision dealing with forged certificates (recitals 18 to 41), express its view on the issue of the applicant's due care or negligence.

296. It follows that the part of the second plea in law alleging that there was no obvious negligence on the part of the applicant is of no consequence and must therefore be rejected (see, to that effect, Bonn Fleisch Ex- und Import v Commission , paragraph 69).

297. In the light of the foregoing, the second plea in law must be rejected in its entirety.

C - The third plea in law, alleging infringement of Article 220(2)(b) of the CCC

1. Arguments of the parties

298. The applicant states, firstly, that in the contested decision (recital 18 et seq.) the Commission considered principally whether Article 220(1)(b) of the CCC was applicable, concluding that there were no deficiencies attributable to the Turkish authorities and that Article 220(2)(b) of the CCC was not therefore applicable. According to the applicant, the Commission's conclusions are inaccurate since the Turkish customs administration was well aware of the fact that the 32 certificates at issue, which it had been instrumental in issuing and registering, were illegal.

299. Moreover, the applicant submits that the meetings held by its representatives and the UCLAF investigations in Turkey attest to the fact that, even if it were established that the certificates at issue were not knowingly issued by the Turkish authorities, at the very least they knew or should have known that those certificates existed. As the applicant considers that there can be no doubt that it acted in good faith, it follows that the import duties that were recovered post-clearance must be reimbursed to it.

300. The Commission states as a preliminary point, with regard to the certificates considered to be forged, that it is clear from the contested decision that the conditions for the application of Article 220(2)(b) of the CCC were not met in the present case as it has not been established that the Turkish authorities committed any error, since the certificates at issue were not issued or signed by those authorities but, on the contrary, were forged by third parties (recitals 18 to 28 of the contested decision).

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301. The Commission submits, moreover, that, according to established case-law, the fact that the Italian customs authorities initially accepted the forged certificates of origin does not of itself constitute an error within the meaning of Article 220(2)(b) of the CCC.

302. Lastly, the Commission states that since the applicant simply makes assertions that have already been rebutted in connection with the plea in law relating to the application of Article 239 of the CCC, it may refer to its earlier considerations. The Commission concludes that the conditions for the application of Article 220(2)(b) of the CCC are not met in the present case, with the effect that the import duties at issue may be entered in the accounts post-clearance. As a consequence, the action is also unfounded in that regard.

2. Findings of the Court

303. Under Article 220(2)(b) of the CCC, three cumulative conditions must be met for the competent authorities to be able to waive subsequent accounting for import duties. Non-collection must have been due to an error by the competent authorities themselves; their error must be of such a kind that it could not reasonably have been detected by a person liable, acting in good faith; and, finally, the latter must have complied with all the provisions laid down by the legislation in force so far as his customs declaration is concerned (see, by analogy, the judgments of the Court of Justice in Case 161/88 Binder [1989] ECR 2415, paragraphs 15 and 16; Case C-348/89 Mecanarte [1991] ECR I-3277, paragraph 12; Case C-292/91 Weis [1993] ECR I-2219, paragraph 14; and Faroe Seafood and Others , paragraph 83; the orders of the Court of Justice in Case C299/98 P CPL Imperial 2 and Unifrigo v Commission [1999] ECR I-8683, paragraph 22, and Case C-30/00 William Hinton & Sons [2001] ECR I-7511, paragraphs 68, 69, 71 and 72; and the judgment of the Court of First Instance in Case T75/95 Günzler Aluminium v Commission [1996] ECR II-497, paragraph 42).

304. It is also to be noted that, according to settled case-law, Article 220(2)(b) of the CCC is intended to protect the legitimate expectation of the person liable that all the factors on which the decision whether or not to proceed with recovery of customs duties is based are correct. However, the legitimate expectations of the person liable attract the protection afforded by that provision only if it was the competent authorities themselves which created the basis for his expectations. Thus, only errors attributable to acts of the competent authorities which could not reasonably have been detected by the person liable create entitlement to the waiver of post-clearance recovery of customs duties (Mecanarte , paragraphs 19 and 23).

305. In the present case, it is to be observed that the Commission concluded, in the disputed part of the contested decision, that the conditions for the application of Article 220(2)(b) of the CCC were not met on the ground that no positive error could be discerned on the part of the competent authorities (recitals 25 to 27).

306. It follows from the foregoing that the applicant has not been able to demonstrate that the acts of the competent authorities contributed to the issue or acceptance of the certificates at issue which proved to be forged.

307. Accordingly, this plea in law must be rejected as unfounded.

308. In the light of the foregoing, the action must be dismissed in its entirety.

Measures of organisation of procedure and measures of inquiry required

309. The applicant asks the Court to order a number of measure of inquiry pursuant to Article 64(4) and Article 65 of the Court's Rules of Procedure.

A - The production of documents contained in the administrative file

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1. Arguments of the parties

310. The applicant asks the Court to call upon the Commission to produce all the documents which the applicant considers it was not able to consult when it was given access to the administrative file (see paragraph 72 et seq. above).

311. In order to demonstrate the lack of cooperation by the Turkish authorities, their failure properly to implement the Association Agreement, and the inadequacy of the investigations carried out by the Commission, it seeks, inter alia, production of UCLAF mission reports. In particular, the applicant wishes to obtain the UCLAF report of 23 December 1998, or another date, on the nature, content and results of the investigations carried out in Turkey, in particular at the Mersin customs office.

312. The Commission submits, in essence, that the applicant has been able to consult all the relevant documents and that those requests are therefore of no effect.

2. Findings of the Court

313. It is clear from paragraph 99 above that the applicant had access to the UCLAF mission reports of 9 and 23 December 1998 before the contested decision was adopted. Furthermore, those reports were lodged by the Commission in response to a written question from the Court. In those circumstances, that request has no purpose and must therefore be refused.

B - Other measures of inquiry

1. Arguments of the parties

314. Firstly, in order to demonstrate the requirement to send specimens of the stamps and signatures used by the Turkish customs administration, in particular the stamps and signatures used by the Mersin customs office, and the fact that those specimens were officially sent to the Commission by the Turkish authorities and subsequently forwarded to the authorities of the Member States, the applicant asks the Court to order the Commission and the Italian customs administration to add those specimens to the case-file, together with documents showing that copies of stamps and authorised signatures were sent to the competent authorities of the Member States.

315. Secondly, in order to demonstrate that the 32 A.TR.1 certificates at issue are not forgeries, the applicant asks the Court to instruct an expert, such as the German Customs Police Service in Cologne, to check the authenticity of the original certificates by comparing them with the appropriate original impressions of stamps and signatures.

316. To that end, the applicant also asks the Court either to order the Commission to request or itself directly to request the Ravenna customs authorities to send to the expert appointed the originals of the 103 A.TR.1 certificates referred to in the letter from the Italian administration annexed to the application. The applicant's representative ad litem should also have the opportunity to consult those certificates.

317. The Court should also request the Turkish Government, possibly through the Commission, to send original copies of the certificates at issue in its possession so that they can be compared with the original certificates in the context of the administrative assistance scheme agreed upon.

318. Thirdly, in order to demonstrate that the certificates at issue are authentic documents and were registered by the Mersin customs office, the applicant asks the Court to request the Turkish central customs administration to appoint an official who should bring to the hearing specimens of the stamps and signatures that were used by the Mersin customs office during the period in question, together with the records, and provide information as to whether the certificates at issue are inauthentic or irregular.

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319. The applicant relies, in that regard, on the mutual assistance agreed between the Contracting Parties to the Association Agreement. It draws attention, in particular, to the fact that under Article 29 of Decision No 1/95, read in conjunction with Annex 7 thereto and Article 15 of Decision No 1/96, the Community authorities and the Turkish authorities are to assist each other in checking the authenticity and accuracy of A.TR.1 certificates. Furthermore, Article 12 of Annex 7 to Decision No 1/95 provides that officials of the requested authority are to appear as experts or witnesses before the courts of the other Contracting Party and are to produce documents or certified copies which may be necessary for the proceedings.

320. The Commission considers that the applicant's request for the certificates at issue to be produced and checked by an expert must be refused since the Turkish authorities alone have competence to determine whether certificates are authentic.

321. In the same way, the request for a Turkish customs official to produce evidence should also be considered to be inadmissible since, according to the Commission, the Turkish customs administration has already, on a number of occasions, confirmed its statement concerning the certificates at issue.

322. With regard to the request that documents from the records of the Mersin customs office should be sent, the Commission submits that that is also inadmissible as it is of no consequence, the Commission having stated that it is possible that there were 32 authentic certificates and they served as a model for those responsible for the forgery in order to produce the certificates at issue.

2. Findings of the Court

323. With regard to the measures of inquiry requested, according to settled case-law, it is for the Court to appraise the usefulness of measures of inquiry for the purpose of resolving the dispute (Case T-68/99 Toditec v Commission [2001] ECR II1443, paragraph 40).

324. In the present case, as the Commission observed, the Turkish authorities clearly stated that the certificates at issue had been forged. Accordingly, in the light of the case-file and in view of the applicant's claims, measures intended to demonstrate that the documents are authentic are neither relevant nor necessary for the purpose of ruling in the present case. It is therefore not appropriate to have recourse to them. The applicant's requests for the certificates at issue to be presented and checked by an expert must therefore be refused.

C - Evidence offered in support

1. Arguments of the parties

325. In order to substantiate the various facts alleged, the applicant offers the oral testimony of the witness Mr Thomas Nothelfer, employee of Steinhauser, who was responsible during the period in question, inter alia, for purchasing fruit juice concentrates in Turkey, and who had a number of meetings with the Turkish authorities in the course of his visit to Turkey during the first two weeks of April 1999. It also puts forward the statements of Professor Gerd Merke, who accompanied Mr Nothelfer on his trip to Turkey.

326. Firstly, in order to demonstrate that the certificates at issue are authentic documents, the applicant offers the testimony of Mr Nothelfer, according to whom the competent customs officials in Mersin acknowledged that the stamps used were barely legible and that, in spite of their requests, the Turkish central customs authorities had failed for more than a year to supply them with new stamps.

327. Next, in order to demonstrate that the certificates at issue were registered by the Mersin customs office, the applicant offers the testimony of Mr Nothelfer to the effect that he saw those records. Mr Nothelfer could also give evidence that, at a meeting with the competent customs official

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in Mersin, he asked for a copy of the pages of the register which refer to the numbers of the 32 allegedly forged A.TR.1 certificates to be made available to him but that, after agreeing to do so, the customs official failed to provide him with any copies at all.

328. Furthermore, in order to demonstrate that the certificates at issue are authentic documents, the applicant offers the testimony of Mr Nothelfer and Mr Merke that, at a meeting with the central customs administration in Ankara in April 1999, Mr Nothelfer stated that, according to the information available to him, all the A.TR. 1 certificates (irregular or forged) had been issued and registered by the customs authorities. The representative of the central customs authorities in Ankara replied that a criminal investigation had been ordered in order to verify the documents.

329. Moreover, in order to demonstrate that the Turkish authorities did not understand the content or importance of rules relating to the system of preferential treatment and on the origin of goods, the applicant offers the testimony of Mr Nothelfer and Mr Merke concerning their meeting with Mr Dogran of the Turkish Prime Minister's Office of Economic Affairs. That testimony also serves to demonstrate that UCLAF informed the Turkish authorities only belatedly of the importance of the rules on preferential treatment and the need to comply with them.

330. Lastly, in order to demonstrate that the Commission failed in its duty to warn importers, the applicant puts forward by way of evidence a Notice of the European Commission and [a] Notice of the European Parliament' concerning irregularities with certificates of origin in Turkey relating to various products.

331. The Commission considers the evidence offered relating to the records kept by the Mersin customs office is irrelevant. Firstly, the relevant parts of the Association Agreement do not lay down rules on the content of such records. Secondly, the Commission submits that the Turkish customs authorities may have issued the 32 A.TR.1 certificates in respect of batches other than the supplies at issue in the present case.

332. With regard to the discussions the applicant's representatives had with the Turkish authorities, the Commission considers that they enhance the credibility of the conclusions sent by those authorities and are therefore irrelevant. Moreover, the Commission considers that Mr Nothelfer's statement that some of the members of the Prime Minister's staff were not familiar with the legislation on origin and preferential tariffs is irrelevant, the essential point being that the customs services were familiar with those rules.

2. Findings of the Court

333. With regard to the evidence offered by the applicant, it suffices to state that, in the light of the foregoing (see, in particular, paragraph 150 et seq., paragraph 161 et seq., and paragraphs 216 and 276 above), it is irrelevant. There is therefore no need to admit it.

Costs

334. 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 be ordered to pay the costs, in accordance with the form of order sought by the Commission.

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AUTHOR Court of First Instance of the European Communities

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FORM	Judgment
TREATY	European Economic Community
PUBREF	European Court reports 2007 Page II-00289
DOC	2007/02/06
LODGED	2003/01/29
JURCIT	21964A1229(01) : 31992R2913-A220P1LB : 31992R2913-A220P2LB : 31992R2913-A239 : 11997E255 : 11997E211 : 21996D0809(01) : 21996D0213(01) : 31993R2454-A93 :
SUB	External relations ; Association ; Free movement of goods ; Customs Union
AUTLANG	German
MISCINF	POURVOI: C-204/07 P
APPLICA	Person
DEFENDA	Commission ; Institutions
NATIONA	Italy
NOTES	Berr, Claude J. ; Natarel, Elisabeth: Chronique de jurisprudence du Tribunal et de la Cour de justice des Communautés européennes. Echanges commerciaux, Journal du droit international 2007 p.631-632
PROCEDU	Action for annulment - unfounded;Application for measures of inquiry - unfounded
DATES	of document: 06/02/2007 of application: 29/01/2003

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Order of the Court of First Instance (Second Chamber)
of 7 June 2004
Segi and Others v Council of the European Union. Action for damages - Justice and home affairs - Council common position - Measures concerning persons, groups and entities involved in terrorist acts - Clear lack of jurisdiction - Action clearly unfounded. Case T-338/02.

1. Actions for damages - Subject-matter - Claim for compensation for damage arising from a common position - Lack of jurisdiction of the Community judicature - No effective judicial remedy - Council declaration on the right to compensation - Not relevant - Power of the Community judicature to hear an action for compensation based on failure by the Council to observe the powers of the Community

(Arts 5 EU, 34 EU and 46 EU)

2. European Union - Police and judicial cooperation in criminal matters - Legal basis - Article 34 EU - Obligation to comply with Community provisions

(Art. 61(e) EC; Art. 34 EU; Council Common Position 2001/931/CFSP, Art. 4)

1. The Court of First Instance clearly has no jurisdiction to hear an action for damages seeking compensation for any damage which may have been caused by a common position based on Article 34 EU since, by virtue of Article 46 EU, no judicial remedy for compensation is available in the context of Title VI of the EU Treaty.

Even if that probably results in there being no effective judicial remedy, that situation cannot in itself give rise to Community jurisdiction in a legal system based on the principle of conferred powers, as follows from Article 5 EU.

The Council declaration on the right to compensation, recorded in the minutes of the meeting during which a common position was adopted, is also inoperative, because it finds no expression in the wording of the provision in question. Nor can that declaration refer to an action before the Community courts without contradicting the judicial system established by the EU Treaty.

By contrast, the Court of First Instance does have jurisdiction over such an action for damages in so far as the applicants allege failure to observe the powers of the Community. The Community courts have jurisdiction to review the content of an act adopted in the context of the EU Treaty in order to ascertain whether that act affects the powers of the Community.

(see paras 33-34, 36, 38-41)

2. Adoption of a common position by the Council could be unlawful for encroachment on the powers of the Community only if it were to take the place of a measure based on a provision of the EC Treaty the adoption of which was obligatory, alternatively to or accompanying the common position.

A common position providing for police and judicial assistance between Member States pursuant to Article 34 EU cannot be regarded as incompatible with the system of Community powers set out by the EC Treaty, since, irrespective of the question whether measures of that nature could be based on Article 308 EC, Article 61(e) EC explicitly states that the Council is to adopt measures in the field of police and judicial cooperation in criminal matters in accordance with the provisions of the EU Treaty.

(see paras 45-46)

In Case T-338/02,

Segi,

Araitz Zubimendi Izaga, residing in Hernani (Spain),

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Aritza Galarraga, residing in Saint Pée sur Nivelle (France),

represented by D. Rouget, lawyer,

applicants,

v

Council of the European Union, represented by M. Vitsentzatos and M. Bauer, acting as Agents,

defendant,

supported by

Kingdom of Spain, represented by its agent, with an address for service in Luxembourg,

and by

United Kingdom of Great Britain and Northern Ireland, represented initially by P. Ormond, and subsequently by C. Jackson, acting as Agents, with an address for service in Luxembourg,

interveners,

APPLICATION for compensation for the damage allegedly sustained by the applicants due to the inclusion of Segi on the list of persons, groups or entities referred to in Article 1 of Council Common Position 2001/931/CFSP of 27 December 2001 on the application of specific measures to combat terrorism (OJ 2001 L 344, p. 93), of Council Common Position 2002/340/CFSP of 2 May 2002 updating Common Position 2001/931 (OJ 2002 L 116, p. 75), and Council Common Position 2002/462/CFSP of 17 June 2002 updating Common Position 2001/931 and repealing Common Position 2002/340 (OJ 2002 L 160, p. 32),

THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES (Second Chamber),

composed of J. Pirrung, President, A.W.H. Meij and N.J. Forwood, Judges,

Registrar: H. Jung,

makes the following

Order

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby orders:

1. The application is dismissed.

2. Each party shall bear its own costs.

Luxembourg, 7 June 2004.

Background to the dispute

1. It is apparent from the documents before the Court that Segi is an organisation which has the aim of supporting the claims of Basque youth, and of Basque identity, culture and language. According to the applicants, this organisation was created on 16 June 2001 and is established in Bayonne (France) and in Donostia (Spain). Ms Araitz Zubimendi Izaga and Mr Aritza Galarraga have been appointed spokespersons. No official documentation has been provided in this respect.

2. On 28 September 2001, the United Nations Security Council adopted Resolution 1373 (2001),

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by which, in particular, it decided that all States should afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings.

3. On 27 December 2001, considering that action by the Community was necessary in order to implement Resolution 1373 (2001) of the United Nations Security Council, the Council adopted Common Position 2001/931/CFSP on the application of specific measures to combat terrorism (OJ 2001 L 344, p. 93). That common position was adopted on the basis of Article 15 EU, which comes under Title V of the EU Treaty entitled Provisions on a common foreign and security policy' (CFSP), and Article 34 EU, which comes under Title VI of the EU Treaty entitled Provisions on police and judicial cooperation in criminal matters' (commonly known as justice and home affairs) (JHA).

4. Articles 1 and 4 of Common Position 2001/931 provide:

Article 1

1. This Common Position applies in accordance with the provisions of the following Articles to persons, groups and entities involved in terrorist acts and listed in the Annex.

...

6. The names of persons and entities on the list in the Annex shall be reviewed at regular intervals and at least once every six months to ensure that there are grounds for keeping them on the list.'

Article 4

Member States shall, through police and judicial cooperation in criminal matters within the framework of Title VI of the [EU] Treaty, afford each other the widest possible assistance in preventing and combating terrorist acts. To that end they shall, with respect to enquiries and proceedings conducted by their authorities in respect of any of the persons, groups and entities listed in the Annex, fully exploit, upon request, their existing powers in accordance with acts of the European Union and other international agreements, arrangements and conventions which are binding upon Member States.'

5. The annex to Common Position 2001/931 indicates in point 2 entitled Groups and entities':

* - Euskadi Ta Askatasuna/Tierra Vasca y Libertad/Basque Fatherland and Liberty (E.T.A.)

(The following organisations are part of the terrorist group E.T.A.: K.a.s., Xaki; Ekin, Jarrai-Haika-Segi, Gestoras pro-amnistía.)'

6. The note at the bottom of this annex states that [p]ersons marked with an * shall be the subject of Article 4 only'.

7. On 27 December 2001, the Council also adopted Common Position 2001/930/CFSP on combating terrorism (OJ 2001 L 344, p. 90), Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism (OJ 2001 L 344, p. 70) and Decision 2001/927/EC establishing the list provided for in Article 2(3) of Regulation (EC) No 2580/2001 (OJ 2001 L 344, p. 83). None of those texts mentions the applicants.

8. According to the Council declaration annexed to the minutes at the time of the adoption of Common

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Position 2001/931 and Regulation No 2580/2001 (the Council declaration concerning the right to compensation'):

The Council recalls regarding Article 1(6) of Common Position [2001/931] that in the event of any error in respect of the persons, groups or entities referred to, the injured party shall have the right to seek judicial redress.'

9. By orders of 5 February and 11 March 2002, the central investigating judge No 5 at the Audiencia Nacional (National High Court), Madrid (Spain), respectively declared Segi's activities illegal and ordered the imprisonment of certain of Segi's presumed leaders, on the ground that that organisation was an integral part of the Basque separatist organisation ETA.

10. By decision of 23 May 2002, the European Court of Human Rights dismissed as inadmissible the action brought by the applicants against the 15 Member States, concerning Common Position 2001/931, on the ground that the situation complained of did not entitle them to be regarded as victims of an infringement of the European Convention on Human Rights and Fundamental Freedoms (ECHR).

11. On 2 May and 17 June 2002, the Council adopted, on the basis of Articles 15 EU and 34 EU, Common Positions 2002/340/CFSP and 2002/462/CFSP updating Common Position 2001/931 (OJ 2002 L 116, p. 75, and OJ 2002 L 160, p. 32). The annexes to these two common positions contain the name Segi', which appears in the same way as it does in Common Position 2001/931.

Procedure and forms of order sought by the parties

12. By application lodged at the Registry of the Court of First Instance on 13 November 2002, the applicants brought the present action.

13. By separate document lodged at the Registry of the Court of First Instance on 12 February 2003, the Council raised an objection of inadmissibility pursuant to Article 114 of the Rules of Procedure of the Court of First Instance, on which the applicants submitted their observations.

14. By order of 5 June 2003, the President of the Second Chamber of the Court of First Instance granted the requests of the Kingdom of Spain and the United Kingdom of Great Britain and Northern Ireland for leave to intervene in support of the forms of order sought by the Council. The United Kingdom did not submit observations on the objection of inadmissibility. The Kingdom of Spain submitted its observations on the objection of inadmissibility within the prescribed time-limits.

15. In its objection of inadmissibility, the Council, supported by the Kingdom of Spain, concludes that the Court should:

- dismiss the action as clearly inadmissible;

- order the applicant' to pay the costs.

16. In their observations on that objection, the applicants claim that the Court should:

- declare the action for damages admissible;

- alternatively, find that the Council infringed general principles of Community law;

- in any event, order the Council to pay the costs.

Law

Arguments of the parties

17. The Council and the Kingdom of Spain submit, first, that Segi does not have the capacity to bring legal proceedings. They add that Ms Zubimendi Izaga and Mr Galarraga do not have the power to represent Segi nor, according to the Kingdom of Spain, locus standi before the Court

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of First Instance.

18. Second, the Council and the Kingdom of Spain submit that the damage referred to in the second paragraph of Article 288 EC must follow from a Community act (Case 99/74 Société des grands moulins des Antilles v Commission [1975] ECR 1531, paragraph 17). As the Council acted on the basis of its powers in the area of the CFSP and JHA, there is no such Community act.

19. Third, the Council and the Kingdom of Spain submit that the non-contractual responsibility of the Community requires evidence of the illegal behaviour alleged against the institution. However, the Court of First Instance does not have jurisdiction, under Articles 35 EU and 46 EU, to assess the legality of an act which comes within the scope of the CFSP or JHA.

20. As a preliminary point, the applicants argue that it is particularly shocking that the Council denies the existence and the capacity to bring legal proceedings of the applicant association with the sole aim of preventing it from challenging its inclusion in the annex to Common Position 2001/931 and of obtaining compensation. This constitutes an infringement of the general principles of Community law as set out, in particular, in Article 1, Article 6(1) and Article 13 of the ECHR.

21. Concerning the applicant association, the applicants submit that the laws of the Member States, Community law and the case-law of the European Court of Human Rights provide that a de facto association has the capacity to bring legal proceedings, in particular when it acts to defend its rights (Case 18/74 Syndicat général du personnel des organismes européens v Commission [1974] ECR 933; Case 135/81 Groupement des agences de voyages v Commission [1982] ECR 3799, paragraph 11; and Case T-161/94 Sinochem Heilongjiang v Council [1996] ECR II695, paragraph 34). By the Council declaration concerning the right to compensation, the Council recognised the capacity to seek compensation of the groups' and entities' referred to in that common position. Moreover, by including it on the list in question, the Council treated the applicant association as an independent legal entity.

22. Concerning the two natural persons included within the applicants, they submit that they are legitimately acting in a dual capacity, as individual applicants and as representatives of the association.

23. They submit that, in a Community of law, in which fundamental laws are applied, in particular those of the ECHR, an effective judicial remedy must be available to them in order that the damage they sustained can be established and compensation obtained. Otherwise, they would find themselves in the presence of a denial of justice, which would mean that the institutions, when acting in the context of the Union, act in a completely arbitrary manner.

24. The applicants take the view that the Council fraudulently chose the legal basis for the measure in question in order to avoid all democratic control, by the courts or otherwise. This abuse of process was clearly condemned by the European Parliament, in particular in its Resolution P5_TA(2002)0055 of 27 December 2001. The choice of different legal bases for the texts concerning terrorism adopted by the Council on 27 December 2001 had the aim of depriving certain categories of persons, in particular those referred to in Article 4 of Common Position 2001/931, of the right to an effective judicial remedy, unlike those referred to in Regulation No 2580/2001. The Court of First Instance is competent to sanction such an abuse of process in the context of an action for damages.

25. Concerning the Council declaration concerning the right to compensation, it is for the Court of First Instance to interpret this declaration and define its legal effect. The Member States' responsibility is indivisible in this respect, first, because it is a Council act which is at issue, second, because the national courts do not have jurisdiction over damage caused by the Council and, third, because it would be unreasonable if the injured party had to bring an action before the 15 Member States. The said declaration gives the Court of First Instance jurisdiction to give a ruling concerning the category of persons referred to in Article 4 of Common Position 2001/931,

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in the same way as it may give a ruling in respect of persons referred to in Regulation No 2580/2001 and Article 3 of that common position, who may invoke a Community act. The error mentioned in that declaration amounts to a fault and such a fault is constituted, in the present case, by errors of fact, legal characterisation and law, and by misuse of powers.

26. If the Court of First Instance ruled that it had no jurisdiction over the present action, the applicants consider that it would have to be held that the Council had infringed the general principles of Community law, as set out in particular in Article 1, Article 6(1), and Article 13 of the ECHR.

27. With regard to costs, the applicants submit that it would be inequitable if they had to be borne by them, since they are trying, in a complex and difficult legal context, to obtain compensation for the alleged damage.

Findings of the Court

28. Under Article 114(1) of the Rules of Procedure, where a party so requests, the Court of First Instance may decide on inadmissibility without going into the substance of the case. Under Article 114(3) of those rules, the remainder of the proceedings are to be oral unless the Court of First Instance decides otherwise.

29. Under Article 111 of the Rules of Procedure, where an action is manifestly lacking any foundation in law, the Court of First Instance may, by reasoned order and without taking further steps in the proceedings, give a decision on the action.

30. The Court takes the view that, in the present case, it has s ufficient information available to it from the documents in the file and that there is no need to open the oral procedure.

31. It must first be noted that, by their action, the applicants seek compensation for the damage sustained on account of the inclusion of Segi on the list annexed to Common Position 2001/931, updated by Common Positions 2002/340 and 2002/462.

32. It should further be noted that the measures from which, it is claimed, the damage allegedly sustained arose are common positions adopted on the basis of Articles 15 EU, which comes within Title V of the EU Treaty on the CFSP, and 34 EU, which comes within Title VI of the EU Treaty on JHA.

33. It should finally be noted that the applicants are only affected by Article 4 of Common Position 2001/931, as expressly stated in the note at the bottom of the annex to that common position. That article states that the Member States shall afford each other the widest possible assistance through police and judicial cooperation within the framework of Title VI of the EU Treaty and does not entail any measure falling within the scope of the CFSP. Therefore, Article 34 EU is the only relevant legal basis of the measures from which the damage allegedly arose.

34. No judicial remedy for compensation is available in the context of Title VI of the EU Treaty.

35. Under the EU Treaty, in the version resulting from the Treaty of Amsterdam, the powers of the Court of Justice are listed exhaustively in Article 46 EU. As regards the provisions relevant to the present case, which were not amended by the Treaty of Nice, this article provides:

The provisions of the Treaty establishing the European Community, the Treaty establishing the European Coal and Steel Community and the Treaty establishing the European Atomic Energy Community concerning the powers of the Court of Justice of the European Communities and the exercise of those powers shall apply only to the following provisions of this Treaty:

...

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(b) provisions of Title VI, under the conditions provided for by Article 35 [EU];

...

(d) Article 6(2) [EU] with regard to action of the institutions, in so far as the Court has jurisdiction under the Treaties establishing the European Communities and under this Treaty;

...'

36. It follows from Article 46 EU that, in the context of Title VI of the EU Treaty, the only judicial remedies envisaged are contained in Article 35(1), (6) and (7) EU, and comprise the reference for a preliminary ruling, the action for annulment and the procedure for settling disputes between Member States.

37. It should further be noted that the guarantee of respect for fundamental rights referred to in Article 6(2) EU is not relevant to the present case, as Article 46(d) EU gives the Court of Justice no further competence.

38. Concerning the absence of an effective remedy invoked by the applicants, it must be noted that indeed probably no effective judicial remedy is available to them, whether before the Community Courts or national courts, with regard to the inclusion of Segi on the list of persons, groups or entities involved in terrorist acts. Contrary to the Council's submissions, it would not be of any use for the applicants to seek to establish the individual liability of each Member State for the national measures enacted pursuant to Common Position 2001/931, as a means to try to obtain compensation for the damage allegedly sustained on account of the inclusion of Segi in the annex to that common position. With regard to seeking to establish the individual liability of each Member State before the national courts on account of their involvement in the adoption of the common positions in question, such an action is likely to be of little effect. Moreover, it is not possible to challenge the legality of the inclusion of Segi in that annex, in particular through a reference for a preliminary ruling on validity, because of the choice of a common position and not, for example, a decision pursuant to Article 34 EU. However, the absence of a judicial remedy cannot in itself give rise to Community jurisdiction in a legal system based on the principle of conferred powers, as follows from Article 5 EU (see, to that effect, Case C-50/00 P Union de Pequeños Agricultores v Council [2002] ECR I-6677, paragraphs 44 and 45).

39. The applicants further invoke the Council declaration concerning the right to compensation, which provides that in the event of any error in respect of the persons, groups or entities referred to, the injured party shall have the right to seek judicial redress'. According to settled case-law, declarations recorded in minutes are of limited value, since they cannot be used for the purposes of interpreting a provision of Community law where no reference is made to the content of the declaration in the wording of the provision in question and the declaration therefore has no legal significance (Case C-292/89 Antonissen [1991] ECR I-745, paragraph 18, and Case C-329/95 VAG Sverige [1997] ECR I-2675, paragraph 23). The declaration in question does not specify either the judicial remedies or, a fortiori, the conditions for the opening of proceedings. In any event, it cannot refer to an action before the Community Courts, as it would then be inconsistent with the judicial system established by the EU Treaty. Therefore, as no jurisdiction has been conferred on the Court of First Instance by the said Treaty, such a declaration cannot lead it to examine the present action.

40. It follows from the above that the Court of First Instance clearly has no jurisdiction over the present action for damages in so far as it seeks compensation for any damage which may have been caused by the inclusion of Segi on the list annexed to Common Position 2001/931, as updated by Common Positions 2002/340 and 2002/462.

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41. By contrast, the Court of First Instance does have jurisdiction over the present action for damages in so far as the applicants allege failure to observe the powers of the Community. The Community Courts have jurisdiction to review the content of an act adopted in the context of the EU Treaty in order to ascertain whether that act affects the powers of the Community (see, by analogy, Case C124/95 CentroCom [1997] ECR I81, paragraph 25, and Case C-170/96 Commission v Council [1998] ECR I2763, paragraph 17).

42. In so far as the applicants allege misuse of procedure by the Council operating in the field of JHA consisting in an encroachment on the powers of the Community leading to their being completely deprived of judicial protection, the present action comes within the jurisdiction of the Community Courts pursuant to Article 235 EC and the second paragraph of Article 288 EC.

43. The Court considers it expedient to rule first on the substance of the present action, solely to the extent indicated in paragraph 42 above.

44. According to settled case-law, the Communities can be held liable only if a number of conditions are satisfied as regards the illegality of the alleged conduct, the genuineness of the damage suffered and the existence of a causal link between the conduct of the institution and the damage alleged.

45. In the present case, there is clearly no unlawful conduct. As is apparent from paragraph 42 above, the alleged unlawful conduct could only consist of failure to adopt a measure based on a provision of the EC Treaty the adoption of which was obligatory, alternatively to or accompanying Common Position 2001/931. As stated in paragraph 33 above, the applicants are only affected by Article 4 of Common Position 2001/931, as confirmed by Common Positions 2002/340 and 2002/462. That provision requires the Member States to fully exploit the acts adopted by the European Union and other existing international agreements, arrangements and conventions with respect to enquiries and proceedings in respect of the persons, groups and entities listed, and to afford each other, in the context of cooperation under Title VI of the EU Treaty, the widest possible assistance. The content of this provision therefore falls within the scope of Title VI of the EU Treaty and the relevant legal basis for its adoption is Article 34 EU.

46. The applicants have failed to cite a legal basis in the EC Treaty which was not applied. However, in so far as they recall in that respect the fact that the Council adopted, on 27 December 2001, various types of act to combat terrorism and, in particular, Regulation No 2580/2001 based on Articles 60 EC, 301 EC and 308 EC, the view cannot be taken that the police and judicial cooperation between Member States referred to in Article 4 of Common Position 2001/931 infringes these provisions of the EC Treaty. In fact, these provisions are clearly intended to implement, where necessary, acts adopted in the field of the CFSP and do not concern acts adopted in the area of JHA. With regard to Article 308 EC, this provision allows, admittedly, the adoption of appropriate Community measures when action appears necessary to attain one of the objectives of the Community and the EC Treaty has not provided the necessary powers. While Article 61(e) EC provides for the adoption of measures in the field of police and judicial cooperation in criminal matters, it explicitly states that the Council shall adopt these measures in accordance with the provisions of the EU Treaty. Under these circumstances, and leaving aside the question whether, where appropriate, measures of that kind could be based on Article 308 EC, the adoption of Article 4 of Common Position 2001/931 on the basis of Article 34 EU alone is not incompatible with the system of Community competences laid down by the EC Treaty. With regard to the Parliament resolution of 7 February 2002, in which it criticises the choice of a legal basis coming within the field of JHA for the establishment of the list of terrorist organisations, it must be noted that that criticism concerns a political choice and does not call into question, as such, the lawfulness of the legal basis chosen or concern the question of failure to observe Community competences. Therefore, while it follows from inclusion on the list of persons, groups or entities involved in acts of terrorism in a common position that

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the persons mentioned have no judicial remedy before the Community judicature, this fact does not constitute, as such, failure to observe the Community competences.

47. In so far as the action is based on a failure to observe Community competences by the Council operating in the area of JHA, it must therefore be dismissed as clearly unfounded, without it being necessary to rule in this respect on the objection of inadmissibility raised by the Council (Case C-23/00 P Council v Boehringer [2002] ECR I-1873, paragraph 52).

48. The applicants' alternative claim requesting a declaration that, despite the dismissal of their action, the Council has infringed the general principles of Community law must also be dismissed. In proceedings before the Community judicature, there is no remedy whereby the Court can adopt a position by means of a general declaration on a matter which exceeds the scope of the main proceedings. Therefore, the Court clearly has no jurisdiction over this claim either.

Costs

49. Under Article 87(3) of the Rules of Procedure, where the circumstances are exceptional, the Court of First Instance may order that the costs be shared or that each party bear its own costs. In the present case, it should be noted that the applicants have requested that the Council bear the whole costs, even if their action is dismissed. In that respect, it is relevant that the Council declaration on the right to compensation could have misled the applicants and that it was legitimate for them to seek a court competent to hear their claims. Under those circumstances, each party must be ordered to bear its own costs.

50. Under the first subparagraph of Article 87(4) of the Rules of Procedure, Member States which intervene in the proceedings are to bear their own costs. The interveners must therefore bear their own costs.

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11997E060 : N 46
11997E061-LE : N 46
11997E235 : N 42
11997E288-L2 : N 42
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11997E308 : N 46
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31991Q0530-A87P4L1 : N 50
31991Q0530-A111 : N 29
31991Q0530-A114P1 : N 28
31991Q0530-A114P3 : N 28
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32001E0931-A01 : N 4
32001E0931-A04 : N 4 33 46
32001R2580 : N 46
32002E0340 : N 31
32002E0462 : N 31
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PROCEDU Action for damages - unfounded

DATES of document: 07/06/2004
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Judgment of the Court of First Instance (Second Chamber)
First Instance (Second Chamber)First Instance (Second Chamber)December 2006. Organisation des Modjahedines du peuple d'Iran v Council of the European Union. Common foreign and security policy - Restrictive measures directed against certain persons and entities with a view to combating terrorism - Freezing of funds - Actions for annulment - Rights of the defence - Statement of reasons - Right to effective judicial protection - Action for damages. Case T-228/02.

1. Procedure - Decision replacing the contested decision during the proceedings

2. Actions for annulment - Jurisdiction of the Community judicature - Action brought against a common position adopted pursuant to Titles V and VI of the Treaty on European Union

(Art. 230 EC; Arts 15 EU, 34 EU, 35 EU and 46 EU)

3. Community law - Principles - Rights of the defence - Decision to freeze funds directed against certain persons and entities suspected of terrorist activities

(Art. 249 EC; Council Regulation No 2580/2001, Art. 2(3); Council Decision 2005/930)

4. Community law - Principles - Rights of the defence - Resolution of the United Nations Security Council requiring restrictive measures to be taken against unspecified persons and entities suspected of terrorist activities - Implementation by the Community in the exercise of own powers

(Arts 60 EC, 301 EC and 308 EC; Council Regulation No 2580/2001)

5. Community law - Principles - Rights of the defence - Decision to freeze funds directed against certain persons and entities suspected of terrorist activities

(Common Position 2001/931, Art. 1(4); Council Regulation No 2580/2001, Art. 2(3))

6. European Union - Common foreign and security policy - Police and judicial cooperation in criminal matters - Obligation of sincere cooperation between the Member States and the Community institutions

(Art. 10 EC; Common Position 2001/931, Art. 1(4); Council Regulation No 2580/2001, Art. 2(3))

7. Community law - Principles - Rights of the defence - Decision to freeze funds directed against certain persons and entities suspected of terrorist activities

(Common Position 2001/931, Art. 1(4) and (6))

8. Acts of the institutions - Statement of reasons - Obligation - Scope

(Art. 253 EC; Council Regulation No 2580/2001)

9. Acts of the institutions - Statement of reasons - Obligation - Scope

(Art. 253 EC; Common Position 2001/931, Art. 1(4) and (6); Council Regulation No 2580/2001)

10. European Communities - Judicial review of the legality of the acts of the institutions

(Art. 230, second para., EC; Common Position 2001/931, Art. 1(4) and (6); Council Regulation No 2580/2001, Art. 2(3))

In Case T228/02,

Organisation des Modjahedines du peuple d'Iran, established in Auvers-sur-Oise (France), represented by J.-P. Spitzer, lawyer, D. Vaughan QC, and E. de Boissieu, lawyer,

applicant,

v

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Council of the European Union, represented by M. Vitsentzatos and M. Bishop, acting as Agents,

defendant,

supported by

United Kingdom of Great Britain and Northern Ireland, represented initially by J.E. Collins, and subsequently by R. Caudwell and C. Gibbs, acting as Agents, assisted by S. Moore, Barrister,

intervener,

ACTION, initially, for annulment of Common Position 2002/340/CFSP of 2 May 2002 updating Common Position 2001/931/CFSP on the application of specific measures to combat terrorism (OJ 2002 L 116, p. 75), of Common Position 2002/462/CFSP of 17 June 2002 updating Common Position 2001/931/CFSP and repealing Common Position 2002/340 (OJ 2002 L 160, p. 32), and of Council Decision 2002/460/EC of 17 June 2002 implementing Article 2(3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Decision 2002/334/EC (OJ 2002 L 160, p. 26), in so far as the applicant is included in the list of persons, groups and entities to which those provisions apply and, additionally, a claim for damages,

THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES (Second Chamber),

composed of J. Pirrung, President, N.J. Forwood and S. Papasavvas, Judges,

Registrar: E. Coulon,

having regard to the written procedure and further to the hearing on 7 February 2006,

gives the following

Judgment

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby:

1. Dismisses the action as in part inadmissible and in part unfounded in so far as it seeks annulment of Common Position 2005/936/CFSP of 21 December 2005 updating Common Position 2001/931/CFSP and repealing Common Position 2005/847/CFSP;

2. Annuls, in so far as it concerns the applicant, Council Decision 2005/930/EC of 21 December 2005 implementing Article 2(3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Decision 2005/848/EC;

3. Dismisses the claim for damages as inadmissible;

4. Orders the Council to bear its own costs and to pay four fifths of the applicant's costs;

5. Orders the United Kingdom of Great Britain and Northern Ireland to bear its own costs.

1. Where a decision is, during the proceedings, replaced by another decision with the same subject-matter, this is to be considered a new factor allowing the applicant to adapt its claims and pleas in law. It would not be in the interests of the due administration of justice and the requirements of procedural economy to oblige the applicant to make a fresh application to the Court. Moreover, it would be inequitable if the institution in question were able, in order to counter criticisms of a decision contained in an application to the Community judicature, to amend the contested decision or to substitute another for it and to rely in the proceedings on such an amendment or substitution in

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order to deprive the other party of the opportunity of extending his original pleadings to the later decision or of submitting supplementary pleadings directed against that decision. This also holds true for the scenario in which a regulation of direct and individual concern to an individual is replaced, during the procedure, by a regulation having the same subject-matter.

(see paras 28-29)

2. The Court of First Instance has jurisdiction to hear an action for annulment directed against a Common Position adopted on the basis of Articles 15 EU under Title V relating to the Common foreign and security policy (CFSP), and 34 EU under Title VI relating to police and judicial cooperation in criminal matters (JHA), only strictly to the extent that, in support of such an action, the applicant alleges an infringement of the Community's competences.

Neither Title V of the EU Treaty relating to the CFSP nor Title VI of the EU Treaty relating to JHA make any provision for actions for annulment of common positions before the Community Courts.

Under the EU Treaty, in the version resulting from the Treaty of Amsterdam, the powers of the Court of Justice are listed exhaustively in Article 46 EU. That article does not confer any competence on the Court in relation to the provisions of Title V of the EU Treaty and, under Title VI of the EU Treaty, it follows from Articles 35 EU and 46 EU that legal remedies seeking a ruling as to validity or annulment are available only as against framework decisions, decisions and the measures implementing conventions provided for by Article 34(2)(b), (c) and (d) EU, with the exception of the common positions provided for in Article 34(2)(a) EU.

(see paras 46-49, 52, 56)

3. The safeguard relating to observance of the actual right to a fair hearing, in the context of the adoption of a decision to freeze funds on the basis of Regulation No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism, cannot be denied to the parties concerned solely on the ground that neither the European Convention for the Protection of Human Rights nor the general principles of Community law confer on individuals any right whatsoever to be heard before the adoption of an act of a legislative nature.

Although Decision 2005/930 implementing Article 2(3) of Regulation No 2580/2001 has the same general scope as that regulation and, like that regulation, is directly applicable in all Member States and thus, despite its title, is an integral part of that regulation for the purposes of Article 249 EC, it is not, however, of an exclusively legislative nature. Whilst being of general application, it is of direct and individual concern to the persons to whom it refers by name as having to be included in the list of persons, groups and entities whose funds are to be frozen pursuant to that regulation.

(see paras 95, 97-98)

4. In the context of Security Council Resolution 1373 (2001), it is for the Member States of the United Nations - and, in this case, the Community, through which its Member States have decided to act - to identify specifically the persons, groups and entities whose funds are to be frozen pursuant to that resolution, in accordance with the rules in their own legal order.

That resolution does not specify individually the persons, groups and entities who are to be the subjects of those measures; nor did it establish specific legal rules concerning the procedure for freezing funds, or the safeguards or judicial remedies ensuring that the persons or entities affected by such a procedure would have a genuine opportunity to challenge the measures adopted by the States in respect of them.

The Community, moreover, does not act under powers circumscribed by the will of the Union or that of its Member States when the Council adopts economic sanctions measures on the basis of Articles

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60 EC, 301 EC and 308 EC.

Since the identification of the persons, groups and entities contemplated in Security Council Resolution 1373 (2001), and the adoption of the ensuing measure of freezing funds, involve the exercise of the Community's own powers, entailing a discretionary appreciation by the Community, the Community institutions concerned, in this case the Council, are in principle bound to observe the right to a fair hearing of the parties concerned when they act with a view to giving effect to that resolution. It follows that the safeguarding of the right to a fair hearing is, as a matter of principle, fully applicable in the context of the adoption of a decision to freeze funds under Regulation No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism.

(see paras 101-102, 106-108)

5. In the context of the adoption of a decision to freeze funds under Article 2(3) of Regulation No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism, the right to a fair hearing only falls to be exercised with regard to the elements of fact and law which are liable to determine the application of the measure in question to the person concerned, in accordance with those rules.

The observance of those rights in that context is however liable to arise at those two levels.

The right of the party concerned to a fair hearing must be effectively safeguarded in the first place as part of the national procedure which led to the adoption, by the competent national authority, of the decision referred to in Article 1(4) of Common Position 2001/931 on the application of specific measures to combat terrorism. It is essentially in that national context that the party concerned must be placed in a position in which he can effectively make known his view of the matters on which the decision is based, subject to possible restrictions on the right to a fair hearing which are legally justified in national law, particularly on grounds of public policy, public security or the maintenance of international relations.

Next, the right of the party concerned to a fair hearing must be effectively safeguarded in the Community procedure culminating in the adoption, by the Council, of the decision to include or maintain it on the disputed list, in accordance with Article 2(3) of Regulation No 2580/2001. As a rule, in that area, the party concerned need only be afforded the opportunity effectively to make known his views on the legal conditions of application of the Community measure in question, namely, where it is an initial decision to freeze funds, whether there is specific information or material in the file which shows that a decision meeting the definition laid down in Article 1(4) of Common Position 2001/931 was taken in respect of him by a competent national authority and, where it is a subsequent decision to freeze funds, the justification for maintaining the party concerned in the disputed list.

(see paras 114-115, 118-120)

6. Under Article 10 EC, relations between the Member States and the Community institutions are governed by reciprocal duties to cooperate in good faith. That principle is of general application and is especially binding in the area of police and judicial cooperation in criminal matters governed by Title VI of the EU Treaty, which is moreover entirely based on cooperation between the Member States and the institutions.

In a case of application of Article 1(4) of Common Position 2001/931 on the application of specific measures to combat terrorism and Article 2(3) of Regulation No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism, provisions which introduce a specific form of cooperation between the Council and the Member States in the

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context of combating terrorism, that principle entails, for the Council, the obligation to defer as far as possible to the assessment conducted by the competent national authority, at least where it is a judicial authority, both in respect of the issue of whether there are serious and credible evidence or clues' on which its decision is based and in respect of recognition of potential restrictions on access to that evidence or those clues, legally justified under national law on grounds of overriding public policy, public security or the maintenance of international relations.

However, these considerations are valid only in so far as the evidence or clues in question were in fact assessed by the competent national authority. If, on the other hand, in the course of the procedure before it, the Council bases its initial decision or a subsequent decision to freeze funds on information or evidence communicated to it by representatives of the Member States without it having been assessed by the competent national authority, that information must be considered as newly-adduced evidence which must, in principle, be the subject of notification and a hearing at Community level, not having already been so at national level.

(see paras 123-125)

7. The general principle of observance of the right to a fair hearing requires, unless precluded by overriding considerations concerning the security of the Community or its Member States, or the conduct of their international relations, that the evidence adduced against the party concerned should be notified to it, in so far as possible, either concomitantly with or as soon as possible after the adoption of an initial decision to freeze funds. Subject to the same reservations, any subsequent decision to freeze funds must, in principle, be preceded by notification of any new evidence adduced and a hearing. However, observance of the right to a fair hearing does not require either that the evidence adduced against the party concerned be notified to it before the adoption of an initial measure to freeze funds, or that that party automatically be heard after the event in such a context.

In the case of an initial decision to freeze funds, the notification of the evidence requires, in principle, first, that the party concerned be informed by the Council of the specific information or material in the file which indicates that a decision meeting the definition given in Article 1(4) of Common Position 2001/931 on the application of specific measures to combat terrorism has been taken in respect of it by a competent authority of a Member State, and also, where applicable, any new material resulting from information or evidence communicated to the Council by representatives of the Member States without it having been assessed by the competent national authority and, second, that it must be placed in a position in which it can effectively make known its view on the information or material in the file.

In the case of a subsequent decision to freeze funds, observance of the right to a fair hearing similarly requires, first, that the party concerned be informed of the information or material in the file which, in the view of the Council, justifies maintaining it in the disputed lists, and also, where applicable, of any new material referred to above and, second, that it must be afforded the opportunity effectively to make known its view on the matter.

(see paras 125-126, 137)

8. The safeguard relating to the obligation to state reasons provided for by Article 253 EC is fully applicable in the context of the adoption of a decision to freeze funds under Regulation No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism.

In principle, the statement of reasons for a measure to freeze funds under Regulation No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism must refer not only to the statutory conditions of application of that regulation, but

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also to the reasons why the Council considers, in the exercise of its discretion, that such a measure must be adopted in respect of the party concerned.

However, the overriding considerations concerning the security of the Community and its Member States, or the conduct of their international relations, may preclude disclosure to the parties concerned of the specific and complete reasons for the initial or subsequent decision to freeze their funds, just as they may preclude the evidence adduced against those parties from being communicated to them during the administrative procedure.

(see paras 109, 146, 148)

9. Unless precluded by overriding considerations concerning the security of the Community and its Member States, or the conduct of their international relations, and subject also to the possibility that only the operative part of the decision and a general statement of reasons may be contained in the version of the decision to freeze funds published in the Official Journal, the statement of reasons for an initial decision to freeze funds referred to in Article 1(4) of Common Position 2001/931 on the application of specific measures to combat terrorism must at least make actual and specific reference to precise information or material in the relevant file which indicates that that decision has been taken by a competent authority of a Member State in respect of the party concerned. The statement of reasons for such a decision must also state the reasons why the Council considers, in the exercise of its discretion, that such a measure must be taken in respect of the party concerned. Moreover, the statement of reasons for a subsequent decision to freeze funds as referred to in Article 1(6) of that common position must, subject to the same reservations, state the actual and specific reasons why the Council considers, following re-examination, that the freezing of the funds of the party concerned remains justified, where applicable on the basis of new information or evidence.

(see paras 116, 125-126, 147, 151)

10. The judicial review of the lawfulness of a decision to freeze funds taken pursuant to Article 2(3) of Regulation No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism is that provided for in the second paragraph of Article 230 EC, under which the Community Courts have jurisdiction in actions for annulment brought on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the EC Treaty or of any rule of law relating to its application or misuse of powers.

As part of that review, and having regard to the grounds for annulment put forward by the party concerned or raised by the Court of its own motion, it is for the Court to ensure, inter alia, that the legal conditions for applying Regulation No 2580/2001 to a particular scenario, as laid down in Article 2(3) of that regulation and, by reference, either Article 1(4) or Article 1(6) of Common Position 2001/931 on the application of specific measures to combat terrorism, depending on whether it is an initial decision or a subsequent decision to freeze funds, are fulfilled. That implies that the judicial review of the lawfulness of the decision in question extends to the assessment of the facts and circumstances relied on as justifying it, and to the evidence and information on which that assessment is based. The Court must also ensure that the right to a fair hearing is observed and that the requirement of a statement of reasons is satisfied and also, where applicable, that the overriding considerations relied on exceptionally by the Council in disregarding those rights are well founded.

That review is all the more imperative where it constitutes the only procedural safeguard ensuring that a fair balance is struck between the need to combat international terrorism and the protection of fundamental rights. Since the restrictions imposed by the Council on the right of the parties concerned to a fair hearing must be offset by a strict judicial review which is independent and

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impartial, the Community Courts must be able to review the lawfulness and merits of the measures to freeze funds without it being possible to raise objections that the evidence and information used by the Council is secret or confidential.

(see paras 153-155)

Background to the case

1. As appears from the case-file, the applicant, the Organisation des Modjahedines du peuple d'Iran (People's Mujahidin of Iran, Mujahedin-e Khalq in Farsi), was founded in 1965 and set itself the objective of replacing the regime of the Shah of Iran, then the mullahs' regime, by a democracy. In 1981 it took part in the foundation of the National Council of Resistance of Iran (NCRI), a body defining itself as the parliament in exile of the Iranian resistance'. At the time of the facts giving rise to the present dispute, it was composed of five separate organisations and an independent section, making up an armed branch operating inside Iran. According to the applicant, however, it and all its members have expressly renounced all military activity since June 2001 and it no longer has an armed structure at the present time.

2. By order of 28 March 2001, the United Kingdom Secretary of State for the Home Department (the Home Secretary') included the applicant in the list of organisations proscribed under the Terrorism Act 2000. The applicant brought two parallel actions against that order, one an appeal before the Proscribed Organisations Appeal Commission (POAC'), the other for judicial review before the High Court of Justice (England and Wales), Queen's Bench Division (Administrative Court) (the High Court').

3. On 28 September 2001, the United Nations Security Council (the Security Council') adopted Resolution 1373 (2001) laying down strategies to combat terrorism by all means, in particular the financing thereof. Paragraph 1(c) of that resolution provides, inter alia, that all States must freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled by such persons; and of persons and entities acting on behalf of, or at the direction of, such persons and entities.

4. On 27 December 2001, taking the view that action by the Community was needed in order to implement Security Council Resolution 1373 (2001), the Council adopted Common Position 2001/930/CFSP on combating terrorism (OJ 2001 L 344, p. 90) and Common Position 2001/931/CFSP on the application of specific measures to combat terrorism (OJ 2001 L 344, p. 93).

5. According to Article 1(1) of Common Position 2001/931, the latter applies to persons, groups and entities involved in terrorist acts and listed in the Annex'. The applicant's name does not appear in that list.

6. Article 1(2) and (3) of Common Position 2001/931 defines what is to be understood by persons, groups and entities involved in terrorist acts' and by terrorist act'.

7. According to the terms of Article 1(4) of Common Position 2001/931, the list in the Annex is to be drawn up on the basis of precise information or material in the relevant file which indicates that a decision has been taken by a competent authority in respect of the persons, groups and entities concerned, irrespective of whether it concerns the instigation of investigations or prosecution for a terrorist act, an attempt to perpetrate, participate in or facilitate such an act based on serious and credible evidence or clues, or condemnation for such deeds. Competent authority' is understood to mean a judicial authority or, where judicial authorities have no competence in the relevant area, an equivalent competent authority in that area.

8. According to Article 1(6) of Common Position 2001/931, the names of persons and entities in

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the list in the Annex are to be reviewed at regular intervals and at least once every six months to ensure that there are grounds for keeping them in the list.

9. According to Articles 2 and 3 of Common Position 2001/931, the European Community, acting within the limits of the powers conferred on it by the EC Treaty, is to order the freezing of the funds and other financial assets or economic resources of persons, groups and entities listed in the Annex and is to ensure that funds, financial assets or economic resources or financial or other related services will not be made available, directly or indirectly, for their benefit.

10. On 27 December 2001, considering that a regulation was necessary in order to implement at Community level the measures described in Common Position 2001/931, the Council adopted, on the basis of Articles 60 EC, 301 EC and 308 EC, Council Regulation (EC) No 2580/2001 of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism (OJ 2001 L 344, p. 70). That regulation provides that, except as permitted thereunder, all funds belonging to a natural or legal person, group or entity included in the list referred to in Article 2(3) thereof are to be frozen. Likewise, it is prohibited to make funds available or provide financial services to those persons, groups or entities. The Council, acting by unanimity, is to establish, review and amend the list of persons, groups and entities to which the regulation applies, in accordance with the provisions laid down in Article 1(4), (5) and (6) of Common Position 2001/931.

11. The initial list of persons, groups and entities to which Regulation No 2580/2001 applies was established by Council Decision 2001/927/EC of 27 December 2001 establishing the list provided for in Article 2(3) of Council Regulation (EC) No 2580/2001 (OJ 2001 L 344, p. 83). The applicant's name is not included in that list.

12. By judgment of 17 April 2002 the High Court dismissed the action for judicial review brought by the applicant against the Home Secretary's order of 28 March 2001 (see paragraph 2 above), considering, essentially, that the POAC was the appropriate forum to hear the applicant's arguments, including those alleging infringement of the right to be heard.

13. On 2 May 2002, the Council adopted, under Articles 15 EU and 34 EU, Common Position 2002/340/CFSP, updating Common Position 2001/931 (OJ 2002 L 116, p. 75). The annex thereto updates the list of persons, groups and entities to which Common Position 2001/931 applies. Point 2 of that annex, entitled Groups and entities', includes inter alia the applicant's name, identified as follows :

Mujahedin-e Khalq Organisation (MEK or MKO) (minus the National Council of Resistance of Iran (NCRI)) (a.k.a. The National Liberation Army of Iran (NLA, the militant wing of the MEK), the People's Mujahidin of Iran (PMOI), National Council of Resistance (NCR), Muslim Iranian Students' Society)'.

14. By Council Decision 2002/334/EC of 2 May 2002 implementing Article 2(3) of Regulation (EC) No 2580/2001 and repealing Decision 2001/927 (OJ 2002 L 116, p. 33), the Council adopted an updated list of the persons, groups and entities to which that regulation applies. The applicant's name is included in that list, in the same terms as those employed in the Annex to Common Position 2002/340.

15. On 17 June 2002, the Council adopted Common Position 2002/462/CFSP updating Common Position 2001/931 and repealing Common Position 2002/340 (OJ 2002 L 160, p. 32) and also Council Decision 2002/460/EC implementing Article 2(3) of Regulation (EC) No 2580/2001 and repealing Decision 2002/334 (OJ 2002 L 160, p. 26). The applicant's name was maintained in the lists provided for by Common Position 2001/931 and by Regulation No 2580/2001 (the disputed lists' or, in the case of the latter, the disputed list').

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16. By judgment of 15 November 2002 the POAC dismissed the appeal brought by the applicant against the Home Secretary's order of 28 March 2001 (see paragraph 2 above), considering, inter alia, that there was no requirement to hear the applicant's views beforehand, such a hearing being impractical or undesirable in the context of legislation directed against terrorist organisations. According to that same decision, the legal scheme of the Terrorism Act 2000 provides a genuine opportunity for the applicant's views to be heard before the POAC.

17. Since then, the Council has adopted a number of common positions and decisions updating the disputed lists. Those in force at the date of the close of the oral procedure were: Common Position 2005/936/CFSP of the Council of 21 December 2005 updating Common Position 2001/931 and repealing Common Position 2005/847/CFSP (OJ 2005 L 340, p. 80), and Council Decision 2005/930/EC of 21 December 2005 implementing Article 2(3) of Regulation No 2580/2001 and repealing Decision 2005/848/EC (OJ 2005 L 340, p. 64). The applicant's name has always been maintained in the disputed lists by the acts thus adopted.

Procedure and forms of order sought

18. By application lodged at the Registry of the Court of First Instance on 26 July 2002, the applicant brought the present action, in which it claims that the Court should:

- annul Common Positions 2002/340 and 2002/462 and also Decision 2002/460, in so far as those acts concern it;

- consequently, declare those Common Positions and that decision to be inapplicable in respect of it;

- order the Council to pay EUR 1 by way of damages for the harm suffered;

- order the Council to pay the costs.

19. In its defence, the Council contends that the Court should:

- dismiss the action as in part inadmissible and in part unfounded;

- order the applicant to pay the costs.

20. By order of 12 February 2003, after the parties had been heard, the President of the Second Chamber of the Court of First Instance granted the United Kingdom of Great Britain and Northern Ireland leave to intervene in support of the forms of order sought by the Council. The intervener lodged its statement in intervention, seeking to have the action dismissed, and the applicant lodged its observations thereon within the prescribed periods.

21. After hearing the report of the Judge-Rapporteur, the Court of First Instance (Second Chamber) decided to open the oral procedure and, by way of measures of organisation of the procedure provided for in Article 64 of the Rules of Procedure of the Court of First Instance, called on the parties, by letter from the Registry of 1 December 2005, to submit their written observations on the inferences to be drawn, for the remainder of the present action, from the new factors, that is, the repeal and replacement on a number of occasions after the application was lodged of the acts challenged in that action, namely Common Positions 2002/340 and 2002/462 and also Decision 2002/460, by acts which have always maintained the applicant in the disputed lists.

22. In its observations, lodged at the Court Registry on 21 December 2005, the Council maintained that it was not necessary to express a view on the Common Positions, since the action is, in its view, in any event inadmissible in this respect. In respect of the Community decisions implementing Regulation No 2580/2001, the Council takes the view that it is appropriate to consider that the application is directed against Decision 2005/848/EC' of the Council of 29 November 2005 implementing Article 2(3) of Regulation No 2580/2001 and repealing Decision 2005/722/EC (OJ 2005 L 314,

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p. 46) or any other decision having the same subject-matter which may be in force on the date the Court of First Instance delivers it judgment, in so far as that decision concerns the applicant'.

23. In its observations, lodged at the Registry on 2 January 2006, the applicant takes the view that the present action must be considered to be directed against Common Position 2005/847/CFSP of the Council of 29 November 2005' updating Common Position 2001/931 and repealing Common Position 2005/725/CFSP (OJ 2005 L 314, p. 41) and Decision 2005/848'. Moreover, in the annex to its observations, the applicant attached a series of new documents, which were put into the case-file. By letter from the Registry of 19 January 2006, those observations and documents were notified to the Council, which acknowledged receipt thereof on 27 January 2006.

24. By letter lodged at the Registry on 25 January 2006, the applicant lodged written observations on the Report for the Hearing, in which it stated inter alia that the action must henceforth also be considered to be directed against Common Position 2005/936 and Decision 2005/930. In the annex to that letter, it attached a further series of new documents. The parties were notified that a decision as to whether those annexes would be put into the case-file would be taken at the hearing.

25. The parties presented oral argument and answered questions put to them by the Court at the hearing on 7 February 2006. During that hearing, the Council argued that the new documents lodged at the Registry by the applicant on 18 and 25 January 2006 (see paragraphs 23 and 24 above) had not been lodged properly. The Council added that it was not in a position to put forth its views properly on those documents because it had been notified of them too late. The Council accordingly asked the Court either not to allow the documents in question to be put into the case-file, or to order that the written procedure be reopened in order to allow the Council to set out its views in writing. The Court reserved its decision on that request, and also on whether the documents referred to in paragraph 24 above would be put into the case-file.

26. In response to a question from the Court, the applicant stated that, as acknowledged by the Council in its observations lodged at the Registry on 23 December 2005 (see paragraph 22 above), the present action must be considered to be directed against Common Position 2005/936 and Decision 2005/930 and also, as the case may be, against all other acts in force on the date the forthcoming judgment is delivered, having the same subject-matter as that common position and decision and having the same effect on it, in so far as those acts concern it.

The procedural consequences of the repeal and replacement of the acts initially challenged

27. As appears from paragraph 17 above, the acts initially challenged by the present action, namely Common Positions 2002/340 and 2002/462 and also Decision 2002/460 (the decision initially contested'), have been repealed and replaced on a number of occasions after the application was lodged, by acts which have always maintained the applicant in the disputed lists. On the date on which the oral procedure was closed, those were Common Position 2005/936 and Decision 2005/930.

28. It must be observed that, where a decision is, during the proceedings, replaced by another decision with the same subject-matter, this is to be considered a new factor allowing the applicant to adapt its claims and pleas in law. It would not be in the interests of the due administration of justice and the requirements of procedural economy to oblige the applicant to make a fresh application to the Court. Moreover, it would be inequitable if the institution in question were able, in order to counter criticisms of a decision contained in an application to the Community judicature, to amend the contested decision or to substitute another for it and to rely in the proceedings on such an amendment or substitution in order to deprive the other party of the opportunity of extending his original pleadings to the later decision or of submitting supplementary pleadings directed against that decision (Case 14/81 Alpha Steel v Commission [1982] ECR 749, paragraph 8; Joined Cases 351/85 and 360/85 Fabrique de Fer de Charleroi and Dillinger Hüttenwerke v Commission [1987]

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ECR 3639, paragraph 11; Case 103/85 Stahlwerke Peine-Salzgitter v Commission [1988] ECR 4131, paragraphs 11 and 12; and Joined Cases T46/98 and T151/98 CCRE v Commission [2000] ECR II167, paragraph 33).

29. In its judgments in Case T306/01 Yusuf and Al Barakaat International Foundation v Council and Commission [2005] ECR II-3533, appeal pending (Yusuf '), paragraph 73, and Case T315/01 Kadi v Council and Commission [2005] ECR II-3649, appeal pending (Kadi '), paragraph 54, the Court applied that case-law to the scenario in which a regulation of direct and individual concern to an individual is replaced, during the procedure, by a regulation having the same subject-matter.

30. Consistently with that case-law, it is therefore appropriate in the present case to allow the applicant's request that its action be considered, on the date on which the oral procedure was closed, to seek annulment of Common Position 2005/936 and Decision 2005/930, in so far as those acts concern it, and to allow the parties to reformulate their claims, pleas and arguments in the light of those new factors, which implies, for them, the right to submit additional claims, pleas and arguments.

31. In those circumstances, it is appropriate, first, to allow the documents attached to the applicant's observations on the Report for the Hearing, lodged at the Registry on 25 January 2006 (see paragraph 24 above), to be put into the case-file and, second, to dismiss the Council's request that neither the documents in question, nor the applicant's observations in response to the Court's written question, lodged at the Registry on 18 January 2006 (see paragraphs 23 and 25 above), should be allowed into the case-file. The production of new evidence and documents and the submission of new offers of evidence must be regarded as an inherent part of the parties' right to reformulate their claims, pleas and arguments, in the light of the new factors referred to in the preceding paragraphs. As to the question whether the addition to the case-file of the documents in question at a late stage justifies, in the present case, a reopening of the written procedure so as to safeguard the Council's rights of defence (see paragraph 25 above), reference is made to paragraph 182 below.

32. As to the remainder, the Court considers that only actions for annulment of an act in existence adversely affecting the applicant may be brought before it. Accordingly, even if, as held in paragraph 30 above, the applicant may be permitted to reformulate its claims so as to seek annulment of acts which have, during the proceedings, replaced the acts initially challenged, that solution cannot authorise the speculative review of the lawfulness of hypothetical acts which have not yet been adopted (see order in Case T22/96 Langdon v Commission [1996] ECR II1009, paragraph 16, and case-law cited).

33. It follows that there are no grounds for allowing the applicant to reformulate its claims so that they are directed not only against Common Position 2005/936 and Decision 2005/930, but also, as the case may be, against any other acts in force at the time of the subsequent judgment, having the same subject-matter as those acts and having the same effect on it, in so far as those acts concern it (see paragraph 26 above).

34. Accordingly, for the purposes of the present action, the Court's review will concern only those acts already adopted and still in force and challenged on the date on which the oral procedure closed, namely Common Position 2005/936 (the contested Common Position') and Decision 2005/930 (the contested decision') (collectively the contested acts'), even if those acts have in turn been repealed and replaced by other acts before the date of delivery of the present judgment.

35. In such circumstances, the applicant still has an interest in obtaining annulment of the contested acts, in that the repeal of an act of an institution does not constitute recognition of the unlawfulness of that act and has only prospective effect, unlike a judgment annulling an act, by which the act is eliminated retroactively from the legal order and is deemed never to have existed. Moreover, as acknowledged by the Council at the hearing, if the contested acts are annulled, it will be obliged

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to take the measures necessary to comply with that judgment, pursuant to Article 233 EC, which may involve its amending or withdrawing, as the case may be, any acts which have repealed and replaced the acts contested subsequent to the close of the oral procedure (see, to that effect, Joined Cases T481/93 and T484/93 Exporteurs in Levende Varkens and Others v Commission [1995] ECR II2941, paragraphs 46 to 48).

The second head of claim

36. By its second head of claim, as reformulated at the hearing, the applicant asks the Court to declare the contested acts inapplicable to it, as a consequence of the partial annulment thereof sought by the first head of claim.

37. It is clear that the second head of claim, so formulated, has no scope independent of the first head of claim. That being so, it must be regarded as having no purpose.

The application for annulment of the contested Common Position

Arguments of the parties

38. The applicant maintains that the present action is admissible, since both the contested Common Position and the contested decision concern it directly and individually and affect it adversely. It states, more specifically, that the Court is competent to review the lawfulness of the Common Position in question, failing which justice will be denied.

39. According to the applicant, the principles of a State governed by the rule of law, as enshrined in Article 6(2) EU, apply to all of the Union's acts, including those adopted as part of the Common Foreign and Security Policy (CFSP) or police and judicial cooperation in criminal matters (commonly known as Justice and Home Affairs') (JHA). As the right to obtain a judicial determination is part of the foundation of a State governed by the rule of law, as also evidenced by Articles 35 EU and 46 EU and the Court of Justice's case-law (Case 222/84 Johnston [1986] ECR 1651, paragraph 18, and Case C50/00 P Union de Pequeños Agricultores v Council [2002] ECR I6677, paragraphs 38 and 39), none of those acts must fall outside the scope of judicial review by the Court of Justice and the Court of First Instance. Otherwise, according to the applicant, a lawless zone would be created.

40. In any event, the legislative process pursued by the Council in this case must be held to be illegal, as must the basing of the contested Common Position on the provisions relating to the CFSP. In the light of, inter alia, the primacy of Community law as enshrined in Article 47 EU, the Court is competent to declare illegal an act adopted on the basis of CFSP or JHA. The applicant refers to Case C170/96 Commission v Council [1998] ECR I2763.

41. That process has been characterised by the steadfast will on the part of the Council, relying on an international rule, to circumvent the imperatives of the protection of fundamental rights and democratic, legislative or judicial review of its acts, in disregard of the general principles of Community law. However, the persons in charge of the actual implementation of those acts of the Union remain subject to judicial review, in the light of fundamental rights.

42. That will was, moreover, criticised by the European Parliament when it was consulted on the draft text of Regulation No 2580/2001. It is illustrated, inter alia, by the fact that the Council gave itself the power to implement Regulation No 2580/2001, by way of decisions which, in addition, do not appear to contain reasons.

43. Without denying that the applicant is directly and individually concerned by the contested acts, the Council and the United Kingdom contend that the action is inadmissible in so far as it is directed against the contested Common Position.

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44. The Council and the United Kingdom submit that, consequently, the present action must be restricted to a review of the lawfulness of the contested decision, by which the measures provided for by Regulation No 2580/2001 are made applicable to the applicant.

Findings of the Court

45. According to the settled case-law of the Court (order of 7 June 2004 in Case T338/02 Segi and Others v Council [2004] ECR II1647, appeal pending, paragraph 40 et seq.; order of 7 June 2004 in Case T333/02 Gestoras Pro Amnistía and Others v Council , not published in the ECR, appeal pending, paragraph 40 et seq., and order of 18 November 2005 in Case T299/04 Selmani v Council and Commission , not published in the ECR, paragraphs 52 to 59), the action must be dismissed as, in part, clearly inadmissible and, in part, clearly unfounded in so far as it seeks annulment of the contested Common Position.

46. The Court notes, at the outset, that that Common Position is not an act of the Council adopted on the basis of the EC Treaty and subject, as such, to the review of its lawfulness provided for by Article 230 EC, but rather an act of the Council, composed of representatives of the Governments of the Member States, adopted on the basis of Articles 15 EU, under Title V of the EU Treaty relating to the CFSP, and 34 EU, under Title VI of the EU Treaty relating to JHA.

47. It is clear that neither Title V of the EU Treaty relating to the CFSP nor Title VI of the EU Treaty relating to JHA make any provision for actions for annulment of common positions before the Community Courts.

48. Under the EU Treaty, in the version resulting from the Treaty of Amsterdam, the powers of the Court of Justice are listed exhaustively in Article 46 EU.

49. That article does not confer any competence on the Court in relation to the provisions of Title V of the EU Treaty.

50. With respect to the relevant provisions of Title VI of the EU Treaty, that article provides:

The provisions of the Treaty establishing the European Community, the Treaty establishing the European Coal and Steel Community and the Treaty establishing the European Atomic Energy Community concerning the powers of the Court of Justice of the European Communities and the exercise of those powers shall apply only to the following provisions of this Treaty:

...

(b) provisions of Title VI, under the conditions provided for by Article 35 [EU];

...

(d) Article 6(2) [EU] with regard to action of the institutions, in so far as the Court has jurisdiction under the Treaties establishing the European Communities and under this Treaty;

...'.

51. According to the relevant provisions of Article 35 EU:

1. The Court of Justice shall have jurisdiction, subject to the conditions laid down in this Article, to give preliminary rulings on the validity and interpretation of framework decisions, and decisions on the interpretation of conventions established under this Title and on the validity and interpretation of the measures implementing them.

...

6. The Court of Justice shall have jurisdiction to review the legality of framework decisions and decisions in actions brought by a Member State or the Commission on grounds of lack of competence,

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infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers. The proceedings provided for in this paragraph shall be instituted within two months of the publication of the measure.

...'.

52. It follows from Articles 35 EU and 46 EU that, under Title VI of the EU Treaty, legal remedies seeking a ruling as to validity or annulment are available only as against framework decisions, decisions and the measures implementing conventions provided for by Article 34(2)(b), (c) and (d) EU, with the exception of the common positions provided for in Article 34(2)(a) EU.

53. It should further be noted that the safeguard of observance of fundamental rights referred to in Article 6(2) EU is not relevant to the present case, as Article 46(d) EU gives the Court of Justice no further competence (Segi and Others v Council , paragraph 45 above, paragraph 37).

54. In the Community legal system founded on the principle of conferred powers, as embodied in Article 5 EC, the absence of an effective legal remedy as claimed by the applicant cannot in itself confer independent Community jurisdiction in relation to an act adopted in a related yet distinct legal system, namely that deriving from Titles V and VI of the EU Treaty (Segi and Others v Council , paragraph 45 above, paragraph 38). Nor can the applicant rely on Union de Pequeños Agricultores v Council , paragraph 39 above. In that judgment (paragraph 40), the Court based its reasoning on the fact that the EC Treaty has established a complete system of legal remedies and procedures designed to ensure judicial review of the lawfulness of acts of the institutions. However, as indicated above, the EU Treaty has, in relation to acts adopted on the basis of Titles V and VI thereof, established a limited system of judicial review, certain areas being outside the scope of that review and certain legal remedies not being available.

55. The Court notes in this respect, however, that, without its being necessary to consider the possibility of challenging the validity of a common position before the courts of the Member States, the contested Common Position requires the adoption of implementing Community and/or national acts in order to be effective. It has not been contended that those implementing acts cannot themselves be the subject-matter of an action for annulment either before the Community Courts or before the national courts. Thus, it has not been established that the applicant does not have available to it an effective legal remedy, albeit indirect, against the acts adopted pursuant to the contested Common Position which affect it adversely and directly. In the present case, moreover, the applicant has availed itself of its right of action against the contested decision.

56. In those circumstances, the Court of First Instance has jurisdiction to hear an action for annulment directed against a Common Position adopted on the basis of Articles 15 EU and 34 EU only strictly to the extent that, in support of such an action, the applicant alleges an infringement of the Community's competences (Selmani v Council and Commission , paragraph 45 above, paragraph 56). The Community Courts have jurisdiction to examine the content of an act adopted pursuant to the EU Treaty in order to ascertain whether that act affects the Community's competences and to annul it if it should emerge that it ought to have been based on a provision of the EC Treaty (see, to that effect, Commission v Council , paragraph 40 above, paragraphs 16 and 17, and Case C176/03 Commission v Council [2005] ECR I7879, paragraph 39; Segi and Others v Council ; Gestoras Pro Amnistía and Others v Council , paragraph 45 above, paragraph 41; see also, by analogy, Case C124/95 Centro-Com [1997] ECR I81, paragraph 25).

57. In the present case, to the extent that the applicant alleges misuse of powers on the part of the Council acting in Union matters in disregard of the Community's competences, in order to deprive it of all forms of judicial protection, the present action therefore comes within the jurisdiction of the Community Courts.

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58. The Court finds, however, that the Council, acting in Union matters, far from infringing the Community's competences, on the contrary, relied on them in order to implement the contested Common Position. First, the Council, having made use of the relevant Community powers, in particular those laid down in Articles 60 EC and 301 EC, cannot be criticised for having been unaware of them. The applicant has not identified any relevant legal basis other than the provisions actually used in the present case which might have been disregarded, contrary to Article 47 EU. Second, those provisions themselves provide for the prior adoption of a common position or a joint action in order to be applicable. It follows that the prior adoption of a common position before the implementation of the Community competences exercised in the present case demonstrates compliance with those competences and not breach thereof. Moreover, even if the use of a common position on the basis of the EU Treaty means that the persons affected are denied a direct remedy before the Community Courts, namely the possibility of challenging directly the lawfulness of the contested Common Position, such a result does not constitute as such a disregard of the Community's competences. Lastly, with regard to the Parliament resolution of 7 February 2002, in which the Parliament criticises the choice of a legal basis coming within the field of the EU Treaty for the establishment of the list of persons, groups or entities involved in terrorist acts, it must be noted that that criticism concerns a political choice and does not call into question, as such, the lawfulness of the legal basis chosen or concern the question of failure to observe Community competences (Segi and Others v Council , paragraph 45 above, paragraph 46).

59. The Court, exercising the limited judicial review within its competence under the EC Treaty, can therefore only find that the contested Common Position does not infringe the Community's competences.

60. It follows from the foregoing that, to the limited extent to which the Court has jurisdiction to hear and determine this action in so far as it is directed against the contested Common Position, that action must be dismissed as manifestly unfounded.

The action for annulment of the contested decision

61. In support of its claim for annulment of the contested decision, the applicant puts forward three pleas in law. The first plea comprises five parts, alleging infringement of the right to a fair hearing, infringement of essential procedural requirements, infringement of the right to effective judicial protection, infringement of the presumption of innocence and a manifest error of assessment. The second plea is based on infringement of the right to revolt against tyranny and oppression. The third is based on infringement of the principle of non-discrimination.

62. It is appropriate to begin by examining the first plea.

Arguments of the parties

63. Under the first plea, the applicant does not contest, as such, either the lawfulness or legitimacy of measures such as the freezing of funds provided for by the contested acts directed against the persons, groups and entities involved in terrorist acts, within the meaning of Common Position 2001/931.

64. The applicant does maintain, however, in the first part of that plea, that the contested decision infringes its fundamental rights, in particular its right to a fair hearing as guaranteed in particular in this case by Article 6(2) EU and by Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR'), in that that act imposes sanctions on it and causes it considerable harm, without its having being able to express its views either before the adoption of the act or even afterwards. It submits that, given that its offices and managers are known, its representatives ought to have been summoned and heard before it was included in the disputed list. At the oral hearing, the applicant insisted that it was not even aware of the identity of the national authority that allegedly took the decision in respect of it for the purposes of Article

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1(4) of Common Position 2001/931 and Article 2(3) of Regulation No 2580/2001, or of the evidence and information on the basis of which such a decision was taken. According to the applicant, it was included in the disputed list apparently solely only on the basis of documents produced by the Tehran regime'.

65. The applicant adds, in the second and third parts of the plea, that its inclusion in the disputed list, without its views having been heard beforehand and without the slightest indication of the factual and legal grounds providing legal justification, also infringes the obligation to state reasons provided for in Article 253 EC as well as the right to effective judicial protection (Case 3/67 Mandelli v Commission [1968] ECR 25, and Johnston , paragraph 39 above).

66. The applicant further maintains, in the fourth part of the plea, that its inclusion also infringes the presumption of innocence, as guaranteed by Article 48(1) of the Charter of Fundamental Rights and also refers, in this respect, to the judgment of the European Court of Human Rights of 10 February 1995 in Allenet de Ribemont (series A No 308).

67. Lastly, the applicant maintains in the fifth part of the plea that its inclusion in the disputed list is the result of a manifest error of assessment. It states that there is no reason to accuse it of being a terrorist organisation.

68. The Council and the United Kingdom maintain that the contested decision does not infringe the fundamental rights infringement of which is alleged.

69. More specifically, with respect to the right to be heard, the Council observes that the applicant itself has stated that it wrote to the current President of the Council, before the adoption of the decision initially contested, in order to plead its case. The Council maintains that it heard the applicant's views at that time before proceeding to freeze its funds. It refers to the order of the President of the Second Chamber of the Court of First Instance of 2 August 2000 in Case T189/00 R Invest' Import und Export and Invest Commerce v Commission [2000] ECR II2993, paragraph 41, which indirectly implies that early contacts with the authorities, setting out one's point of view in detail and knowledge of the imminent inclusion in the blacklist are all factors which satisfy the right to be heard.

70. Moreover, the applicant has never contacted the Council again, since the decision initially contested was adopted, in order to have its case reconsidered with a view to its being removed from the disputed list.

71. In any event, it is not apparent from the ECHR, the Charter of Fundamental Rights, a non-binding instrument, or the constitutional traditions common to the Member States, that observance of the right to a fair hearing entails an unconditional right to be heard before the adoption of a civil or administrative sanction measure, such as that challenged in the present case.

72. The Council and the United Kingdom observe that exceptions to the general right to be heard during administrative procedures appear to be possible, at least in some Member States, on grounds of public interest, public policy or the maintenance of international relations, or when the purpose of the decision to be taken would be or could be defeated if the right in question were to be observed. The Council refers to German, French, Italian, English, Danish, Swedish, Irish and Belgian law by way of example.

73. The United Kingdom Government describes the special procedure applicable before the POAC, in the context of an action brought against a decision of the Home Secretary to prohibit an organisation he believes to be involved in terrorism, pursuant to the Terrorism Act 2000. One feature, among others, of that procedure is the appointment of special counsel to represent the applicant before the POAC, sitting in camera, or the fact that the POAC may take into consideration evidence

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which has not been divulged to that party or its legal representative, pursuant to the law or on grounds of public interest. In this case, the applicant was the subject of such a proscription decision (see paragraph 2 above), against which it has brought two parallel actions, one an appeal before the POAC, the other an action for judicial review before the High Court. By judgment of 17 April 2002, the High Court dismissed the action for judicial review (see paragraph 12 above) and, by judgment of 15 November 2002, the POAC dismissed the appeal (see paragraph 16 above).

74. Likewise, according to the Council and the United Kingdom, Community law does not confer on the applicant any right to be heard before being included in the disputed list.

75. According to the United Kingdom, the present case is different from the one which gave rise to the judgment in Case C135/92 Fiskano v Commission [1994] ECR I2885, relied on by the applicant, in that the inclusion of the applicant in the disputed list is not the implementation of a procedure concerning it, relating to a pre-existing right, but rather the adoption of a legislative or administrative measure by the Community institutions. A person affected by such a measure is not a defendant in a procedure and, consequently, the question of rights of the defence simply does not arise. Its rights are safeguarded by the possibility of bringing legal proceedings, in this case an action before the Court of First Instance on the basis of Article 230 EC, in order to have ascertained whether the rules at issue have been adopted legally and/or whether the applicant does in fact come within the scope of those rules.

76. The Council also refers, in the same vein, to Case 5/85 AKZO Chemie v Commission [1986] ECR 2585, paragraphs 20 and 24, and Case C54/99 Eglise de scientologie [2000] ECR I1335, paragraph 20. The Council doubts, moreover, that the principles deriving from case-law in competition and trade protection cases may be applied without reservation to the present case. In its view, the most relevant case-law for the present case is that which has held that, in the case of a person concerned by a Community sanction adopted on the proposal of a national authority, the right to be heard must actually be secured in the first place in the relations between that undertaking and the national administrative authority (Invest' Import und Export and Invest Commerce v Commission , paragraph 69 above, paragraph 40).

77. The Council states, with regard to Article 6 of the ECHR, that there is nothing in the case-law of the European Court of Human Rights to indicate that the safeguards provided for by that provision should have been applied during the administrative procedure which led to the adoption of the contested decision. The freezing of the applicant's assets is not a criminal penalty and cannot be equated with such a penalty under the gravity-related criteria applied by the European Court of Human Rights (Eur. Court H.R. Engel and Others , judgment of 8 June 1976, Series A No 22; Campbell and Fell , judgment of 28 June 1984, Series A No 80; and Oztürk , judgment of 23 October 1984, Series A No 85). That court has also held that Article 6(1) of the ECHR is not applicable to the administrative phases of an investigation before the administrative authorities. Only the manner in which the information gathered during the administrative inquiries is used in judicial proceedings is covered by the right to a fair hearing (Eur. Court H.R. Fayed , judgment of 21 September 1994, Series A No 294B).

78. The United Kingdom also disputes that Article 6(1) of the ECHR envisages the adoption of legislative or regulatory measures. That provision applies only to challenges concerning rights and obligations of a civil nature, and the safeguards it provides are applicable only where there is a dispute requiring a decision. It thus does not give individuals the right to be heard before the adoption of a set of general rules which interferes with their property rights. In such a situation, individuals are only entitled to bring a subsequent challenge against the lawfulness of those rules or the application thereof to their circumstances (Eur. Court H.R., Lithgow and Others , judgment of 8 July 1986, Series A No 102, and James and Others , judgment of 21 February 1986, Series

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A No 98).

79. In the present case, in the submission of the United Kingdom, neither the inclusion of the applicant in the disputed list nor, accordingly, the freezing of its assets come within the scope of Article 6(1) of the ECHR. Consequently, the applicant had no right to put forward its arguments before the adoption of those measures. Under that same provision, however, the applicant does have the right to bring legal proceedings to challenge the lawfulness of the acts in question. It has in fact exercised that right in bringing the present action.

80. In any event, the acts at issue in the present case, introduced as an emergency measure, are not disproportionate to the objective pursued and did not cause an unfair lack of balance between the requirements of the public interest and those relating to the protection of fundamental rights, it being understood that the right to a fair hearing may be exercised once those measures have been taken.

81. The Council and the United Kingdom point out that providing information to or hearing the views of the applicant before freezing its assets would have compromised the attainment of the important public interest objective pursued by Regulation No 2580/2001, which is to prevent funds from being used to finance terrorist activities. According to the Council and the United Kingdom, the applicant could have taken advantage of the time period allowed it to submit its comments to transfer those funds out of the Union.

82. The United Kingdom adds that there are in all likelihood overriding reasons of national security for not disclosing to the party concerned the information and evidence on the basis of which a competent authority may adopt a decision finding that an entity is involved in terrorism.

83. As to the alleged failure to state reasons, the Council contends that the contested decision, whilst not containing a specific statement of reasons, merely updates the list provided for by Regulation No 2580/2001, Article 2(3) of which lists the criteria on the basis of which the persons, groups and entities are included in the disputed list. That regulation, the contested Common Position and the contested decision, taken together in a context well known to the applicant, thus satisfy the obligation to state reasons as contemplated in the case-law, it being understood that the material conditions in the fight against terrorism are not the same as those existing in other areas, such as competition (Case C350/88 Delacre and Others v Commission [1990] ECR I395, paragraph 15; see, in the context of freezing funds, Invest' Import und Export and Invest Commerce v Commission , paragraph 69 above, paragraph 43).

84. The Council adds that the contested decision does not have any adverse effect on the presumption of innocence.

85. As to the allegation of a manifest error of assessment, the Council and the United Kingdom contend that the applicant can hardly claim that it is not a terrorist organisation and that it does not therefore come within the scope of Article 2(3) of Regulation No 2580/2001.

86. The Council and the United Kingdom observe that, under Article 1(4) of Common Position 2001/931, the disputed list is to be established on the basis of precise information or material in the file which indicates that a decision has been taken by a competent national authority identifying a person, group or entity as being involved in terrorist activities. The applicant has not maintained, and nor does anything suggest, that it was not included in the disputed list on the basis of such a decision.

87. The Council acknowledges that, as set out in that same provision, it is to check that the national authorities comply with the criteria fixed by the Union. However, that check does not concern facts such as those alleged by the applicant, or information sometimes based on protected sources or on

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the actions of specialised units in the Member States. Given the essential role played in the procedure by the competent national authorities, the Council and the United Kingdom take the view that a challenge to the very facts in the light of which those authorities proposed the inclusion of a person in the disputed list or an application for review of their decision can properly be brought only at the national level. The United Kingdom observes in this regard that Article 7 of Regulation No 2580/2001 allows the Commission to amend the annex to that regulation on the basis of information provided by the Member States.

88. Moreover, the Home Secretary, who is the competent national authority in this area in the United Kingdom, has rejected an application brought by the applicant to have itself removed from the list of proscribed organisations pursuant to the Terrorism Act 2000. Whilst noting the applicant's assertions that it has been involved in a legitimate struggle against an oppressive regime and that its acts of resistance have been focused on military targets in Iran, the Home Secretary declared that he could not accept any right to resort to acts of terrorism, whatever the motivation'. The legal proceedings brought by the applicant against that decision have been rejected (see paragraph 73 above).

Findings of the Court

89. It is appropriate to begin by examining, together, the pleas alleging infringement of the right to a fair hearing, infringement of the obligation to state reasons and infringement of the right to effective judicial protection, which are closely linked. First, the safeguarding of the right to a fair hearing helps to ensure that the right to effective judicial protection is exercised properly. Second, there is a close link between the right to an effective judicial remedy and the obligation to state reasons. As held in settled case-law, the Community institutions' obligation under Article 253 EC to state the reasons on which a decision is based is intended to enable the Community judicature to exercise its power to review the lawfulness of the decision and the persons concerned to know the reasons for the measure adopted so that they can defend their rights and ascertain whether or not the decision is well founded (Case 24/62 Germany v Commission [1963] ECR 63, 69; Case C400/99 Italy v Commission [2005] ECR I3657, paragraph 22; Joined Cases T346/02 and T347/02 Cableuropa and Others v Commission [2003] ECR II4251, paragraph 225). Thus, the parties concerned can make genuine use of their right to a judicial remedy only if they have precise knowledge of the content of and the reasons for the act in question (see, to that effect, Case C309/95 Commission v Council [1998] ECR I655, paragraph 18, and Case T89/96 British Steel v Commission [1999] ECR II2089, paragraph 33).

90. In the light of the principal arguments put forward by the Council and the United Kingdom, the Court will begin by considering whether the rights and safeguards alleged by the applicant to have been infringed may, in principle, apply in the context of the adoption of a decision to freeze funds on the basis of Regulation No 2580/2001. The Court will then determine the purpose of and identify the restrictions on those rights and safeguards in such a context. Lastly, the Court will rule on the alleged infringement of the rights and safeguards in question, in the specific circumstances of the present case.

Applicability of the safeguards relating to observance of the right to a fair hearing, the obligation to state reasons and the right to effective judicial protection in the context of the adoption of a decision to freeze funds on the basis of Regulation No 2580/2001

- The right to a fair hearing

91. According to settled case-law, observance of the right to a fair hearing is, in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of Community law which must be guaranteed even in the absence of any rules

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governing the procedure in question. That principle requires that any person on whom a penalty may be imposed must be placed in a position in which he can effectively make known his view of the matters on which the penalty is based (see Fiskano v Commission , paragraph 75 above, paragraphs 39 and 40, and case-law cited).

92. In the present case, the contested decision, by which an individual economic and financial sanction was imposed on the applicant (freezing of funds), undeniably affects the applicant adversely (see also paragraph 98 below). That case-law is, therefore, relevant to the present case.

93. It follows from that case-law that, subject to exceptions (see paragraph 127 et seq. below), the safeguarding of the right to be heard comprises, in principle, two main parts. First, the party concerned must be informed of the evidence adduced against it to justify the proposed sanction (notification of the evidence adduced'). Second, he must be afforded the opportunity effectively to make known his view on that evidence (hearing').

94. So understood, the safeguarding of the right to a fair hearing in the context of the administrative procedure itself is to be distinguished from that resulting from the right to an effective judicial remedy against the act having adverse effects which may be adopted at the end of that procedure (see, to that effect, Case T372/00 Campolargo v Commission [2002] ECR-SC IA49 and II223, paragraph 36). The arguments of the Council and the United Kingdom relating to Article 6 of the ECHR (see paragraphs 77 to 79 above) are thus irrelevant to this plea.

95. Moreover, the safeguard relating to observance of the actual right to a fair hearing, in the context of the adoption of a decision to freeze funds on the basis of Regulation No 2580/2001, cannot be denied to the parties concerned solely on the ground, r elied on by the Council and the United Kingdom (see paragraphs 78 and 79 above), that neither the ECHR nor the general principles of Community law confer on individuals any right whatsoever to be heard before the adoption of an act of a legislative nature (see, to that effect and by analogy, Yusuf , paragraph 29 above, paragraph 322).

96. It is true that the case-law relating to the right to be heard cannot be extended to the context of a Community legislative process culminating in the enactment of legislation involving a choice of economic policy and applying to the generality of the traders concerned (Case T521/93 Atlanta and Others v Council and Commission [1996] ECR II1707, paragraph 70, upheld on appeal in Case C104/97 P Atlanta v Commission and Council [1999] ECR I6983, paragraphs 34 to 38).

97. It is also true that the contested decision, which maintains the applicant in the disputed list, after the applicant had been included by the decision initially contested, has the same general scope as Regulation No 2580/2001 and, like that regulation, is directly applicable in all Member States. Thus, despite its title, it is an integral part of that regulation for the purposes of Article 249 EC (see, by analogy, order in Case T45/02 DOW AgroSciences v Parliament and Council [2003] ECR II1973, paragraphs 31 to 33, and case-law cited, and Yusuf , paragraph 29 above, paragraphs 184 to 188).

98. In the instant case, however, the contested regulation is not of an exclusively legislative nature. Whilst being of general application, it is of direct and individual concern to the applicant, to whom it refers by name as having to be included in the list of persons, groups and entities whose funds are to be frozen pursuant to Regulation No 2580/2001. Since it is an act which imposes an individual economic and financial sanction (see paragraph 92 above), the case-law cited in paragraph 96 above is therefore irrelevant (see, by analogy, Yusuf , paragraph 29 above, paragraph 324).

99. It is, moreover, appropriate to mention the aspects which distinguish the present case from the cases which gave rise to the judgments in Yusuf and Kadi , paragraph 29 above, where it was held that the Community institutions were not required to hear the parties concerned in the context

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of the adoption and implementation of a similar measure freezing the funds of persons and entities linked to Osama bin Laden, Al-Qaeda and the Taleban.

100. That solution was justified in those cases by the fact that the Community institutions had merely transposed into the Community legal order, as they were required to do, resolutions of the Security Council and decisions of its Sanctions Committee that imposed the freezing of the funds of the parties concerned, designated by name, without in any way authorising those institutions, at the time of actual implementation, to provide for any Community mechanism whatsoever for the examination or re-examination of individual situations. The Court inferred therefrom that the Community principle relating to the right to be heard could not apply in such circumstances, where a hearing of the persons concerned could not in any event lead the institution to review its position (Yusuf , paragraph 29 above, paragraph 328, and Kadi , paragraph 29 above, paragraph 258).

101. In the present case, by contrast, although Security Council Resolution 1373 (2001) provides inter alia in Paragraph 1(c) that all States must freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts, of entities owned or controlled directly or indirectly by such persons, and of persons and entities acting on behalf of, or at the direction of, such persons and entities, it does not specify individually the persons, groups and entities who are to be the subjects of those measures. Nor did the Security Council establish specific legal rules concerning the procedure for freezing funds, or the safeguards or judicial remedies ensuring that the persons or entities affected by such a procedure would have a genuine opportunity to challenge the measures adopted by the States in respect of them.

102. Thus, in the context of Resolution 1373 (2001), it is for the Member States of the United Nations (UN) - and, in this case, the Community, through which its Member States have decided to act - to identify specifically the persons, groups and entities whose funds are to be frozen pursuant to that resolution, in accordance with the rules in their own legal order.

103. In that connection, the Council maintained at the hearing that, in the implementation of Security Council Resolution 1373 (2001), the measures that it adopted under circumscribed powers, which thereby benefit from the principle of primacy as contemplated in Articles 25 and 103 of the United Nations Charter, are essentially those provided for by the relevant provisions of Regulation No 2580/2001, which determine the content of the restrictive measures to be adopted in relation to the persons referred to in Paragraph 1(c) of that resolution. However, unlike the acts at issue in the cases which gave rise to the judgments in Yusuf and Kadi , paragraph 29 above, the acts which specifically apply those restrictive measures to a given person or entity, such as the contested decision, do not come within the exercise of circumscribed powers and accordingly do not benefit from the primacy effect in question. The Council submits that the adoption of those acts falls instead within the ambit of the exercise of the broad discretion it has in the area of the CFSP.

104. These submissions may, in substance, be approved by the Court, subject to the potential difficulties in applying Paragraph 1(c) of Resolution 1373 (2001) which may arise owing to the absence, to date, of a universally-accepted definition of the concepts of terrorism' and terrorist act' in international law (see, on this point, Final Document (A/60/L1) adopted by the UN General Assembly on 15 September 2005, on the occasion of the world summit celebrating the 60th anniversary of the UN).

105. Lastly, the Council stated at the oral hearing that, as the Community institution which adopted Regulation No 2580/2001 and the decisions implementing that regulation, it did not consider itself to be bound by the common positions adopted as part of the CFSP by the Council in its capacity as the institution composed of the representatives of the Member States, although it did consider it appropriate to ensure that its actions were consistent with the CFSP and the EC Treaty.

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106. The Council adds, rightly, that the Community does not act under powers circumscribed by the will of the Union or that of its Member States when, as in the present case, the Council adopts economic sanctions measures on the basis of Articles 60 EC, 301 EC and 308 EC. That point of view is, moreover, the only one compatible with the actual wording of Article 301 EC, according to which the Council is to decide on the matter by a qualified majority on a proposal from the Commission', and that of Article 60(1) EC, according to which the Council may take', following the same procedure, the urgent measures necessary for an act under the CFSP.

107. Since the identification of the persons, groups and entities contemplated in Security Council Resolution 1373 (2001), and the adoption of the ensuing measure of freezing funds, involve the exercise of the Community's own powers, entailing a discretionary appreciation by the Community, the Community institutions concerned, in this case the Council, are in principle bound to observe the right to a fair hearing of the parties concerned when they act with a view to giving effect to that resolution.

108. It follows that the safeguarding of the right to a fair hearing is, as a matter of principle, fully applicable in the context of the adoption of a decision to freeze funds under Regulation No 2580/2001.

- The obligation to state reasons

109. In principle, the safeguard relating to the obligation to state reasons provided for by Article 253 EC is also fully applicable in the context of the adoption of a decision to freeze funds under Regulation No 2580/2001, a point which has not been questioned by any of the parties.

- The right to effective judicial protection

110. As to the safeguard relating to the right to effective judicial protection, it should be borne in mind that, according to settled case-law, individuals must be able to avail themselves of effective judicial protection of the rights they have under the Community legal order, as the right to such protection is part of the general legal principles deriving from the constitutional traditions common to the Member States and has been enshrined in Articles 6 and 13 of the ECHR (see Case T279/02 Degussa v Commission [2006] II-0000, paragraph 421, and case-law cited).

111. This also applies particularly to measures to freeze the funds of persons or organisations suspected of terrorist activities (see, to that effect, Article XIV of the Guidelines on Human Rights and the Fight against Terrorism, adopted by the Committee of Ministers of the Council of Europe on 11 July 2002).

112. In the present case, the only reservation expressed by the Council, in relation to the applicability of the principle of that safeguard, is that the Court has no jurisdiction to review the internal lawfulness of the relevant provisions of Regulation No 2580/2001, because they were adopted by virtue of powers circumscribed by Security Council Resolution 1373 (2001) and therefore benefit from the principle of primacy referred to in paragraph 103 above.

113. It is not, however, necessary for the Court to rule on the well-foundedness of that reservation because, as will be discussed below, the present dispute can be resolved solely on the basis of a judicial review of the lawfulness of the contested decision, and none of the parties deny that that indeed comes within the Court's competence.

Purpose of and restrictions on the safeguards relating to the right to a fair hearing, the obligation to state reasons and the right to effective judicial protection in the context of the adoption of a decision to freeze funds under Regulation No 2580/2001

- The right to a fair hearing

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114. It is appropriate first, to define the purpose of the safeguard of the right to a fair hearing in the context of the adoption of a decision to freeze funds under Article 2(3) of Regulation No 2580/2001, distinguishing between an initial decision to freeze funds referred to in Article 1(4) of Common Position 2001/931 (the initial decision to freeze funds') and any subsequent decision to maintain a freeze of funds, following a periodic review, as referred to in Article 1(6) of that common position (subsequent decisions to freeze funds').

115. In that context, it should be noted, first, that the right to a fair hearing only falls to be exercised with regard to the elements of fact and law which are liable to determine the application of the measure in question to the person concerned, in accordance with the relevant rules.

116. In the circumstances of the present case, the relevant rules are laid down in Article 2(3) of Regulation No 2580/2001, according to which the Council, acting by unanimity, is to establish, review and amend the list of persons, groups and entities to which that regulation applies, in accordance with the provisions laid down in Article 1(4) to (6) of Common Position 2001/931. Thus, in accordance with Article 1(4) of Common Position 2001/931, the list is to be drawn up on the basis of precise information or material in the relevant file which indicates that a decision has been taken by a competent authority in respect of the persons, groups and entities concerned, irrespective of whether it concerns the instigation of investigations or prosecution for a terrorist act, an attempt to perpetrate, participate in or facilitate such an act based on serious and credible evidence or clues, or condemnation for such deeds. Competent authority' is understood to mean a judicial authority, or, where judicial authorities have no jurisdiction in the relevant area, an equivalent competent authority in that area. Moreover, the names of persons and entities in the list are to be reviewed at regular intervals and at least once every six months to ensure that there are grounds for keeping them in the list, as provided for by Article 1(6) of Common Position 2001/931.

117. As rightly pointed out by the Council and the United Kingdom, the procedure which may culminate in a measure to freeze funds under the relevant rules therefore takes place at two levels, one national, the other Community. In the first phase, a competent national authority, in principle judicial, must take in respect of the party concerned a decision complying with the definition in Article 1(4) of Common Position 2001/931. If it is a decision to instigate investigations or to prosecute, it must be based on serious and credible evidence or clues. In the second phase, the Council, acting by unanimity, must decide to include the party concerned in the disputed list, on the basis of precise information or material in the relevant file which indicates that such a decision has been taken. Next, the Council must, at regular intervals, and at least once every six months, ensure that there are grounds for keeping the party concerned in the list. Verification that there is a decision of a national authority meeting that definition is an essential precondition for the adoption, by the Council, of an initial decision to freeze funds, whereas verification of the consequences of that decision at the national level is imperative in the context of the adoption of a subsequent decision to freeze funds.

118. Accordingly, the observance of the right to a fair hearing in the context of the adoption of a decision to freeze funds is also liable to arise at those two levels (see, to that effect and by analogy, Invest' Import und Export and Invest Commerce v Commission , paragraph 69 above, paragraph 40).

119. The right of the party concerned to a fair hearing must be effectively safeguarded in the first place as part of the national procedure which led to the adoption, by the competent national authority, of the decision referred to in Article 1(4) of Common Position 2001/931. It is essentially in that national context that the party concerned must be placed in a position in which he can effectively make known his view of the matters on which the decision is based, subject to possible restrictions on the right to a fair hearing which are legally justified in national law, particularly on grounds

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of public policy, public security or the maintenance of international relations (see, to that effect, Eur. Court H.R., Tinnelly & Sons Ltd and Others and McElduff and Others v United Kingdom , judgment of 10 July 1998, Reports of Judgments and Decisions, 1998-IV, º78).

120. Next, the right of the party concerned to a fair hearing must be effectively safeguarded in the Community procedure culminating in the adoption, by the Council, of the decision to include or maintain it on the disputed list, in accordance with Article 2(3) of Regulation No 2580/2001. As a rule, in that area, the party concerned need only be afforded the opportunity effectively to make known his views on the legal conditions of application of the Community measure in question, namely, where it is an initial decision to freeze funds, whether there is specific information or material in the file which shows that a decision meeting the definition laid down in Article 1(4) of Common Position 2001/931 was taken in respect of him by a competent national authority and, where it is a subsequent decision to freeze funds, the justification for maintaining the party concerned in the disputed list.

121. However, provided that the decision in question was adopted by a competent national authority of a Member State, the observance of the right to a fair hearing at Community level does not usually require, at that stage, that the party concerned again be afforded the opportunity to express his views on the appropriateness and well-foundedness of that decision, as those questions may only be raised at national level, before the authority in question or, if the party concerned brings an action, before the competent national court. Likewise, in principle, it is not for the Council to decide whether the proceedings opened against the party concerned and resulting in that decision, as provided for by the national law of the relevant Member State, was conducted correctly, or whether the fundamental rights of the party concerned were respected by the national authorities. That power belongs exclusively to the competent national courts or, as the case may be, to the European Court of Human Rights (see, by analogy, Case T353/00 Le Pen v Parliament [2003] ECR II1729, paragraph 91, upheld on appeal in Case C208/03 P Le Pen v Parliament [2005] ECR I6051).

122. Nor, if the Community measure to freeze funds is adopted on the basis of a decision by a national authority of a Member State concerning investigations or prosecutions (rather than on the basis of a decision of condemnation), does the observance of the right to a fair hearing require, as a rule, that the party concerned be afforded the opportunity effectively to make known his views on whether that decision is based on serious and credible evidence or clues', as required by Article 1(4) of Common Position 2001/931. Although that element is one of the legal conditions of application of the measure in question, the Court finds that it would be inappropriate, in the light of the principle of sincere cooperation referred to in Article 10 EC, to make it subject to the exercise of the right to a fair hearing at Community level.

123. The Court notes that, under Article 10 EC, relations between the Member States and the Community institutions are governed by reciprocal duties to cooperate in good faith (see Case C339/00 Ireland v Commission [2003] ECR I11757, paragraphs 71 and 72, and case-law cited). That principle is of general application and is especially binding in the area of JHA governed by Title VI of the EU Treaty, which is moreover entirely based on cooperation between the Member States and the institutions (Case C105/03 Pupino [2005] ECR I5285, paragraph 42).

124. In a case of application of Article 1(4) of Common Position 2001/931 and Article 2(3) of Regulation No 2580/2001, provisions which introduce a specific form of cooperation between the Council and the Member States in the context of combating terrorism, the Court finds that that principle entails, for the Council, the obligation to defer as far as possible to the assessment conducted by the competent national authority, at least where it is a judicial authority, both in respect of the issue of whether there are serious and credible evidence or clues' on which its decision is based and in respect of recognition of potential restrictions on access to that evidence or those

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clues, legally justified under national law on grounds of overriding public policy, public security or the maintenance of international relations (see, by analogy, Case T353/94 Postbank v Commission [1996] ECR II921, paragraph 69, and case-law cited).

125. However, these considerations are valid only in so far as the evidence or clues in question were in fact assessed by the competent national authority referred to in the preceding paragraph. If, on the other hand, in the course of the procedure before it, the Council bases its initial decision or a subsequent decision to freeze funds on information or evidence communicated to it by representatives of the Member States without it having been assessed by the competent national authority, that information must be considered as newly-adduced evidence which must, in principle, be the subject of notification and a hearing at Community level, not having already been so at national level.

126. It follows from the foregoing that, in the cont ext of relations between the Community and its Member States, observance of the right to a fair hearing has a relatively limited purpose in respect of the Community procedure for freezing funds. In the case of an initial decision to freeze funds, it requires, in principle, first, that the party concerned be informed by the Council of the specific information or material in the file which indicates that a decision meeting the definition given in Article 1(4) of Common Position 2001/931 has been taken in respect of it by a competent authority of a Member State, and also, where applicable, any new material referred to in paragraph 125 above and, second, that it must be placed in a position in which it can effectively make known its view on the information or material in the file. In the case of a subsequent decision to freeze funds, observance of the right to a fair hearing similarly requires, first, that the party concerned be informed of the information or material in the file which, in the view of the Council, justifies maintaining it in the disputed lists, and also, where applicable, of any new material referred to in paragraph 125 above and, second, that it must be afforded the opportunity effectively to make known its view on the matter.

127. At the same time, however, certain restrictions on the right to a fair hearing, so defined in terms of its purpose, may legitimately be envisaged and imposed on the parties concerned, in circumstances such as those of the present case, where what are in issue are specific restrictive measures, consisting of a freeze of the financial funds and assets of the persons, groups and entities identified by the Council as being involved in terrorist acts.

128. The Court therefore finds, as held in Yusuf , paragraph 29 above, and as submitted in the present case by the Council and the United Kingdom, that notification of the evidence adduced and a hearing of the parties concerned, before the adoption of the initial decision to freeze funds, would be liable to jeopardise the effectiveness of the sanctions and would thus be incompatible with the public interest objective pursued by the Community pursuant to Security Council Resolution 1373 (2001). An initial measure freezing funds must, by its very nature, be able to benefit from a surprise effect and to be applied with immediate effect. Such a measure cannot, therefore, be the subject-matter of notification before it is implemented (Yusuf , paragraph 29 above, paragraph 308; see also, to that effect and by analogy, the Opinion of Advocate General Warner in Case 136/79 National Panasonic v Commission [1980] ECR 2033, 2061, 2068, 2069).

129. However, in order for the parties concerned to be able to defend their rights effectively, particularly in legal proceedings which might be brought before the Court of First Instance, it is also necessary that the evidence adduced against them be notified to them, in so far as reasonably possible, either concomitantly with or as soon as possible after the adoption of the initial decision to freeze funds (see also paragraph 139 below).

130. In that context, the parties concerned must also have the opportunity to request an immediate re-examination of the initial measure freezing their funds (see, to that effect, in the case-law

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of the Community civil service, Case T211/98 F v Commission [2000] ECR-SC IA107 and II471, paragraph 34; Case T333/99 X v ECB [2001] ECR-SC II3021, paragraph 183, and Campolargo v Commission , paragraph 94 above, paragraph 32). The Court recognises, however, that such a hearing after the event is not automatically required in the context of an initial decision to freeze funds, in the light of the possibility that the parties concerned also have immediately to bring an action before the Court of First Instance, which also ensures that a balance is struck between observance of the fundamental rights of the persons included in the disputed list and the need to take preventive measures in combating international terrorism (see, to that effect and by analogy, the Opinion of Advocate General Warner in National Panasonic v Commission , paragraph 128 above, [1980] ECR 2069).

131. It must be emphasised, however, that the considerations just mentioned are not relevant to subsequent decisions to freeze funds adopted by the Council in connection with the re-examination, at regular intervals, at least every six months, of the justification for maintaining the parties concerned in the disputed list, provided for by Article 1(6) of Common Position 2001/931. At that stage, the funds are already frozen and it is accordingly no longer necessary to ensure a surprise effect in order to guarantee the effectiveness of the sanctions. Any subsequent decision to freeze funds must accordingly be preceded by the possibility of a further hearing and, where appropriate, notification of any new evidence.

132. The Court cannot accept the viewpoint put forward by the Council and the United Kingdom on this point at the oral hearing, to the effect that the Council need only hear the parties concerned, in the context of the adoption of a subsequent decision to freeze funds, if they have previously made an express request to that effect. Under Article 1(6) of Common Position 2001/931, the Council may only adopt such a decision after having ensured that maintaining the parties concerned in the disputed list remains justified, which implies that it must afford them the opportunity effectively to make known their views on the matter.

133. Next, the Court recognises that, in circumstances such as those of this case, where what is at issue is a temporary protective measure restricting the availability of the property of certain persons, groups and entities in connection with combating terrorism, overriding considerations concerning the security of the Community and its Member States, or the conduct of their international relations, may preclude the communication to the parties concerned of certain evidence adduced against them and, in consequence, the hearing of those parties with regard to such evidence, during the administrative procedure (see, by analogy, Yusuf , paragraph 29 above, paragraph 320).

134. Such restrictions are consistent with the constitutional traditions common to the Member States, as submitted by the Council and the United Kingdom, who have pointed out that exceptions to the general right to be heard in the course of an administrative procedure are permitted in many Member States on grounds of public interest, public policy or the maintenance of international relations, or when the purpose of the decision to be taken is or could be jeopardised if the right is observed (see the examples referred to in paragraph 72 above).

135. They are, moreover, consistent with the case-law of the European Court of Human Rights which, even in the more stringent context of adversarial criminal proceedings subject to the requirements of Article 6 of the ECHR, acknowledges that, in cases concerning national security and, more specifically, terrorism, certain restrictions on the right to a fair hearing may be envisaged, especially concerning disclosure of evidence adduced or terms of access to the file (see, by way of example, Chahal v United Kingdom , judgment of 15 November 1996, Report 1996-V, º 131, and Jasper v United Kingdom , judgment of 16 February 2000, No 27052/95, not published in Reports of Judgments and Decisions, ºº 51 to 53, and case-law cited; see also Article IX.3 of the Guidelines adopted by the Committee of Ministers of the Council of Europe, referred to in paragraph 111 above).

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136. In the present circumstances, those considerations apply above all to the serious and credible evidence or clues' on which the national decision to instigate an investigation or prosecution is based, in so far as they may have been brought to the attention of the Council, but it is also conceivable that the restrictions on access may concern the specific content or the particular grounds for that decision, or even the identity of the authority that took it. It is even possible that, in certain, very specific circumstances, the identifiction of the Member State or third country in which a competent authority has taken a decision in respect of a person may be liable to jeopardise public security, by providing the party concerned with sensitive information which it could misuse.

137. It follows from all of the foregoing that the general principle of observance of the right to a fair hearing requires, unless precluded by overriding considerations concerning the security of the Community or its Member States, or the conduct of their international relations, that the evidence adduced against the party concerned, as identified in paragraph 126 above, should be notified to it, in so far as possible, either concomitantly with or as soon as possible after the adoption of an initial decision to freeze funds. Subject to the same reservations, any subsequent decision to freeze funds must, in principle, be preceded by notification of any new evidence adduced and a hearing. However, observance of the right to a fair hearing does not require either that the evidence adduced against the party concerned be notified to it before the adoption of an initial measure to freeze funds, or that that party automatically be heard after the event in such a context.

- The obligation to state reasons

138. According to settled case-law, the purpose of the obligation to state the reasons for an act adversely affecting a person is, first, to provide the person concerned with sufficient information to make it possible to determine whether the act is well founded or whether it is vitiated by an error which may permit its validity to be contested before the Community Courts and, second, to enable the Community judicature to review the lawfulness of the decision (Case C199/99 P Corus UK v Commission [2003] ECR I11177, paragraph 145, and Joined Cases C189/02 P, C202/02 P, C205/02 P to C208/02 P and C213/02 P Dansk Rørindustri and Others v Commission [2005] ECR I5425, paragraph 462). The obligation to state reasons therefore constitutes an essential principle of Community law which may be derogated from only for compelling reasons (see Case T218/02 Napoli Buzzanca v Commission [2005] ECR II-0000, paragraph 57, and case-law cited).

139. The statement of reasons must therefore in principle be notified to the person concerned at the same time as the act adversely affecting him. A failure to state the reasons cannot be remedied by the fact that the person concerned learns the reasons for the act during the proceedings before the Community Courts (Case 195/80 Michel v Parliament [1981] ECR 2861, paragraph 22, and Dansk Rørindustri and Others v Commission , paragraph 138 above, paragraph 463). The possibility of regularising the total absence of a statement of reasons after an action has been started might prejudice the right to a fair hearing because the applicant would have only the reply in which to set out his pleas contesting the reasons which he would not know until after he had lodged his application. The principle of equality of the parties before the Community Courts would accordingly be affected (Case T132/03 Casini v Commission [2005] ECR II-0000, paragraph 33, and Napoli Buzzanca v Commission , paragraph 138 above, paragraph 62).

140. If the party concerned is not afforded the opportunity to be heard before the adoption of an initial decision to freeze funds, compliance with the obligation to state reasons is all the more important because it constitutes the sole safeguard enabling the party concerned, especially after the adoption of that decision, to make effective use of the legal remedies available to it to challenge the lawfulness of that decision (Case T237/00 Reynolds v Parliament [2005] ECR II-0000, paragraph 95; see also, to that effect, Joined Cases T371/94 and T394/04 British Airways and British Midland Airways v Commission [1998] ECR II2405, paragraph 64).

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141. The Court has consistently held that the statement of reasons required by Article 253 EC must be appropriate to the measure at issue and to the context in which it was adopted. It must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to exercise its power of review of the lawfulness thereof. 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 statement of reasons to specify all the relevant matters of fact and law, since the question whether the statement of reasons meets the requirements of Article 253 EC 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 decision are sufficient if it was adopted in circumstances known to the party concerned which enable him to understand the scope of the measure concerning him (Case 125/80 Arning v Commission [1981] ECR 2539, paragraph 13; Case C367/95 P Commission v Sytraval and Brink's France [1998] ECR I-1719, paragraph 63; Case C-301/96 Germany v Commission [2003] ECR I-9919, paragraph 87; Case C42/01 Portugal v Commission [2004] ECR I6079, paragraph 66; and Joined Cases T228/99 and T233/99 Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen v Commission [2003] ECR II435, paragraphs 278 to 280). Moreover, the degree of precision of the statement of the reasons for a decision must be weighed against practical realities and the time and technical facilities available for making the decision (see Delacre and Others v Commission , paragraph 83 above, paragraph 16, and case-law cited).

142. In the context of the adoption of a decision to freeze funds under Regulation No 2580/2001, the grounds for that decision must be assessed primarily in the light of the legal conditions of application of that regulation to a given scenario, as laid down in Article 2(3) thereof and, by reference, in Article 1(4) or Article 1(6) of Common Position 2001/931, depending on whether it is an initial decision or a subsequent decision to freeze funds.

143. The Court cannot accept the position advocated by the Council that the statement of reasons may consist merely of a general, stereotypical formulation, modelled on the drafting of Article 2(3) of Regulation No 2580/2001 and Article 1(4) or (6) of Common Position 2001/931. In accordance with the principles referred to above, the Council is required to state the matters of fact and law which constitute the legal basis of its decision and the considerations which led it to adopt that decision. The grounds for such a measure must therefore indicate the actual and specific reasons why the Council considers that the relevant rules are applicable to the party concerned (see, to that effect, Case T117/01 Roman Parra v Commission [2002] ECR-SC IA27 and II121, paragraph 31, and Napoli Buzzanca v Commission , paragraph 138 above, paragraph 74).

144. That entails, in principle, that the statement of reasons of an initial decision to freeze funds must at least refer to each of the aspects referred to in paragraph 116 above and also, where applicable, the aspects referred to in paragraphs 125 and 126 above, whereas the statement of reasons for a subsequent decision to freeze funds must indicate the actual and specific reasons why the Council considers, following re-examination, that the freezing of the funds of the party concerned remains justified.

145. Moreover, when unanimously adopting a measure to freeze funds under Regulation No 2580/2001, the Council does not act under circumscribed powers. Article 2(3) of Regulation No 2580/2001, read together with Article 1(4) of Common Position 2001/931, is not to be construed as meaning that the Council is obliged to include in the disputed list any person in respect of whom a decision has been taken by a competent authority within the meaning of those provisions. This interpretation, endorsed by the United Kingdom at the oral hearing, is confirmed by Article 1(6) of Common Position

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2001/931, to which Article 2(3) of Regulation No 2580/2001 also refers, and according to which the Council is to conduct a review' at regular intervals, at least once every six months, to ensure that there are grounds' for keeping the parties concerned in the disputed list.

146. It follows that, in principle, the statement of reasons for a measure to freeze funds under Regulation No 2580/2001 must refer not only to the statutory conditions of application of that regulation, but also to the reasons why the Council considers, in the exercise of its discretion, that such a measure must be adopted in respect of the party concerned.

147. The considerations set out in paragraphs 143 to 146 above must nevertheless take account of the fact that a decision to freeze funds under Regulation No 2580/2001, whilst imposing an individual economic and financial sanction, is, like that act, also regulatory in nature, as explained in paragraphs 97 and 98 above. Moreover, a detailed publication of the complaints put forward against the parties concerned might not only conflict with the overriding considerations of public interest which will be discussed in paragraph 148 below, but also jeopardise the legitimate interests of the persons and entities in question, in that it would be capable of causing serious damage to their reputation. Accordingly, the Court finds, exceptionally, that only the operative part of the decision and a general statement of reasons, of the type referred to in paragraph 143 above, need be in the version of the decision to freeze funds published in the Official Journal , it being understood that the actual, specific statements of reasons for that decision must be formalised and brought to the knowledge of the parties concerned by any other appropriate means.

148. Moreover, in circumstances such as those of this case, it must be recognised that the overriding considerations concerning the security of the Community and its Member States, or the conduct of their international relations, may preclude disclosure to the parties concerned of the specific and complete reasons for the initial or subsequent decision to freeze their funds, just as they may preclude the evidence adduced against those parties from being communicated to them during the administrative procedure. In that connection the Court refers to the considerations set out above, in particular in paragraphs 133 to 137 above, regarding the restrictions on the general principle of observance of the right to a fair hearing which may be permitted in such a context. Those considerations are valid, mutatis mutandis, in respect of the restrictions which may be imposed on the obligation to state reasons.

149. Although it is not applicable to the circumstances of the present case, the Court also considers that inspiration may be drawn from the provisions of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77, corrigendum OJ 2004 L 229, p. 35, corrigendum to the corrigendum OJ 2005 L 197, p. 34). Article 30(2) of that directive provides that the persons concerned shall be informed, precisely and in full, of the public policy, public security or public health grounds on which the decision [restricting the freedom of movement and residence of a citizen of the Union or a member of his family] taken in their case is based, unless this is contrary to the interests of State security'.

150. In accordance with the settled case-law of the Court of Justice (Case 36/75 Rutili [1975] ECR 1219, and Case 131/79 Santillo [1980] ECR 1585) concerning Council Directive 64/221/EEC of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health (OJ, English Special Edition 1963-1964, p. 117), repealed by Directive 2004/38, Article 6 of which was essentially identical to Article 30(2) of the latter, any person enjoying the protection of the provisions quoted must be entitled to a twofold safeguard, consisting of notification to

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him of the grounds on which any restrictive measure has been adopted in his case and the availability of a right of appeal. Subject to the same reservation, in particular, this requirement means that the State concerned must, when notifying an individual of a restrictive measure adopted in his case, give him a precise and comprehensive statement of the grounds for the decision, to enable him to take effective steps to prepare his defence.

151. It follows from all of the foregoing that, unless precluded by overriding considerations concerning the security of the Community and its Member States, or the conduct of their international relations, and subject also to what has been set out in paragraph 147 above, the statement of reasons for an initial decision to freeze funds must at least make actual and specific reference to each of the aspects referred to in paragraph 116 above and also, where applicable, to the aspects referred to in paragraphs 125 and 126 above, and state the reasons why the Council considers, in the exercise of its discretion, that such a measure must be taken in respect of the party concerned. Moreover, the statement of reasons for a subsequent decision to freeze funds must, subject to the same reservations, state the actual and specific reasons why the Council considers, following re-examination, that the freezing of the funds of the party concerned remains justified.

- The right to effective judicial protection

152. Lastly, with respect to the safeguard relating to the right to effective judicial protection, this is effectively ensured by the right the parties concerned have to bring an action before the Court against a decision to freeze their funds, pursuant to the fourth paragraph of Article 230 EC (see, to that effect, Eur. Court H.R., Bosphorus v Ireland , judgment of 30 June 2005, No 45036/98, not yet published in the Reports of Judgments and Decisions, ° 165, and decision in Segi and Others and Gestoras pro Amnistía v The 15 Member States of the European Union , judgment of 23 May 2002, Nos 6422/02 and 9916/02, Reports of Judgments and Decisions, 2002-V).

153. Thus the judicial review of the lawfulness of a decision to freeze funds taken pursuant to Article 2(3) of Regulation No 2580/2001 is that provided for in the second paragraph of Article 230 EC, under which the Community Courts have jurisdiction in actions for annulment brought on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the EC Treaty or of any rule of law relating to its application or misuse of powers.

154. As part of that review, and having regard to the grounds for annulment put forward by the party concerned or raised by the Court of its own motion, it is for the Court to ensure, inter alia, that the legal conditions for applying Regulation No 2580/2001 to a particular scenario, as laid down in Article 2(3) of that regulation and, by reference, either Article 1(4) or Article 1(6) of Common Position 2001/931, depending on whether it is an initial decision or a subsequent decision to freeze funds, are fulfilled. That implies that the judicial review of the lawfulness of the decision in question extends to the assessment of the facts and circumstances relied on as justifying it, and to the evidence and information on which that assessment is based, as the Council expressly recognised in its written pleadings in the case giving rise to the judgment in Yusuf , paragraph 29 above (paragraph 225). The Court must also ensure that the right to a fair hearing is observed and that the requirement of a statement of reasons is satisfied and also, where applicable, that the overriding considerations relied on exceptionally by the Council in disregarding those rights are well founded.

155. In the present case, that review is all the more imperative because it constitutes the only procedural safeguard ensuring that a fair balance is struck between the need to combat international terrorism and the protection of fundamental rights. Since the restrictions imposed by the Council on the right of the parties concerned to a fair hearing must be offset by a strict judicial review which is independent and impartial (see, to that effect, Case C341/04 Eurofood [2006] ECR I-3813, paragraph 66), the Community Courts must be able to review the lawfulness and merits of the measures

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to freeze funds without it being possible to raise objections that the evidence and information used by the Council is secret or confidential.

156. Although the European Court of Human Rights recognises that the use of confidential information may be necessary when national security is at stake, that does not mean, in its view, that national authorities are free from any review by the national courts simply because they state that the case concerns national security and terrorism (see Eur. Court H.R., Chahal v United Kingdom , paragraph 135 above, º 131, and case-law cited, and Ocalan v Turkey , judgment of 12 March 2003, No 46221/99, not published in the Reports of Judgments and Decisions, º 106, and case-law cited).

157. The Court finds that, here also, inspiration may be drawn from the provisions of Directive 2004/38. As noted in the case-law referred to in paragraph 150 above, Article 31(1) of that directive provides that the persons concerned are to have access to judicial and, where appropriate, administrative means of redress in the host Member State to appeal against or seek review of any decision taken against them on the grounds of public policy, public security or public health. Moreover, Article 31(3) of that directive provides that the means of redress are to allow for an examination of the lawfulness of the decision, as well as of the facts and circumstances on which the proposed measure is based.

158. The question whether the applicant and/or its lawyers may be provided with the evidence and information alleged to be confidential, or whether they may be provided only to the Court, in accordance with a procedure which remains to be defined so as to safeguard the public interests at issue whilst affording the party concerned a sufficient degree of judicial protection, is a separate issue on which it is not necessary for the Court to rule in the present action (see nevertheless Eur. Court H.R., Chahal v United Kingdom , paragraph 135 above, ºº 131 and 144; Tinnelly & Sons and Others and McElduff and Others v United Kingdom , paragraph 119 above, ºº 49, 51, 52 and 78; Jasper v United Kingdom , paragraph 135 above, ºº 51 to 53; and Al-Nashif v Bulgaria , judgment of 20 June 2002, No 50963/99, not published in the Reports of Judgments and Decisions, ºº 95 to 97, and also Article IX.4 of the Guidelines adopted by the Committee of Ministers of the Council of Europe, cited in paragraph 111 above).

159. Lastly, it is true that the Council enjoys broad discretion in its assessment of the matters to be taken into consideration for the purpose of adopting economic and financial sanctions on the basis of Articles 60 EC, 301 EC and 308 EC, consistent with a common position adopted on the basis of the CFSP. Because the Community Courts may not, in particular, substitute their assessment of the evidence, facts and circumstances justifying the adoption of such measures for that of the Council, the review carried out by the Court of the lawfulness of decisions to freeze funds must be restricted to checking that the rules governing procedure and the statement of reasons have been complied with, that the facts are materially accurate, and that there has been no manifest error of assessment of the facts or misuse of power. That limited review applies, especially, to the Council's assessment of the factors as to appropriateness on which such decisions are based (see paragraph 146 above and, to that effect, Eur. Court H.R., Leander v Sweden , judgment of 26 March 1987, Series A No 116, º 59, and Al-Nashif v Bulgaria , paragraph 158 above, ºº 123 and 124).

Application to the present case

160. The Court notes, first, that the relevant legislation, namely Regulation No 2580/2001 and Common Position 2001/931 to which it refers, does not explicitly provide for any procedure for notification of the evidence adduced or for a hearing of the parties concerned, either before or concomitantly with the adoption of an initial decision to freeze their funds or, in the context of the adoption of subsequent decisions, with a view to having them removed from the disputed list. At most, Article 1(6) of Common Position 2001/931 states that the names of persons and entities

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in the list in the Annex shall be reviewed at regular intervals and at least once every six months to ensure that there are grounds for keeping them on the list', and Article 2(3) of Regulation No 2580/2001 provides that the Council ... shall ... review and amend the list..., in accordance with the provisions laid down in Article 1... (6) of Common Position 2001/931'.

161. Next, the Court finds that at no time before this action was brought was the evidence adduced against the applicant notified to it. The applicant rightly points out that both the initial decision to freeze its funds and subsequent decisions, up to and including the contested decision, do not even mention the specific information' or material in the file' showing that a decision justifying its inclusion in the disputed list was taken in respect of it by a competent national authority.

162. Thus, even though the applicant learned that it was soon to be included in the disputed list, and even though it took the initiative to contact the Council in an attempt to prevent the adoption of such a measure (see paragraph 69 above), it had not been apprised of the specific evidence adduced against it in order to justify the sanction envisaged and was not, therefore, in a position effectively to make known its views on the matter. In those circumstances, the Council's argument that it heard the applicant before proceeding with the freezing of funds cannot be accepted.

163. The foregoing considerations, concerning verification of respect for the right to a fair hearing, are also applicable, mutatis mutandis, to the determination of whether the obligation to state reasons has been fulfilled.

164. In the circumstances of the present case, neither the contested decision nor Decision 2002/334, which it updates, satisfies the requirement of a statement of reasons as set out above; they merely state, in the second recital in their preamble, that it is desirable' to adopt an up-to-date list of the persons, groups and entities to which Regulation (EC) No 2580/2001 applies.

165. Not only has the applicant been unable effectively to make known its views to the Council but, in the absence of any statement, in the contested decision, of the actual and specific grounds justifying that decision, it has not been placed in a position to avail itself of its right of action before the Court, given the aforementioned links between safeguarding the right to a fair hearing, the obligation to state reasons and the right to an effective legal remedy. It must be borne in mind that the possibility of regularising the total absence of a statement of reasons after an action has been started is currently viewed in the case-law as prejudicing the right to a fair hearing (see paragraph 139 above).

166. Moreover, neither the written pleadings of the different parties to the case, nor the file material produced before the Court, enable it to conduct its judicial review, since it is not even in a position to determine with certainty, after the close of the oral procedure, exactly which is the national decision referred to in Article 1(4) of Common Position 2001/931, on which the contested decision is based.

167. In its application, the applicant merely maintained that it was included in the disputed list apparently solely on the basis of documents produced by the Tehran regime'. In its reply, it added, in particular, that there was nothing by way of explanation as to why it was entered' in the disputed list and that the reasons for its inclusion were most likely diplomatic'.

168. In its defence and rejoinder, the Council refrained from taking any position on this issue.

169. In its statement in intervention, the United Kingdom stated that the Applicant [did] not allege, and there [was] nothing to suggest, that the Applicant [had] not [been] included in the Annex on the basis of [a decision adopted by a competent authority identifying the applicant as being involved in terrorist activities]'. That same statement also appears to indicate that, in the view of the United Kingdom, the decision in question was that of the Home Secretary of 28

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March 2001, confirmed by decision of that Home Secretary of 31 August 2001, then, in an action for judicial review, by judgment of the High Court of 17 April 2002 and, lastly, on appeal, by decision of the POAC of 15 November 2002.

170. In its observations on the statement in intervention, the applicant did not specifically refute or even comment upon those observations of the United Kingdom. However, in the light of the applicant's pleas and general arguments and, more specifically, its allegations referred to in paragraph 167 above, it is not possible simply to accept the United Kingdom's position at face value. At the hearing, moreover, the applicant reiterated its position that it did not know which competent authority had adopted the national decision in respect of it, nor on the basis of what material and specific information that decision had been taken.

171. Furthermore, at the hearing, in response to the questions put by the Court, the Council and the United Kingdom were not even able to give a coherent answer to the question of what was the national decision on the basis of which the contested decision was adopted. According to the Council, it was only the Home Secretary's decision, as confirmed by the POAC (see paragraph 169 above). According to the United Kingdom, the contested decision is based not only on that decision, but also on other national decisions, not otherwise specified, adopted by competent authorities in other Member States.

172. It is therefore clear that, even at the end of the oral procedure, the Court is not in a position to review the lawfulness of the contested decision.

173. In conclusion, the Court finds that the contested decision does not contain a sufficient statement of reasons and that it was adopted in the course of a procedure during which the applicant's right to a fair hearing was not observed. Furthermore, the Court is not, even at this stage of the procedure, in a position to review the lawfulness of that decision.

174. Those considerations must therefore lead to the annulment of the contested decision, in so far as it concerns the applicant, without it being necessary to rule, as part of the action for annulment, on the last two parts of the first plea or on the other pleas and arguments put forward in the action.

The claim for damages

Arguments of the parties

175. The applicant has not put forward any matters of fact or law in support of its claim seeking for the Council to pay it EUR 1 for the harm allegedly suffered. Neither the Council nor the intervener has expressed any view on this point in their written pleadings or at the hearing.

Findings of the Court

176. Pursuant to Article 19 of the Statute of the Court of Justice and Article 44(1)(c) of the Rules of Procedure of the Court of First Instance, an application must indicate the subject-matter of the proceedings and include a brief statement of the grounds relied on. The information given must be sufficiently clear and precise to enable the defendant to prepare his defence and the Court of First Instance to decide the case, if appropriate without other information. In order to ensure legal certainty and the sound administration of justice, if an action is to be admissible the essential points of fact and law on which it is based must be apparent from the text of the application itself, even if only stated briefly, provided the statement is coherent and comprehensible (see Case T19/01 Chiquita Brands and Others v Commission [2005] ECR II315, paragraph 64, and case-law cited).

177. To satisfy those requirements, an application for compensation for damage said to have been caused by a Community institution must indicate the evidence from which the conduct which the applicant alleges against the institution can be identified, the reasons why the applicant considers there

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is a causal link between the conduct and the damage it claims to have suffered, and the nature and extent of that damage (Case T38/96 Guérin automobiles v Commission [1997] ECR II1223, paragraphs 42 and 43, and Chiquita Brands and Others v Commission , paragraph 176 above, paragraph 65, and case-law cited). However, a claim for an unspecified form of damage is not sufficiently concrete and must therefore be regarded as inadmissible (Chiquita Brands and Others v Commission , paragraph 176 above, paragraph 66).

178. More specifically, a claim for damages in respect of non-material injury, whether as symbolic reparation or as genuine compensation, must give particulars of the nature of the injury alleged in connection with the conduct for which the defendant institution is held responsible and must quantify the whole of that injury, even if approximately (see Case T277/97 Ismeri Europa v Court of Auditors [1999] ECR II1825, paragraph 81, and case-law cited).

179. In the present case, the claim for damages contained in the application must in all likelihood be construed as compensation for non-material injury, as it is set at the symbolic amount of EUR 1. The fact remains, however, that the applicant has not specified the nature and type of that non-material injury nor, more importantly, identified the allegedly improper conduct of the Council which it is alleged is the cause of that injury. It is not for the Court to seek and identify, from amongst the various pleas put forward in support of the action for annulment, that or those on which it may consider the claim for damages to be based. Nor is it for the Court to make assumptions and ascertain whether there is a causal link between the conduct referred to in those pleas and the non-material injury alleged.

180. That being so, the claim for damages contained in the application lacks even the most basic detail and must, accordingly, be declared inadmissible, especially given that the applicant did not even attempt to remedy that defect in its reply.

181. It also follows that it is not necessary to rule, in connection with the claim for damages, on the pleas and arguments relied on by the applicant in support of its action for annulment, but not yet considered by the Court (see paragraph 174 above).

The request to have the written procedure reopened

182. The considerations which have led the Court to annul the contested decision, in so far as it concerns the applicant, are in no respect based on the new documents lodged by it at the Registry on 18 and 25 January 2006 (see paragraphs 23 and 24 above). Although those documents were put into the case-file (see paragraph 31 above), they must therefore be regarded as being devoid of relevance for the purposes of the present judgment. In those circumstances, it is not necessary to grant the Council's request to have the written procedure reopened (see paragraph 25 above).

Costs

183. Article 87(3) of the Rules of Procedure provides that the Court may order that costs be shared or that the parties bear their own costs if each party succeeds on some and fails on other heads. In the circumstances of the present case, the Council must be ordered to pay, in addition to its own costs, four-fifths of the applicant's costs.

184. Under the first subparagraph of Article 87(4) of the Rules of Procedure, Member States which intervene in the proceedings are to bear their own costs.

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AUTHOR	Court of First Instance of the European Communities
FORM	Judgment
TREATY	European Economic Community
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JURCIT

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11997M035 : N 51 52
11997M046 : N 48 52
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11997M047 : N 58
11997E005 : N 54
11997E010 : N 123
11997E060 : N 10 58 159
11997E230 : N 46
11997E230-L2 : N 153
11997E230-L4 : N 152
11997E233 : N 35
11997E249 : N 97
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11997E301 : N 10 58 159
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32001E0931-A01P1 : N 5
32001E0931-A01P2 : N 6
32001E0931-A01P3 : N 6
32001E0931-A01P4 : N 7 10 114 116 117 119 120 122 124 126 142 143 145 154 166
32001E0931-A01P5 : N 10 116
32001E0931-A01P6 : N 8 10 114 116 131 132 142 143 145 154 160
32001E0931-A02 : N 9
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32001R2580 : N 11 15 90 95 97 98 103 105 109 112 142 146 147 160 164
32001R2580-A02P3 : N 10 14 114 116 120 124 143 145 153 154 160
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32002D0460 : N 15 27
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61979J0131 : N 150
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62003A0132 : N 139
62003J0176 : N 56
62003J0208 : N 121
62004B0299 : N 45 56
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CONCERNS Amends 32005D0930 -
Confirms 32005E0936 -

SUB Common foreign and security policy ; Free movement of capital

AUTLANG French

APPLICA Person

DEFENDA Council ; Institutions

NATIONA France

NOTES Armone, G.: Il Foro italiano 2007 IV Col.189-193 ; Mari, Chiara: La lotta al terrorismo e le garanzie procedimentali, Giornale di diritto amministrativo 2007 p.487-491 ; Mariatte, Flavien: Lutte contre le terrorisme, sanctions économiques et droits fondamentaux, Europe 2007 Février Comm. no 45 p.11-13 ; Bou Franch, Valentín: TPI - Sentencia de 12.12.2006, Organizacion Mujahedin del Pueblo de Iran / Consejo, T-228/02 - PESC-Medidas antiterrorismo y derechos humanos, Revista de Derecho Comunitario Europeo 2007 p.157-169 ; Cappuccio, Laura: E illegittima la decisione delle istituzioni comunitarie che non rispetta il diritto di difesa?, Quaderni costituzionali 2007 p.416-419 ; Eckes, Christina: Common Market Law Review 2007 p.1117-1129 ; Gryllos, G.: Evropaion Politeia 2007 p.679-689 ; Van Hoek, A.A.H. ; Rijken, C.R.J.J.: Rechtsbescherming en het recht van verdediging bij plaatsing op de Europese terrorismelijst - de zaak -Mujahedin-e Kalq v. De Raad, Nederlands tijdschrift voor Europees recht 2007 p.284-292 ; Ricke, Klaus-Peter: Rechtliches Gehör auch für als terroristische Vereinigung Gelistete - Zum Urteil des

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Gerichts erster Instanz vom 12.12.2006, T-228/02, Zeitschrift für Zölle und Verbrauchsteuern 2008 p.5-6

PROCEDU Action for annulment - inadmissible;Action for annulment - unfounded;Action for annulment - successful;Action for damages - inadmissible

DATES of document: 12/12/2006
of application: 26/07/2002

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Judgment of the Court of First Instance (Fourth Chamber)
First Instance (Fourth Chamber)First Instance (Fourth Chamber)2000. JT's Corporation Ltd v Commission of the European Communities. Transparency - Access to documents - Decision 94/90/ECSC, EC, Euratom - Scope of the exception based on protection of the public interest - Inspection and investigation tasks - Authorship rule - Statement of reasons. Case T-123/99.

1. Commission - Public's right of access to Commission documents - Decision 94/90 - Decision refusing public access to documents - Meaning - Invitation to make a request for access more specific - Not included - Inadmissibility of an action for annulment directed against an alleged refusal of access

(Commission Decision 94/90)

2. Commission - Public's right of access to Commission documents - Decision 94/90 - Exceptions to the principle of access to documents - Refusal of access occurring without prior examination of partial access to information not covered by the exceptions - Not lawful

(Commission Decision 94/90)

3. Commission - Public's right of access to Commission documents - Decision 94/90 - Limitations of the principle of access to documents - Authorship rule - Scope - Refusal of access to documents emanating from a non-member State

(Commission Decision 94/90)

4. Acts of the institutions - Statement of reasons - Obligation - Scope - Decision refusing public access to Commission documents

(Art. 253 EC; Commission Decision 94/90)

1. In the context of Decision 94/90 on public access to Commission documents, an invitation by the Commission, following an implicit decision rejecting a confirmatory application for access, to make the request more specific, in view of the large number of documents concerned, expressly leaves open the examination of the request for access and clearly does not exclude the possibility of granting access to some of those documents. The Commission's position concerning access to the documents concerned is not therefore final, so that an action for annulment directed against an alleged refusal to authorise access to those documents is inadmissible.

(see paras 24-26)

2. The exceptions laid down by Decision 94/90 on public access to Commission documents, which contains a code of conduct in that area, must be interpreted in the light of the principle of the right to information and the principle of proportionality, so that, before refusing access to a document as such, the Commission is required to examine whether partial access should be granted, that is to say access to information that is not covered by the exceptions.

Therefore, a Commission decision refusing access to Community mission reports concerning a non-member State and to correspondence sent by the Commission to the Government of that State, such decision containing no indication that such an examination took place, is vitiated by manifest errors in the application of Decision 94/90 and must therefore be annulled.

(see paras 44-46, 48)

3. Decision 94/90 on public access to Commission documents provides that, where a document held by an institution was written by a natural or legal person, a Member State, another Community institution or body or any other national or international body, the application must be sent direct to the author. The authorship rule may be applied by the Commission when handling a request for

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access so long as there is no higher rule of law prohibiting it from excluding from the scope of the code of conduct documents of which it is not the author. The fact that Decision 94/90 refers to declarations of general policy, namely Declaration No 17 and the conclusions of several European Councils, does nothing to alter that finding, since those declarations do not have the force of a higher rule of law.

In holding that it was not required to give access to certain documents that had been sent to it by the Government of a non-member State, the Commission made a correct assessment of the authorship rule.

(see paras 53-54)

4. The duty under Article 190 of the Treaty (now Article 253 EC) to give reasons for individual decisions has the dual purpose of, first, allowing interested parties to know the reasons justifying the decision taken so as to enable them to protect their rights and, secondly, to enable the Community judicature to exercise its power to review the legality of the decision. Whether a statement of reasons satisfies those requirements is a question to be assessed by reference not only to its wording but also to its context and the whole body of legal rules governing the matter in question.

In the case of a request for public access to Commission documents, the Commission is obliged to consider, in the case of each document to which access is sought, whether, in the light of the information available to the Commission, disclosure is in fact likely to undermine one of the aspects of the public interest protected by the exceptions laid down by the code of conduct adopted by Decision 94/90 on public access to Commission documents.

A decision refusing access in which the Commission does not make clear in the grounds stated that it carried out an assessment of the documents at issue in the particular case does not comply with the above requirements and must therefore be annulled.

(see paras 63-65)

In Case T-123/99,

JT's Corporation Ltd, established in Bromley (United Kingdom), represented by M. Cornwell-Kelly, Solicitor, with an address for service in Luxembourg at the Chambers of Wilson Associates, 3 Boulevard Royal,

applicant,

v

Commission of the European Communities, represented by U. Wölker and X. Lewis, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of C. Gomez de la Cruz, also of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment of the Commission's decision of 11 March 1999 refusing the applicant access to certain documents,

THE COURT OF FIRST INSTANCE

OF THE EUROPEAN COMMUNITIES (Fourth Chamber),

composed of: V. Tiili, President, R.M. Moura Ramos and P. Mengozzi, Judges,

Registrar: B. Pastor, Principal Administrator,

having regard to the written procedure and further to the hearing on 29 March 2000,

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gives the following

Judgment

Costs

69 Under Article 87(3) of the Rules of Procedure of the Court of First Instance, where each party succeeds on some and fails on other heads, the Court may order that the costs be shared or that each party bear its own costs. In this case, the Court decides that, on a fair assessment of the circumstances, the Commission must bear its own costs and pay one half of those incurred by the applicant, which must therefore bear one half of its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber),

hereby:

1. Annuls the Commission decision of 11 March 1999 in so far as it refuses the applicant access to the mission reports of the European Union from 1993 to 1996 concerning Bangladesh, including their annexes, and to the correspondence sent by the Commission to the Government of Bangladesh concerning the annulment of the certificates of origin under the generalised system of preferences;

2. Dismisses the remainder of the action;

3. Orders the applicant to bear one half of its own costs;

4. Orders the Commission to bear its own costs, and to pay one half of the costs incurred by the applicant.

Legal background

1 In the Final Act of the Treaty on European Union, the Member States incorporated a Declaration (No 17) on the right of access to information (Declaration No 17), worded as follows:

The Conference considers that transparency of the decision-making process strengthens the democratic nature of the institutions and the public's confidence in the administration. The Conference accordingly recommends that the Commission submit to the Council no later than 1993 a report on measures designed to improve public access to the information available to the institutions.

2 On 6 December 1993, the Council and the Commission approved a Code of Conduct concerning public access to Council and Commission Documents (OJ 1993 L 340, p. 41; the Code of Conduct), designed to establish the principles governing access to the documents held by them.

3 The Commission adopted that Code of Conduct by Decision 94/90/ECSC, EC, Euratom of 8 February 1994 on public access to Commission documents (OJ 1994 L 46, p. 58).

4 The Code of Conduct lays down the following general principle:

The public will have the widest possible access to documents held by the Commission and the Council.

5 Under the third paragraph of the section headed Processing of initial applications, the Code of Conduct provides as follows (hereinafter referred to as the authorship rule):

Where the document held by an institution was written by a natural or legal person, a Member State, another Community institution or body or any other national or international body, the application must be sent direct to the author.

6 The matters on which an institution may rely in order to justify rejection of an application

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for access to documents are set out as follows under the heading of the Code of Conduct entitled Exceptions:

The institutions will refuse access to any document where disclosure could undermine:

- the protection of the public interest (public security, international relations, monetary stability, court proceedings, inspections and investigations),

...

They may also refuse access in order to protect the institution's interest in the confidentiality of its proceedings.

7 On 4 March 1994, Commission Communication 94/C 67/03 on improved access to documents, which explains the conditions for implementation of Decision 94/90, was published (OJ 1994 C 67, p. 5). According to that communication, anyone may... ask for access to any unpublished Commission document, including preparatory documents and other explanatory material. As to the exceptions provided for in the Code of Conduct, the communication states that the Commission may take the view that access to a document should be refused because its disclosure could undermine public and private interests and the good functioning of the institution.... It is also stated that there is nothing automatic about the exemptions, and each request for access to a document will be considered on its own merits.

8 Council Regulation (EEC) No 1468/81 of 19 May 1981 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs or agricultural matters (OJ 1981 L 144, p. 1), as amended by Council Regulation (EEC) No 945/87 of 30 March 1987 (OJ 1987 L 90, p. 3), provides in Article 15b:

... For the purposes of attaining the objectives of this Regulation the Commission may, under the conditions laid down in Article 15a, carry out Community administrative and investigative missions in third countries in coordination and close cooperation with the competent authorities of the Member States.

...

9 Article 15c of the same regulation provides:

The findings established and the information obtained in the context of the Community missions referred to in Article 15b, particularly in the form of documents passed on by the competent authorities of the third countries concerned, shall be dealt with in accordance with Article 19.

Original documents obtained or certified copies thereof shall be delivered by the Commission to the competent authorities of the Member States, at the said authorities' request, for use in connection with judicial proceedings or proceedings instituted for failure to comply with the law on customs or agricultural matters.

10 Article 19 of Regulation No 1468/81 is worded as follows:

1. Any information communicated in whatever form pursuant to this Regulation shall be of a confidential nature. It shall be covered by the obligation of professional secrecy and shall enjoy the protection extended to like information under both the national law of the Member State which received it and the corresponding provisions applying to the Community authorities.

The information referred to in the first subparagraph may not in particular be sent to persons other than those in the Member States or within the Community institutions whose duties require that they have access to it. Nor may it be used for purposes other than those provided for in this

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Regulation, unless the authority supplying it has expressly agreed and in so far as the provisions in force in the Member State where the authority which received it is situated do not preclude such communication or use.

2. Paragraph 1 shall not impede the use, in any legal actions or proceedings subsequently instituted in respect of non-compliance with the law on customs or agricultural matters, of information obtained pursuant to this Regulation.

The competent authority of the Member State which supplied this information shall be informed forthwith of such utilisation.

11 Regulation No 1468/81 was repealed and replaced with effect from 13 March 1998 by Council Regulation (EEC) No 515/97 of 13 March 1997 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters (OJ 1997 L 82, p. 1).

Background to the dispute

12 The applicant is an importer of textiles coming mainly from Bangladesh. During 1997 and 1998, it received several post-clearance demands for customs duty totalling UKL 661 133.89. Those demands were in respect of certain imports of goods under Chapter 61 of the Common Customs Tariff, carried out in 1994, 1995 and 1996.

13 The imports concerned had initially been exempted from import duties, on presentation of certificates of origin under the generalised system of preferences (hereinafter GSP Forms A), certifying that the origin of the goods was Bangladesh. Those GSP Forms A were subsequently declared void by the Bangladesh Government.

14 The applicant has challenged the post-clearance demands for customs duty before a United Kingdom court. Presuming that certain documents in the Commission's possession might help to clarify the reasons for the annulment of the GSP Forms A, the applicant asked the Commission in a letter of 20 November 1998 for access to certain documents, namely:

- the mission reports of the European Union from 1993 to 1996 concerning Bangladesh, together with the annexes thereto (Category 1 of the requested documents);

- the replies of the Government of Bangladesh (Category 2);

- the Commission's decisions with regard to the mission reports (Category 3)

- the correspondence between the Commission and the Government of Bangladesh concerning the annulment of the GSP Forms A (Category 4);

- the reports or summaries compiled or received by the Commission regarding the operation and conduct of the GSP scheme for textile products imported from Bangladesh between 1991 and 1996 (Category 5).

15 By letter of 15 December 1998, the Commission refused access to those documents. The applicant then confirmed its application by letter of 7 January 1999. By letter of 18 February 1999, the Commission informed the applicant that it would deal with the confirmatory application as soon as possible and would take a decision subsequently. Finally, by letter of 11 March 1999 (hereinafter the decision or the contested decision), the Commission rejected the confirmatory application in the following terms:

... Concerning the first category and part of the fourth category of documents (the mission reports and annexes, and the correspondence of the Commission with the Government of Bangladesh regarding the cancellation of the GSP Forms A): these reports are covered by the exception regarding the

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protection of the public interest, since they concern the Commission's inspection and investigation tasks. This exception to the rule of access is expressly provided for in the Code of Conduct concerning public access to Commission and Council documents, adopted by the Commission on 8 February 1994. It is indeed essential for the Commission to be able to conduct such investigations, the aim of which is to investigate the authenticity and regularity of certificates while respecting the confidential nature of such proceedings. In addition, sincere cooperation and a climate of mutual confidence between the Commission, the Member States concerned - which participated in the mission - and the Government of Bangladesh are required in order to ensure compliance with customs legislation.

Moreover, the Commission did carry out the enquiry in Bangladesh under Regulation No 1468/81... Indeed, Article 15b of that amended regulation allows the Commission to conduct Community administrative and investigative cooperation missions in third countries in coordination and close cooperation with the competent authorities of the Member States. The findings and information obtained in the course of these Community missions are to be handled in accordance with Article 19 of the regulation, which lays down strict confidentiality conditions on the use and exchange of information within the provisions on mutual assistance. In accordance with that article, both the Commission and the Member States' authorities are prohibited from transmitting information obtained in the context of the enquiries to anyone other than those in the Member States' administrations or within the Community institutions whose functions require them to know or to use it.

Concerning the second category and part of the fourth category of documents (responses of the Government of Bangladesh to the report on its agencies, and correspondence from the Government of Bangladesh to the Commission regarding the cancellation of GSP Forms A), the abovementioned Code of Conduct specifies that "where the document held by an institution was written by a natural or legal person, a Member State, another Community institution or body or any other national or international body, the application must be sent direct to the author". Therefore, as these letters are not Commission documents, I suggest you contact directly the authorities which produced them.

Concerning the third category of documents (Commission decisions with respect to the mission reports), I can advise you that, as there have been no "Commission Decisions" with respect to any of the mission reports which you have specified, such documents do not exist.

Concerning the fifth category of documents (reports or summaries compiled or received by the Commission with regard to the operation and conduct of the GSP scheme relating to textile goods from Bangladesh between 1991 and 1996), your request covers such a large number of documents that it is completely impractical to undertake an exercise which would encompass many of the archives of other Directorates-General, as well as the UCLAF's for this period (the volume of correspondence on this subject, together with reports and annexes would exceed several thousand documents). I would thus suggest [that] you [make] your request on this point [more specific]....

Procedure and forms of order sought by the parties

16 By application lodged at the Registry of the Court of First Instance on 21 May 1999, the applicant brought the present action.

17 The written procedure closed on 15 October 1999.

18 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Fourth Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure, asked the parties to reply to written questions and to produce certain documents. The parties complied with those requests.

19 The parties presented oral argument and replied to the oral questions of the Court of First Instance at the hearing in open court on 29 March 2000.

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20 The applicant claims that the Court should:

- annul the contested decision;

- order the Commission to pay the costs.

21 The Commission contends that the Court should:

- dismiss the action as inadmissible or, in the alternative, as unfounded as regards the alleged refusal to authorise access to documents in Category 5;

- dismiss the action as inadmissible or, in the alternative, as unfounded, for lack of an interest in bringing an action in so far as it concerns the refusal to authorise access to the mission report of November-December 1996;

- dismiss the action as unfounded as to the remainder;

- order the applicant to pay the costs.

Admissibility

The admissibility of the action in so far as it concerns the reports or summaries compiled or received by the Commission regarding the operation of the generalised preference scheme for textile products imported from Bangladesh between 1991 and 1996

22 The Commission states that it did not refuse access to the documents in Category 5, but merely asked the applicant to be more specific about its application, which the applicant subsequently failed to do.

23 The Commission concludes that it did not take a decision in relation to this category of documents. Therefore, the present action for annulment is partly inadmissible.

24 The Court finds that the applicant's request for access, in particular to the documents in Category 5, met initially with a rejection decision by the Commission. In that respect, it should be noted that Article 2(4) of Decision 94/90 provides that failure to reply within one month of an application for review being made constitutes a refusal. In this case, the Commission did not reply to the confirmatory application within that period of one month from receipt. The documents before the Court show that the Commission, which received the applicant's confirmatory application on 18 January 1999, merely informed the applicant, by letter of 18 February 1999, that it would deal with the application as soon as possible and that it would send its reply later. Therefore, at the expiry of the one-month period following the Commission's receipt of the confirmatory application, there was in existence a decision rejecting that application. However, the letter of 11 March 1999 replaced that implicit rejection decision and constitutes, in relation to the latter, a decision containing a new factor, namely the replacement of the previous refusal to give the applicant access to the Category 5 documents with an invitation to be more specific about the request for access to those documents.

25 The next point to note is that, by inviting the applicant to make its request more specific, in view of the large number of documents concerned, the Commission expressly left open the examination of that part of the request for access and clearly did not exclude the possibility of granting access to some of those documents (see, by analogy, the order of the Court of Justice in Case C-64/93 Donatab v Commission [1993] ECR I-3595, paragraphs 13 and 14, and the order of the Court of First Instance in Case T-182/98 UPS Europe v Commission [1999] ECR II-2857, paragraphs 39 to 45). The Commission's position concerning access to that category of documents is not therefore final.

26 It follows that the action is inadmissible in so far as it relates to the Category 5 documents.

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The admissibility of the action in so far as it concerns the mission report of November-December 1996

Arguments of the parties

27 The Commission observes that the applicant already has this Category 1 document, which is, moreover, reproduced in Annex 5 to the application. The document was sent to the applicant by the British customs authorities on 22 July 1998, after the removal of certain information. The Commission emphasises in that respect that the applicant has not specified in any of its letters that it wished to have access to the information removed by the British authorities.

28 The Commission concludes that the applicant has no interest in obtaining access to that document.

29 The applicant explains that it received an extract from the mission report in question and copies of the correspondence concerning the negotiations between the Commission and the Government of Bangladesh, but that certain information such as the statements of Bangladeshi companies in Annex 1 to the report has been removed. Nor, moreover, were the reports, notes, statements, invoices and correspondence collected by the mission and annexed to the report sent to the applicant. The applicant also observes that it received the extract from that mission report on 11 May 1999, and thus after the contested decision was adopted.

Findings of the Court of First Instance

30 The Court finds that the applicant has not had full access to the mission report of November-December 1996. The fact that the applicant has had access to part of one of the documents referred to in its application cannot deprive it of the right to apply for disclosure of the other parts of that document and of the other documents to which it has not yet obtained access (Case T-92/98 Interporc v Commission [1999] ECR II-3521, paragraph 46). Therefore, contrary to what the Commission maintains, the applicant has an interest in obtaining the annulment of the refusal to grant access to the mission report of November-December 1996.

Substance

31 The applicant raises, essentially, two pleas in law in support of its action, alleging infringement, first, of Decision 94/90 and Regulation No 1468/81, and, secondly, of Article 190 of the EC Treaty (now Article 253 EC).

The first plea, alleging infringement of Decision 94/90 and Regulation No 1468/81

32 This plea needs to be examined in relation to the various documents to which access has been requested.

Mission reports and correspondence from the Commission to the Bangladesh Government

Arguments of the parties

33 The applicant states that exceptions to the rule that access is to be given must be interpreted narrowly, so that application of the general principle of conferring on the public the widest possible access to documents held by the Commission should not be thwarted. It also points out that the Commission must examine in relation to each document requested whether disclosure is in fact likely to undermine one of the interests protected.

34 In this case, the applicant maintains, there is no evidence that disclosure of the information sought might prejudice an inspection or an investigation, especially since the inspection and investigation work has already been completed. Nor, in its submission, can the fact that the documents concerned were produced in the context of mutual cooperation between the Commission, the Member States and the government of a non-member country alter the nature of the information contained in those documents.

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That information deals with purely factual questions as to the entitlement of certain exports of goods to duty reliefs, such exports having previously been certified as attracting such relief. The applicant does not regard the information in question as inherently confidential or sensitive. It does not relate, for example, to matters of public or commercial policy or to diplomatic issues.

35 The applicant further states that, under Article 19(2) of Regulation No 1468/81, the use, in legal actions or proceedings subsequently instituted in respect of non-compliance with customs legislation, of information obtained pursuant to the same regulation may not be impeded. In this case, the information requested of the Commission was intended precisely for use in legal proceedings. Therefore, to claim that such information is confidential, as the Commission does, runs contrary to Article 19(2) of Regulation No 1468/81.

36 In this case, moreover, refusal of access infringed the principle of compliance with the rights of defence. The information to which the applicant requested access was used to justify demands for post-clearance recovery of customs duties, whilst the applicant was unable to defend itself effectively by reason of the refusal by the Commission. On that point, the applicant adds that, in the United Kingdom, it is for the person appealing against a demand for post-clearance recovery to establish that the customs duties were not due. Moreover, the national court hearing the dispute as to whether the duties were due has no jurisdiction to compel the Commission to produce documents.

37 The Commission makes the preliminary observation that a national court can order the Commission to communicate specified documents to it unless such communication is likely to interfere with the functioning and independence of the Communities, in which situation the institution may be justified in refusing. Consequently, the national court before which the applicant has challenged the customs duties demanded of it could request the Commission to communicate documents to it in so far as communication of them does not fall within the exception referred to above.

38 The Commission then states that the documents in question were drawn up within the context of investigations conducted pursuant to Regulation No 1468/81. They therefore belong to the category of documents relating to inspections and investigations which fall within the mandatory exception relating to the protection of the public interest. The Commission explains in that respect that a climate of mutual confidence between the Commission, the Member States and the Government of Bangladesh is necessary to ensure that Community customs legislation is complied with. The inspections carried out from July 1996 onwards were designed to establish whether the Bangladeshi authorities had issued certificates of origin in accordance with the legislation in force. A climate of cooperation was essential in that context, especially since the Community considered it unsafe to make inspections in Bangladesh from 1995 until May 1996.

39 The Commission challenges the applicant's interpretation of Regulation No 1468/81, and states that that regulation lays down a principle that information obtained in the context of investigations is confidential. It acknowledges that there is an exception to that principle in respect of judicial proceedings, but argues that that exception only releases the competent authorities of the Member States or the Commission from their strict obligation of confidentiality if that information is needed by the authorities in connection with judicial proceedings. The individuals concerned cannot, on the strength of that exception, claim a right of access to that information simply because judicial proceedings are pending. That right is granted to those individuals and may be exercised by them only in the context defined by national legislation on procedure, where the competent authorities use that information in judicial proceedings.

40 The Commission further observes that its investigation into the circumstances in which the Bangladeshi authorities issued certificates of origin has not yet been completed. Even if it had been completed, the Commission would legitimately have been able to refuse the access requested.

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41 Finally, the Commission states that the national administration, which is a party to the proceedings before a British court, may communicate the documents concerned to the applicant pursuant to Article 19(2) of Regulation No 1468/81. The question whether that national administration is obliged to communicate them is a matter of domestic law. In any event, a possible infringement of the applicant's rights of defence in the course of the national proceedings is not a circumstance which is capable of conferring upon the applicant greater rights pursuant to Decision No 94/90 than those of any other person seeking access to the documents.

42 In its reply, the applicant refers to the judgment in Case T-14/98 Hautala v Council [1999] ECR II-2489, in which the Court of First Instance held that an institution that has been presented with a request for access to documents is required to examine whether partial access should be granted to information not covered by the exceptions, and that the public interest might in some cases be adequately protected by the removal, after examination, of passages in a document which might harm that interest.

43 The Commission maintains that the applicant's reference to the judgment in Hautala v Council constitutes a new plea in law and is thus inadmissible under Article 48(2) of the Rules of Procedure. It submits, moreover, that the plea, which it regards as being based on infringement of the principle of proportionality, is unfounded in any event.

Findings of the Court of First Instance

44 As a first point, the Court finds that the Commission's argument that the reference in the reply to the judgment in Hautala constitutes a new, and therefore inadmissible, plea cannot be accepted. That judgment merely clarifies the scope of the right of access as laid down by the Code of Conduct, by specifying that the exceptions to that right must be interpreted in the light of the principle of the right to information and the principle of proportionality and that, therefore, the institution is required to examine whether partial access should be granted, that is to say access to information that is not covered by the exceptions (Hautala, paragraph 87). Therefore, the reference to that judgment in the applicant's reply forms part of the plea, already contained in the application, alleging infringement of Decision 94/90, to which the Code of Conduct is annexed.

45 Moreover, in reply to a question put to it during the oral procedure, the Commission stated that it is accustomed when dealing with requests for access to examining the possibility of granting partial access. It follows that the Commission does not in any way deny the relevance of the principles raised in Hautala.

46 However, the contested decision does not contain any indication that such an examination took place. On the contrary, the reasons given for that decision (see paragraph 15 above) show that the Commission reasoned by reference to categories of documents and not on the basis of the actual information contained in the documents in question. The Commission limited itself to stating that the mission reports are covered by the exception regarding the protection of the public interest, since they concern the Commission's inspection and investigation tasks, explaining only that, for the Commission, it is essential ... to be able to conduct such investigations whose aim is to investigate the authenticity and regularity of certificates whilst respecting the confidential nature of such proceedings and that sincere cooperation and a climate of mutual confidence... are required in order to ensure compliance with customs legislation. By expressing itself in those terms, the Commission implies that it has not assessed specifically whether the exception concerning the protection of the public interest genuinely applies to the whole of the information contained in those documents.

47 Moreover, the Commission's argument is invalidated by the extract from the mission report of November-December 1996, which was sent to the applicant by the British authorities and which is annexed to its application. An examination of that extract shows that much of the information which

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it contains consists of descriptions and factual findings that clearly do no harm to inspection and investigation tasks or, therefore, to the public interest (see Case T-188/98 Kuijer v Council [2000] ECR II-1959, paragraph 57).

48 It follows from the above that, in so far as it concerns the mission reports (Category 1) and correspondence sent by the Commission to the Government of Bangladesh (Category 4, part), the contested decision is vitiated by manifest errors in the application of Decision 94/90 and must therefore be annulled (Hautala, paragraphs 87 and 88).

49 That conclusion is not invalidated either by the Commission's argument concerning the possibility that the national court hearing the dispute between the applicant and the British authorities might have jurisdiction to ask the Commission to produce the documents concerned (see paragraph 37 above), or by its argument that the right of access of a party to national legal proceedings is a matter for domestic law (see paragraph 41 above). Those arguments are irrelevant to the decision in this case. Communication 94/C 67/03 makes it plain that any person may at any time submit a request for access to documents held by the Commission (see paragraph 7 above). Once such a request has been submitted, the provisions of Decision 94/90 apply, and the Commission must examine that request in the light of the general principle contained in the Code of Conduct, annexed to that decision, whereby the public is to have the widest possible access to the documents which it holds (see Joined Cases C-174/98 P and C-189/98 P Netherlands and Van der Wal v Commission [2000] ECR I-1, paragraphs 27 to 29; Interporc, paragraphs 44 and 45).

50 Similarly, the Commission cannot justify its refusal to grant access to the documents referred to in the applicant's request on the basis of Regulation No 1468/81 or Regulation No 515/97, which lay down the principle that information obtained in customs investigations is confidential. The Code of Conduct, the text of which is annexed to Decision 94/90, sets out an essential right, namely that of access to documents. That code was adopted with the aim of making the Community more transparent, the transparency of the decision-making process being a means of strengthening the democratic nature of the institutions and the public's confidence in the administration (Declaration No 17). Regulation No 1468/81, as far as it is to be applied as a lex specialis, cannot be interpreted in a sense contrary to Decision 94/90, whose fundamental objective is to give citizens the opportunity to monitor more effectively the lawfulness of the exercise of public powers (Interporc, paragraphs 37 to 39 and 43 to 47; Case T-188/97 Rothmans v Commission [1999] ECR II-2463, paragraph 53; Case T-309/97 Bavarian Lager v Commission [1999] ECR II-3217, paragraphs 36 and 37). Moreover, Article 19(2) of Regulation No 1468/81 and Article 45(3) of Regulation No 515/97, applicable as from 13 March 1998, provide that the confidential nature of the information in question shall not impede the use, in any legal actions or proceedings subsequently instituted in respect of non-compliance with the law on customs or agricultural matters, of information obtained pursuant to this Regulation. In this case, as the applicant has rightly pointed out, its request for access has indeed been made within the context of a legal action.

Correspondence sent by the Government of Bangladesh to the Commission

- Arguments of the parties

51 The applicant maintains that the authorship rule should be interpreted as meaning that an application for documents must be made to the authors only where the Commission does not hold originals or copies. To require an applicant to seek documents from bodies that do not come within the ambit of judicial review, when those documents are in the possession of the Commission, would circumvent the purpose of Decision 94/90 and Declaration No 17. In that respect, the applicant further states that Decision 94/90 must be applied in such a way as to give effect to the clear intention of the parties to the Treaty on European Union. Moreover, if the authorship rule were not interpreted in the way suggested by the applicant, it would contravene the principle of proportionality, by

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virtue of which the measures adopted must be necessary to achieve the objective of protecting confidentiality and the public interest.

52 The Commission submits that the applicant's argument is contradicted by the clear wording of the authorship rule. It states that it cannot give access to documents of the governments of non-member countries simply on the ground that it is in possession of those documents. The decision whether or not to disclose documents drawn up by third parties is a matter exclusively for those parties, since they are the only ones able to decide whether or not they wish to conduct a policy of transparency.

Findings of the Court of First Instance

53 It should be pointed out that the authorship rule may be applied by the Commission when handling a request for access so long as there is no higher rule of law prohibiting it from excluding from the scope of the Code of Conduct documents of which it is not the author. The fact that Decision 94/90 refers to declarations of general policy, namely Declaration No 17 and the conclusions of several European Councils does nothing to alter that finding, since those declarations do not have the force of a higher rule of law (Interporc, paragraphs 66, 73 and 74).

54 It follows that the Commission made a correct assessment in holding that it was not required to give access to documents that had been sent to it by the Government of Bangladesh. Therefore, the first plea must be rejected in so far as it concerns correspondence sent by that government to the Commission.

Decisions of the Commission concerning the mission reports

- Arguments of the parties

55 The applicant challenges the Commission's assertion that no decisions exist in relation to the mission reports. It observes in particular that, following the mission report of November-December 1996, several Member States initiated actions for post-clearance recovery of customs duties, which must have resulted from a decision of the Commission adopting the report's recommendations. The applicant further emphasises that it appears from page 2 of Appendix 5 to the mission report of November-December 1996 that three meetings took place at the Commission between officers of that institution and representatives of the Member States to discuss the report.

56 The Commission notes that the applicant has systematically defined the documents requested as Commission Decisions. The Commission therefore understood the request to relate to decisions within the meaning of Article 189 of the EC Treaty (now Article 249 EC). No decision of that type was adopted in respect of the mission reports.

57 In its reply, the applicant maintains that the Commission admits by the statements in its defence that a document exists. The applicant assumes that the document in question is the Commission's decision on the mission report of November-December 1996. It reiterates that, if the Commission had not taken any decision, no post-clearance recovery action would have been undertaken by the Member States. The applicant submits that, by raising the question whether the measure in question constituted a decision within the meaning of Article 189 of the Treaty, the Commission avoids justifying its refusal to disclose the minutes of its decision requesting Member States to take the necessary measures.

- Findings of the Court of First Instance

58 The Court finds that the applicant has not produced relevant or consistent evidence to support its assertion that there are one or more decisions in existence taken by the Commission in respect of the mission reports. The fact that meetings took place between Commission officials and representatives of the Member States on the subject of those reports and of the national actions for post-clearance recovery of customs duties does not necessarily show that any decision had been taken by the Commission

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in addition to its recommendations at the end of the mission reports. Nor has the applicant produced evidence to refute the Commission's assertion that the authorities of the Member States may, or must, initiate post-clearance recovery procedures following the recommendations contained in the mission reports, without a decision of the Commission being necessary or, indeed, possible.

59 It follows that the first plea in law must be dismissed in so far as it concerns the alleged decisions of the Commission concerning the mission reports.

60 It follows from all of the foregoing considerations that the contested decision must be annulled in so far as it relates to the mission reports and correspondence from the Commission to the Government of Bangladesh, and that the remainder of the first plea in law must be dismissed.

The second plea, alleging infringement of Article 190 of the Treaty

- Arguments of the parties

61 The applicant argues that insufficient reasons were stated for the contested decision. The Commission did not examine in respect of each document requested whether disclosure was in fact likely to undermine one of the interests protected.

62 The Commission contends that the reasoning of the contested decision is exhaustive. As regards the mission reports and correspondence from the Commission to the Bangladesh Government, the decision clearly shows that those documents belong to the category concerning inspections and investigations and are therefore covered by the public-interest exception. The decision also sets out the reasons for which public disclosure of those documents could harm the public interest. The Commission stresses that it did not satisfy itself simply by concluding that the documents fell within the public-interest exception. The reasoning of the contested decision indicates not only why the category of documents concerned fell within the ambit of the exception but also why in practice their public disclosure would harm the public interest.

Findings of the Court of First Instance

63 It is settled case-law that the duty to give reasons for individual decisions has the dual purpose of, first, allowing interested parties to know the reasons justifying the measure so as to enable them to protect their rights and, secondly, to enable the Community judicature to exercise its power to review the legality of the decision (Case C-350/88 Delacre and Others v Commission [1990] ECR I-395, paragraph 15; Case T-105/95 WWF UK v Commission [1997] ECR II-313, paragraph 66). Whether a statement of reasons satisfies those requirements is a question to be assessed by reference not only to its wording but also to its context and the whole body of legal rules governing the matter in question (Case C-122/94 Commission v Council [1996] ECR I-881, paragraph 29; Kuijer, paragraph 36).

64 It is also clear from the case-law that the Commission is obliged to consider, in the case of each document to which access is sought, whether, in the light of the information available to the Commission, disclosure is in fact likely to undermine one of the aspects of the public interest protected by the exceptions (Case T-174/95 Svenska Journalistförbundet v Council [1998] ECR II-2289, paragraph 112; Kuijer, paragraph 37).

65 The Commission must therefore make clear in the grounds stated for its decision that it has carried out an assessment of the documents at issue in the particular case (Kuijer, paragraph 38). In this case, as the Court has already found above in relation to the mission reports and the correspondence from the Commission to the Government of Bangladesh (paragraph 46), that such an assessment does not appear in the contested decision. On the contrary, the Commission based its reasoning exclusively on the general characteristics of the categories of documents requested.

66 The second plea is therefore well founded in so far as it concerns the mission reports (Category

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1) and the correspondence from the Commission to the Government of Bangladesh (Category 4, part).

67 However, the reasons stated in the contested decision are sufficient as regards the other documents referred to in the applicant's request. As regards the correspondence from the Government of Bangladesh to the Commission, the latter has cited the authorship rule and indicated to the applicant that it was for it to request copies of the documents in question from the Bangladesh authorities. The applicant was therefore in a position to know the reasons for the contested decision and the Court of First Instance to exercise its power of review of the legality of that decision. The applicant therefore has no grounds for maintaining that a more specific statement of reasons was necessary (Interporc, paragraph 78). Similarly, as regards the alleged decisions concerning the mission reports, it must be held that the Commission was entitled to limit itself to indicating that such documents did not exist, without being under any obligation to specify why such decisions had not been taken.

68 It follows from all the foregoing considerations that the contested decision must be annulled in so far as it refuses access to the mission reports of the European Union from 1993 to 1996 concerning Bangladesh, including their annexes, and to the correspondence from the Commission to the Government of Bangladesh concerning the annulment of the GSP Forms A, and that the remainder of the application must be dismissed.

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AUTHOR	Court of First Instance of the European Communities
FORM	Judgment
TREATY	European Economic Community
PUBREF	European Court reports 2000 Page II-03269
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LODGED	1999/05/21
JURCIT	31981R1468 : N 50 31981R1468-A19P2 : N 50 31994D0090 : N 44 49 50 53 31994D0090-A02P4 : N 24 31997R0515 : N 50 31997R0515-A45P3 : N 50 61988J0350-N15 : N 63 61993O0064-N13-14 : N 25 61994J0122-N29 : N 63 61995A0105-N66 : N 63 61995A0174-N112 : N 64 61997A0188-N53 : N 50 61997A0309-N36-37 : N 50 61998B0014 : N 45 61998B0014-N87 : N 44 48

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61998B0014-N88 : N 48
61998B0092-N37-39 : N 50
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61998B0092-N44-45 : N 49 50
61998B0092-N46 : N 30 50
61998B0092-N47 : N 50
61998B0092-N66 : N 53
61998B0092-N73-74 : N 53
61998B0092-N78 : N 67
61998J0174-N27-29 : N 49
61998B0182-N39-45 : N 25
61998A0188-N36 : N 63
61998A0188-N37 : N 64
61998A0188-N38 : N 65
61998A0188-N57 : N 47

SUB Free movement of goods ; Customs Union ; Provisions governing the Institutions

AUTLANG English

APPLICA Person

DEFENDA Commission ; Institutions

NATIONA United Kingdom

NOTES Simon, Denys: Europe 2000 Décembre Comm. no 378 p.12 ; Molaschi, Viviana: Diritto di accesso: il Tribunale stabilisce la portata delle deroghe e i limiti di applicabilità della "regola dell'autore", Diritto pubblico comparato ed europeo 2001 p.340-345 ; Gautier, Yves: Chronique de jurisprudence du Tribunal et de la Cour de justice des Communautés européennes, Journal du droit international 2001 p.591-596

PROCEDU Action for annulment - successful;Action for annulment - inadmissible;Action for annulment - unfounded

DATES of document: 12/10/2000
of application: 21/05/1999

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Judgment of the Court of First Instance (Third Chamber)
First Instance (Third Chamber)First Instance (Third Chamber)2002. Hyper Srl v Commission of the European Communities. Customs duties - Importation of television sets from India - Invalid certificates of origin - Application for remission of import duties - Article 13(1) of Regulation (EEC) No 1430/79 - Rights of the defence - Special situation. Case T-205/99.

In Case T-205/99,

Hyper Srl, established in Limena (Italy), represented by D. Ehle and D. Ehle, Rechtsanwälte, with an address for service in Luxembourg,

applicant,

v

Commission of the European Communities, represented by J.-C. Schieferer, acting as Agent, assisted by M. Nuñez-Müller, Rechtsanwalt, with an address for service in Luxembourg,

defendant,

APPLICATION for annulment of Commission Decision REM 14/98 of 5 February 1999 finding that the remission of import duties due from the applicant in respect of television sets imported from India is not justified,

THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES

(Third Chamber),

composed of: M. Jaeger, President, K. Lenaerts and J. Azizi, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 6 March 2002,

gives the following

Judgment

Costs

137 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. As the applicant has been unsuccessful and the Commission has applied for costs, the applicant must be ordered to pay the costs incurred by the Commission.

On those grounds,

THE COURT OF FIRST INSTANCE

(Third Chamber)

hereby:

1. Dismisses the action;

2. Orders the applicant to pay the costs.

General background to the dispute

1. Legal background

Legislation concerning the remission of customs duties

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1 The conditions governing the remission of customs duties applicable to the present case are laid down in Article 13(1) of Council Regulation (EEC) No 1430/79 of 2 July 1979 on the repayment or remission of import or export duties (OJ 1979 L 175, p. 1), as amended by Article 1(6) of Council Regulation (EEC) No 3069/86 of 7 October 1986 (OJ 1986 L 286, p. 1). That article provides:

`Import duties may be... remitted in special situations... which result from circumstances in which no deception or obvious negligence may be attributed to the person concerned'.

2 Article 4(2)(c) of Commission Regulation (EEC) No 3799/86 of 12 December 1986 laying down provisions for the implementation of Articles 4a, 6a, 11a and 13 of Regulation No 1430/79 (OJ 1986 L 352, p. 19) provides that the `production, even in good faith, for the purpose of securing preferential tariff treatment of goods entered for free circulation, of documents subsequently found to be forged, falsified or not valid for the purpose of securing such preferential tariff treatment' is a situation which is not in itself a special situation within the meaning of Article 13 of Regulation No 1430/79.

3 The procedural rules concerning the remission of customs duties which are of relevance to the present case are Articles 235 to 239 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1) and Articles 878 to 909 of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Regulation No 2913/92 (OJ 1993 L 253, p. 1).

4 It follows from those provisions that the administrative procedure for the remission of customs duties is a two-step process. First, the person liable must lodge his application for remission with `the customs office of entry in the accounts', which is the office where the import or export duties for which remission is sought were entered into the accounts. That office forwards the application to the `decision-making customs authority' which is defined as the national customs authority competent to decide on the application (Article 879 of Regulation No 2454/93). If that authority considers that there are no grounds for granting the remission, it may, pursuant to the rules in force, adopt a decision to that effect without transmitting the application to the Commission. By contrast, where that authority is unable to make a decision on the basis of Article 899 et seq. of Regulation No 2454/93, which describe a number of situations in which remission may or may not be granted, and `the application is supported by evidence which might constitute a special situation resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned', the Member State to which the authority belongs must transmit the case to the Commission (Article 905(1) of Regulation No 2454/93). The file sent to the Commission must include all the facts necessary for a full examination of the case as well as a signed statement from the person applying for remission certifying `that he has read the case and stating either that he has nothing to add or listing all the additional information that he considers should be included' (Article 905(2) of that regulation). Subsequently, after consulting a group of experts composed of representatives of all the Member States, meeting within the framework of the Customs Code Committee to consider the case in question, the Commission `shall decide whether or not the special situation which has been considered justifies... remission' (first paragraph of Article 907). That decision must be taken within six months of the date on which the file transmitted by the Member State is received by the Commission (second paragraph of Article 907 of Regulation No 2454/93) and the Member State concerned must be notified of that decision as soon as possible (Article 908(1)). On the basis of that Commission decision the decision-making customs authority must decide whether to grant or refuse the application for remission made to it (Article 908(2) of Regulation No 2454/93).

5 Following the entry into force, on 6 August 1998, of Commission Regulation (EC) No 1677/98 of 29 July 1998 amending Regulation No 2454/93 (OJ 1998 L 212, p. 18), Regulation No 2454/93

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now includes an additional provision, Article 906a, which provides:

`Where, at any time in the procedure provided for in Articles 906 and 907, the Commission intends to take a decision unfavourable towards the applicant for... remission, it shall communicate its objections to him/her in writing, together with all the documents on which it bases those objections. The applicant for... remission shall express his/her point of view in writing within a period of one month from the date on which the objections were sent. If he/she does not give his/her point of view within that period, he/she shall be deemed to have waived the right to express a position'.

System of generalised tariff preferences applicable to products originating in India

6 Council Regulation (EEC) No 3831/90 of 20 December 1990 applying generalised tariff preferences for 1991 in respect of certain industrial products originating in developing countries (OJ 1990 L 370, p. 1), which is applicable to the present case, grants generalised tariff preferences in respect of, inter alia, finished and semi-finished industrial products from developing countries.

7 Article 1(1) of Regulation No 3831/90 provides for the suspension from 1 January to 31 December 1991 of duties of the Common Customs Tariff in respect of those products covered by the regulation (`preferential treatment'). That suspension was extended to cover the period from 1 January to 31 December 1992 by Council Regulation (EEC) No 3587/91 of 3 December 1991 (OJ 1991 L 341, p. 1).

8 The beneficiaries of the system of tariff preferences established by Regulation No 3831/90 include, inter alia, the Republic of India (the second indent of Article 1(2) in conjunction with Annex III). The list of products covered by that system includes colour television sets which come under the tariff heading 8528 (Article 1(1) in conjunction with Annex I).

9 To determine the origin of goods and, hence, whether they are eligible for preferential treatment, Article 1(4) of Regulation No 3831/90 refers to the rules laid down in Commission Regulation (EEC) No 693/88 of 4 March 1988 on the definition of the concept of originating products for purposes of the application of tariff preferences granted by the European Economic Community in respect of certain products from developing countries (OJ 1988 L 77, p. 1).

Rules on the determination of product origins

10 Article 1(1) of Regulation No 693/88 provides:

`... the following shall be considered as products originating in a country enjoying those preferences...:

(a) products wholly obtained in that country;

(b) products obtained in that country in the manufacture of which products other than those referred to in (a) are used, provided that the said products have undergone sufficient working or processing...'

11 As regards, more specifically, colour televisions classified under tariff heading 8528, a combined reading of Article 3(3) of Regulation No 693/88 and Annex III thereto makes it clear that where those products are manufactured using materials which do not enjoy preferential treatment, they may be regarded as having been sufficiently worked or processed if the aggregate value of the non-originating materials does not exceed 40% of the ex-works price of the product.

12 On importation into the Community, originating products within the meaning of Regulation No 693/88 are, in principle, eligible to benefit from tariff preferences on production of a Form A certificate of origin. That certificate is issued either by the customs authorities or by other governmental authorities of the exporting country `provided that the latter country... assists the Community by allowing the customs authorities of Member States to verify the authenticity of the document or the accuracy of the information regarding the true origin of the products in question' (Article 7(1) of Regulation No 693/88). The certificate must be presented to the customs authorities

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in the Member State of importation (Article 9 of that regulation).

13 Since the certificate of origin constitutes the documentary evidence for the application of the provisions concerning tariff preferences, it is the responsibility of the competent authorities of the exporting country to take any steps necessary to verify the origin of the products and to check the other statements on the certificate (Article 19 of Regulation No 693/88). For that purpose, those authorities have, in particular, the right to call for any documentary evidence and to carry out any checks which they consider appropriate (Article 20(5) of that regulation).

14 Whenever the competent customs authorities in the Community have reasonable doubt as to the authenticity of a certificate of origin or the accuracy of information concerning the true origin of the products in question, a subsequent verification of the certificate must be carried out (Article 13(1) of Regulation No 693/88). To that end, the customs authorities must return the certificate to the appropriate governmental authority in the exporting country giving, where appropriate, the reasons as to form or substance for an inquiry (Article 13(2) of that regulation).

15 When an application for subsequent verification has been made, the verification must be carried out and its results communicated to the customs authorities in the Community within a maximum of six months. Those results must be such as to establish whether the certificate of origin in question applies to the products actually exported and whether those products were in fact eligible to benefit from the provisions on tariff preferences (Article 27(1) of Regulation No 693/88).

2. Facts and procedure

The disputed imports

16 The applicant is a company incorporated under Italian law, established in Limena (Italy). It imported two consignments of 700 colour television sets, classified under tariff heading 8528, from India (`the disputed imports'). Those television sets had been manufactured, sold and exported by Weston Electroniks, a company established in New Delhi (India) (`the exporter').

17 The fact that the television sets originated in India was certified by two certificates of origin bearing the reference numbers 4371009 and 4649001, which had been issued by the Indian authorities at the request of the exporter in May and September 1992 respectively (`the disputed certificates').

18 In August and October 1992, the television sets were released for free circulation in Italy with the authorisation of the Padua customs office - the customs office of entry in the accounts - which, on the basis of the disputed certificates, granted the tariff preferences provided for in Regulation No 3831/90.

The withdrawal of the disputed certificates and the recovery order issued by the Italian customs authorities

19 By letter of 9 September 1994, the Indian Embassy in Brussels informed the defendant that a number of certificates of origin, including the disputed certificates, had been withdrawn by the Indian governmental authorities.

20 After being informed by the defendant of that withdrawal, the Italian customs authorities addressed a decision to the applicant, on 8 March 1995, ordering post-clearance recovery of customs duties totalling 33 101 795 Italian lire (ITL).

Administrative procedure before the Italian and Community authorities

21 By letter of 20 September 1996, the applicant submitted an application for remission to the Padua customs office in respect of the customs duties claimed by that office.

22 That application was forwarded to the Italian Ministry of Finance, as the decision-making customs

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authority. Taking the view that the conditions for remission were met in the case in question, the Ministry transmitted the case to the defendant by letter of 22 April 1998, in accordance with Article 905(1) of Regulation No 2454/93.

23 It should be noted that before the application for remission was transmitted to the defendant, the applicant had declared to the Italian authorities, by letter of 10 December 1997, that it had no observations to make regarding the proposed application for remission and that the file drawn up by the Italian authorities was complete.

24 After receiving the application for remission from the Italian Ministry of Finance, the defendant examined the case in the light of Article 13(1) of Regulation No 1430/79 and Article 905 et seq. of Regulation No 2454/93.

25 By letter of 29 July 1998, the defendant informed the applicant of its intention not to grant the application for remission since it had doubts as to whether there was a `special situation' within the meaning of Article 13(1) of Regulation No 1430/79. Before taking a final decision, the defendant none the less requested the applicant to submit any observations it might have within one month.

26 In reply to that letter, the applicant wrote on 25 August 1998 expressing its views in respect of the information in the file which, according to the Commission, did not justify a remission of the customs duties.

27 The defendant noted those observations and, before taking a final decision, consulted the group of experts composed of representatives of all Member States, meeting within the framework of the Customs Committee, as provided for in Article 907(1) of Regulation No 2454/93. That committee considered the matter at its meeting on 16 October 1998.

28 Finally, in Decision REM 14/98 of 5 February 1999 (`the contested decision'), the defendant rejected the application for remission which had been transmitted to it by the Italian Ministry of Finance. The applicant was notified of that decision on 9 July 1999.

Proceedings before the Court

29 By application of 13 September 1999, received at the Registry of the Court of First Instance on 15 September 1999, the applicant brought the present action for annulment of the contested decision.

30 By order of the President of the Third Chamber of 13 September 2000, the proceedings were suspended pending delivery of the final judgment in Joined Cases T-186/97, T-187/97, T-190/97 to T-192/97, T-210/97, T-211/97, T-216/97 to T-218/97, T-279/97, T-280/97, T-293/97 and T-147/99 Kaufring and Others v Commission [2000] ECR II-1337; `Turkish Televisions'). That judgment, which annulled all the decisions contested in those joined cases, was delivered in open court on 10 May 2001.

31 By letter of 31 July 2001, the Court requested the Commission to decide on the procedural steps it intended to take in the present case in the light of the judgment in Turkish Televisions.

32 By letter of 13 September 2001, the Commission informed the Court that, in its view, the judgment in Turkish Televisions did not have any specific procedural implications for the present case inasmuch as the facts and the procedure underlying the cases at issue in that judgment were dissimilar to those in the present case.

33 Following the report of the Judge-Rapporteur, the Court of First Instance (Third Chamber) decided to open the oral procedure and to put a number of written questions to the parties. In addition, the Court, granting an application submitted by the applicant, requested the defendant to produce a number of documents, in particular, the reports of investigations which it had conducted

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in India, the written correspondence between it and the Indian authorities and the file transmitted by the Italian authorities on which it had based the contested decision. The parties replied to those questions and requests for the production of documents within the prescribed period.

34 The parties presented oral argument and replied to the questions put by the Court at the hearing on 6 March 2002.

Forms of order sought

35 The applicant claims that the Court should:

- annul the contested decision;

- order the defendant to pay the costs.

36 The defendant contends that the Court should:

- dismiss the application;

- order the applicant to pay the costs.

Substance

1. Summary of the pleas in law

37 In support of its action for annulment, the applicant alleges, first, failure to observe the principle of respect for the rights of the defence and, second, infringement of Article 13(1) of Regulation No 1430/79.

38 In its application, the applicant had also claimed that the contested decision infringed Article 5(2) of Council Regulation (EEC) No 1697/79 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 (OJ 1979 L 197, p. 1). However, in response to a question put by the Court, the applicant confirmed at the hearing that it had withdrawn that plea.

2. The plea alleging failure to observe the principle of respect for the rights of the defence

Arguments of the parties

39 The applicant claims that the principle of respect for the rights of the defence was not observed in the course of the administrative procedure. That plea is raised in two parts.

40 In the first part of that plea, the applicant submits that the defendant failed to observe the principle of respect for the rights of the defence in so far as it did not provide the applicant with all the documents on which the contested decision was based.

41 The applicant observes that, according to settled case-law, that principle requires that any person who may be adversely affected by a decision should be placed in a position in which he may effectively make his views known, at least as regards the matters taken into account by the Commission as the basis for its decision (see Case T-42/96 Eyckeler & Malt v Commission [1998] ECR II-401, paragraph 78). The applicant also submits that that principle is reflected in Article 906a of Regulation No 2454/93 in so far as, under that provision, when the Commission intends to adopt a decision rejecting an application for remission it is required to communicate its objections to the party concerned in writing, together with all the documents on which it intends to base those objections. It must also allow the party concerned to express its views on those documents.

42 According to the applicant, that principle and Article 906a were not complied with in the present case in so far as, in the administrative procedure, the applicant was not granted access to all

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the documents relied on by the defendant as the basis for the contested decision. The applicant observes that it did not have access to, inter alia, the communications from the Indian authorities concerning the withdrawal of the disputed certificates, which stated the reasons for the withdrawal and the exporter's views on the matter. Likewise, the applicant asserts that it did not have access to the reports drawn up by the Commission's services concerning the importation of colour television sets from India or to any joint findings by the defendant and the Indian authorities regarding the origin of those goods. The applicant also points out that none of those documents was sent to it as annexes to the defendant's letter of 29 July 1998, which contained only a brief summary of the case and some very general observations on the purported checks and findings made by the Indian authorities. The applicant also notes that the letter of 9 September 1994 from the Indian Embassy informing the defendant that the disputed certificates had been withdrawn was communicated to the applicant only in the form of an annex to the statement of defence.

43 In that regard, the applicant rejects the defendant's contention that the principle of respect for the rights of the defence was observed in the present case inasmuch as, on 10 December 1997, the applicant stated that it had read the file compiled by the Italian authorities and that it had nothing to add to it. The applicant submits that although that statement implies that the applicant had access to that file, the fact remains that it did not have access to the other documents held by those authorities, in particular, the written correspondence with the defendant and the letter from the Indian Government concerning the withdrawal of the disputed certificates. It also disputes the defendant's contention that the defendant did not add any documents to the file submitted by the Italian authorities.

44 In the second part of the first plea, the applicant claims that its rights of defence were not respected by the defendant in so far as the defendant did not grant it access to all its documents relating to imports of colour television sets from India. The applicant submits that although the defendant wrongfully failed to incorporate that procedural guarantee in Article 906a of Regulation No 2454/93, the right to access to the file is expressly recognised by the case-law.

45 In that regard, the applicant refers to paragraphs 78 to 80 of the judgment in Eyckeler & Malt v Commission, cited in paragraph 41 above, which make clear that the right to access to the file is one of the procedural guarantees intended to protect the right to be heard and must most particularly be respected in cases where the party concerned claims that the Commission has made serious errors. According to the applicant, it also follows from that judgment that, first, the Commission must provide access to all non-confidential official documents concerning the contested decision, if requested to do so, and, second, the Commission is not empowered to carry out a pre-selection of those documents, since documents which the Commission does not consider to be relevant may well be of interest to the person applying for the remission (Eyckeler & Malt v Commission, cited above, paragraph 81; see also, on competition matters, Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 Cimenteries CBR and Others v Commission [2000] ECR II-491). The applicant also submits that, as is apparent from the interpretation of the right to access to the file given in the Turkish Televisions judgment, that right is not confined to access to non-confidential documents but also covers access to confidential documents.

46 The applicant submits that in the case at issue here it was not given any access to the defendant's file even though the applicant had claimed that serious errors had been made by the defendant. Furthermore, the applicant considers that the defendant ought, at its own initiative and without any express request from the applicant, to have informed the applicant of the possibility of such access in the course of the consultation procedure.

47 At the hearing the applicant further claimed that, in its view, the non-communication of mission

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reports drawn up by the defendant constituted an infringement of Article 8(3) of 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 of Articles 12, 20 and 21 of Council Regulation (EC) No 515/97 of 13 March 1997 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters (OJ 1997 L 82, p. 1) in so far as, pursuant to those provisions, such reports may be used as evidence in administrative and judicial proceedings.

48 The defendant denies that it failed to respect the applicant's rights of defence during the administrative procedure.

Findings of the Court

Introductory observations

49 It is now well-established case-law that, in view of the power of assessment enjoyed by the Commission when it adopts a decision pursuant to the general equitable provision set down in Article 13 of Regulation No 1430/79, observance of the right to be heard must be guaranteed in procedures for the remission or repayment of import duties (see, inter alia, paragraph 152 of Turkish Televisions, and the case-law referred to therein). That conclusion is particularly apt where, in exercising its exclusive authority under Article 905 of Regulation No 2454/93, the Commission proposes not to follow the opinion of the national authority as to whether the conditions laid down by Article 13 of Regulation No 1430/79 have been met (Case T-346/94 France-aviation v Commission [1995] ECR II-2841, paragraph 36).

50 The principle of respect for the rights of the defence requires that any person who may be adversely affected by a decision be placed in a position in which he may effectively make his views known, at least as regards the evidence on which the Commission has based its decision (see, to that effect, Case C-135/92 Fiskano v Commission [1994] ECR I-2885, paragraph 40, and Case C-32/95 P Commission v Lisrestal and Others [1996] ECR I-5373, paragraph 21).

51 The two parts of the applicant's plea alleging failure to observe the principle of respect for the rights of the defence must be examined in the light of those principles.

First part of the plea: non-communication of the documents used by the defendant as the basis for the contested decision

52 It is clear that, by the defendant's letter of 29 July 1998, the applicant was placed in a position, before the contested decision was adopted, to take a stance and adequately make known its views on the evidence which, according to the defendant, justified the rejection of its application for remission.

53 The applicant does not dispute that fact. It submits, however, that the principle of respect for the rights of the defence was breached in so far as it was not granted access to all the documents on which the defendant based the contested decision.

54 In that regard it should be noted that, in its written pleadings and at the hearing, the defendant stated that it had based the contested decision solely on the file submitted to it by the Italian authorities in accordance with Article 905(1) of Regulation No 2454/93.

55 It is clear from the applicant's written statement of 10 December 1997 that it had had access to that file in the context of the administrative procedure before the Italian authorities. Moreover, in contrast to the cases at issue in Turkish Televisions (paragraphs 182 and 183), it is not apparent from the contested decision that the defendant based that decision on documents other than those

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in the file submitted by the national authorities. In particular, contrary to the applicant's assertion, there is no aspect of the contested decision which supports the conclusion that that decision was based on reports drawn up by the Commission's services concerning the importation of colour television sets from India or on joint findings of the defendant and the Indian authorities regarding the origin of those goods.

56 It must therefore be held that the applicant did indeed have access to all the documents on which the defendant based the contested decision.

57 That finding is not invalidated by the fact that, as submitted by the applicant, its written statement of 10 December 1997 related only to the application for remission which it had presented to the Italian authorities and which was then submitted by them to the defendant.

58 It should be noted that, in its reply, the applicant acknowledged that it had read the file held by the Italian authorities. In addition, the abovementioned statement was submitted pursuant to the first subparagraph of Article 905(2) of Regulation No 2454/93. That provision expressly provides that the case transmitted to the Commission by the national authorities must also include a statement from the party concerned certifying that he has read the case and stating either that he has nothing to add or listing all the additional information that he considers should be included. That procedural requirement was introduced in order to ensure, in accordance with the principles enunciated by the Court in paragraphs 30 to 36 of France-aviation v Commission, cited above in paragraph 49, that the person liable can acquaint himself with the case compiled by the national authorities before it is transmitted to the Commission (see, to that effect, Case T-290/97 Mehibas Dordtselaan v Commission [2000] ECR II-15, paragraph 44).

59 Therefore, if the applicant chose not to avail itself of the opportunity, provided under that provision, to acquaint itself with the file that the Italian authorities were about to forward to the defendant, it cannot subsequently claim, in support of its plea that its rights of defence were not respected, that it did not have access to that file. While the principle of respect for the rights of the defence imposes a number of procedural obligations on the national and Community authorities, it also implies a certain amount of diligence on the part of the party concerned. Accordingly, if the party concerned considers that its rights of defence have not been respected, or have not been adequately respected, in the administrative procedure, it is for that party to take the measures necessary to ensure that they are respected or, at the very least, to inform the competent administrative authority of that situation in good time.

60 Finally, as regards the fact, acknowledged by the defendant at the hearing, that the letter of 9 September 1994 from the Indian Embassy was not included in the file held by the Italian authorities, the non-communication of that letter in the administrative procedure, while regrettable, does not constitute a breach of the principle of respect for the rights of the defence. As observed above, that principle implies only that the party concerned be able to take a position on the documents on which the Commission based the contested decision. In the present case, it is obvious from that decision that the Commission did not rely on the abovementioned letter in deciding whether the conditions for the remission of the duties had been met. Although the contested decision implicitly referred to that letter, by stating that the Indian authorities had withdrawn a number of certificates of origin, including the disputed certificates, that reference was intended only as an explanation for the Italian authorities' decision to undertake post-clearance recovery of the customs debt from which the applicant is seeking remission. By contrast, at no point in the contested decision did the Commission rely on that letter to justify its rejection of that application for remission.

61 In view of the foregoing, the first part of the present plea must be rejected.

Second part of the plea: failure to observe the right to access to the file

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62 As regards the applicant's claim that the contested decision fails to observe the principle of respect for the rights of the defence in so far as the defendant did not grant it access to all the documents relating to the present case, it must be observed at the outset that the applicant never requested access to those documents during the administrative procedure.

63 Next, as observed in paragraph 50 of this judgment, the principle of respect for the rights of the defence implies only that the party concerned be placed in a position in which he may effectively make his views known as regards the evidence, including the documents, on which the Commission has based its decision. That principle therefore does not require the Commission, acting on its own initiative, to grant access to all the documents which may have some connection with the case at issue when an application for remission is referred to it. If the party concerned considers that such documents are relevant for establishing the existence of a special situation and/or the lack of deception or obvious negligence on its part, then it is for the party concerned itself to request access to those documents in accordance with the provisions adopted by the institutions under Article 255 EC.

64 Contrary to the applicant's assertions, it does not follow from the case-law that the principle of respect for the rights of the defence imposes a general obligation on the institutions to spontaneously grant access to all documents relating to the contextual background of the case at issue.

65 As regards the administrative procedure concerning remission of customs duties, the Court has clearly stated, in paragraph 81 of Eyckeler & Malt v Commission, cited above in paragraph 41, that it is at the request of the party concerned that the defendant is required to provide access to all non-confidential official documents concerning the contested decision (see also Case T-50/96 Primex Produkte Import-Export and Others v Commission [1998] ECR II-3773, paragraph 64). Therefore, if no such request is made, there is no automatic access to the documents held by the defendant.

66 Finally, the applicant's argument alleging infringement of Article 8(3) of Regulation No 2185/96 and of Articles 12, 20 and 21 of Regulation No 515/97 must be rejected.

67 Since that argument is neither an amplification of the plea under consideration nor a plea based on factual or legal evidence which has come to light in the course of the proceedings, it is to be considered as a new plea, which, in accordance with Article 48(2) of the Court's Rules of Procedure, must be rejected as inadmissible.

68 Furthermore, even if that line of argument ought to be taken into consideration, the provisions in question have no bearing whatsoever on the present case. Article 8(3) of Regulation No 2185/96 concerns only the drawing-up and probative value of reports compiled by the Commission services in the context of checks carried out in the Member States. Articles 12, 20 and 21 of Regulation No 515/97 provide, inter alia, that findings and information obtained in the course of checks carried out by the national and Community authorities may be relied on as evidence. Those provisions thus provide no support whatsoever for the applicant's assertion that the defendant ought to have granted it access to all the documents relating to the present case even in the absence of any such express request from the applicant.

69 The second part of the plea must therefore be rejected.

Conclusion

70 In the light of the foregoing, the plea alleging failure to observe the principle of respect for the rights of the defence is unfounded.

3. The plea alleging infringement of Article 13(1) of Regulation No 1430/79

Arguments of the parties

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71 The applicant submits that, as is apparent from Eyckeler & Malt v Commission, cited above in paragraph 41 (paragraph 132), Article 13(1) of Regulation No 1430/79 constitutes a general equitable provision designed to cover situations other than those which arise most often in practice. That provision is intended to apply, inter alia, where the circumstances characterising the relationship between a trader and the administration are such that it would be inequitable to require the trader to bear a loss which it normally would not have incurred.

72 The applicant also submits that, according to the case-law, the Commission must take account not only of the Community interest in ensuring that the customs provisions are respected, but also of the interest of an importer acting in good faith not to suffer harm which goes beyond its normal commercial risk (Eyckeler & Malt v Commission, cited above in paragraph 41, at paragraph 133).

73 In the light of those principles, the applicant considers that the contested decision clearly infringes Article 13(1) of Regulation No 1430/79 in so far as, in the present case, there are various circumstances which constitute a special situation justifying remission of the customs duties.

74 First, the applicant claims that the administrative procedure leading to the withdrawal of the disputed certificates was marred by irregularities. According to the applicant, that fact constitutes a special situation within the meaning of Article 13(1) of Regulation No 1430/79.

75 The applicant thus observes that the disputed certificates were withdrawn by the Indian authorities without the exporter being informed of that fact or given the opportunity to express its views on the matter. Moreover, as is apparent from the documents produced by the Commission at the Court's request, at no point during the administrative procedure did the Community and Indian authorities provide any evidence or valid grounds for the finding that the television sets at issue did not originate in India. In the applicant's view, that failure is all the more serious given that the exporter's statements and the findings of the Italian authorities show that the television sets met the conditions on origin laid down in Regulation No 693/88, and that the disputed certificates were therefore valid.

76 In that regard, the applicant rejects the defendant's argument that the validity of the disputed certificates and, hence, the creation of the customs debt cannot be contested in the present action. It submits that the defendant's argument is inconsistent in so far as, on the one hand, the defendant claims that it is for the Italian authorities and courts alone to ensure the judicial protection of persons liable for duties in matters concerning the invalidity of certificates of origin and, on the other hand, it considers that the national and Community customs authorities are not obliged to verify the legality of a withdrawal of certificates of origin by the authorities of non-member countries. The applicant submits that that argument amounts to a refusal to grant the importer any effective judicial protection in the Community and that it runs contrary to Community case-law inasmuch as it is well-established practice of the Community Courts, as is clear from, inter alia, Case C-61/98 De Haan [1999] ECR I-5003, paragraphs 52 and 53, to rule on cases concerning remission of duties even where the legality of recovery of those duties is in doubt.

77 Second, the applicant considers that in the present case its legitimate expectation that the disputed certificates were valid and its good faith were sufficient to constitute a special situation within the meaning of Article 13(1) of Regulation No 1430/79.

78 The applicant argues that its legitimate reliance on the validity of the disputed certificates was backed up by the certificates themselves, the declarations made by the exporter and the findings of the Italian customs authorities, since it appeared from those factors that the television sets met the conditions for granting preferential treatment and there was no evidence to suggest their inaccuracy. The applicant also observes that its reliance on the validity of the disputed certificates was all the more legitimate since it was not, and still is not, in possession of any evidence proving,

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first, the invalidity of those certificates and, second, the withdrawal of those certificates by the Indian authorities.

79 Moreover, the applicant considers that, contrary to the defendant's contentions, it is entitled to plead that the protection of its legitimate expectation that the disputed certificates were valid and its good faith constitute a special situation within the meaning of Article 13(1) of Regulation No 1430/79. It considers that in the contested decision the defendant wrongly held, on the basis of the case-law (Joined Cases 98/83 and 230/83 Van Gend & Loos v Commission [1984] ECR 3763) and Article 904(c) of Regulation No 2454/93, that reliance on the validity of the certificates of origin is not normally protected. In particular, it points out that Article 904(c) of Regulation No 2454/93 does not apply to the present case because the disputed certificates were not forged and there is no evidence to suggest that they were falsified or not valid for obtaining preferential treatment. It also notes that, even if that provision were to apply to the present case, the protection of its legitimate expectations and its good faith was not the sole ground relied on by the applicant in support of its application for remission and that, consequently, the conditions laid down in Article 13(1) of Regulation No 1430/79 might none the less have been met. Finally, according to the applicant, Article 904(c) of Regulation No 2454/93 is unlawful because it disproportionately restricts the protection afforded to the legitimate expectations and good faith of importers.

80 In addition, the applicant considers that its view that protection of the legitimate expectation that a certificate of origin is valid and of the good faith of importers may, in certain circumstances, constitute a special situation within the meaning of Article 13(1) of Regulation No 1430/79 finds support in both the case-law (Eyckeler & Malt v Commission, cited above in paragraph 41, paragraph 157) and the Council Decision of 28 May 1996 on the post-clearance recovery of the customs debt (OJ 1996 C 170, p. 1).

81 Third, the applicant claims that, contrary to the defendant's finding in the contested decision, the financial damage which it suffered as a result of the post-clearance recovery of the customs duties constitutes a special situation within the meaning of Article 13(1) of Regulation No 1430/79.

82 It submits that, first, it is for the defendant to guard against and mitigate the damage suffered by importers and, second, importers do not gain any benefit from the preferential treatment inasmuch as the reduction in the customs duties directly benefits consumers, whereas the financial burden of post-clearance recovery is borne exclusively by the importers, who have no possibility of passing that burden on to consumers.

83 The applicant further submits that it guarded itself against the risk of post-clearance recovery by ordering television sets complete with certificates of origin from its supplier. It also notes that in the present case it cannot bring an action for damages against the exporter because it is not in possession of any evidence that the conditions for preferential treatment were not met. It submits that the Indian authorities and the defendant neither produced any documents containing such evidence nor contacted the supplier. Moreover, according to the applicant, such an action would, in all probability, already be time-barred.

84 Fourth, the applicant claims that the Indian authorities and the defendant committed serious breaches of their obligations. In its view, those breaches constitute a special situation within the meaning of Article 13(1) of Regulation No 1430/79.

85 In that regard, it notes that the system of preferential treatment is based on agreements between the Community and those countries authorised to benefit from that system (including India). Under those agreements, the beneficiary countries and the defendant are required to ensure that the rules governing the system are observed, which implies, in particular, an obligation on the beneficiary countries to verify the accuracy of exporters' declarations as to the origin of products and an

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obligation on the defendant to exercise the greatest care when carrying out checks, in order to protect importers from suffering unnecessary damage. According to the applicant, those obligations are particularly stringent since it is the beneficiary countries which profit from the preferential treatment and not the importers who, as is the case for the applicant, are obliged to participate in a system from which they accrue no benefit. The applicant notes that the importers' sole interest lies in equal treatment with their competitors and not in advantages from preferential tariffs.

86 According to the applicant, the Indian authorities acted in breach of their obligations by, first, withdrawing the disputed certificates without any objective reason and without giving the exporter the opportunity to express its views prior to the withdrawal, second, issuing the disputed certificates in full knowledge of all the facts necessary for applying the customs rules in question (Joined Cases C-153/94 and C-204/94 Faroe Seafood and Others [1996] ECR I-2465, paragraph 95) and, third, colluding with the exporters.

87 As to the defendant's failure to fulfil its obligations, the applicant submits, first, that the defendant did not adequately supervise the Indian authorities' application of the rules of origin in respect of goods intended for export to Europe and, second, that it did not adequately ascertain the facts when carrying out its investigation in India.

88 The applicant also takes the view that the defendant failed to fulfil its obligations toward the applicant by failing to warn it in good time of its doubts as to the validity of the certificates of origin issued by the Indian authorities for export of the colour television sets. The applicant submits that it is apparent from the defendant's records and the documents produced by it that at the end of 1990 the defendant was already harbouring doubts as to the validity of the certificates of origin issued in respect of the colour television sets. In particular, the applicant points out that it is clear from the communications of irregularities, of 25 October 1991 and 29 November 1991, that the defendant was clearly informed of the problems regarding colour television sets from India and was therefore in a position to inform importers of its doubts as to the validity of the certificates of origin issued by the Indian authorities. However, in the present case, the defendant did not do so and accordingly failed to fulfil its duty of diligence (Turkish Televisions judgment, paragraph 268).

89 The applicant also submits that in De Haan, cited above in paragraph 76, the Court of Justice held that the lack of a warning may constitute a special situation within the meaning of Article 13(1) of Regulation No 1430/79. The applicant points out, in particular, that in that judgment the Court of Justice considered that there is no general obligation on customs authorities to inform the person liable for customs duties of irregularities affecting the customs arrangements used by that person, but the fact that those authorities failed to warn that person may constitute a special situation within the meaning of Article 13(1) of Regulation No 1430/79. The fact that the authorities knowingly failed to inform the person liable for the duty of frauds in respect of those arrangements prevented that person from avoiding a customs debt being incurred.

90 The defendant denies having made a manifest error of assessment by finding in the contested decision that the conditions laid down in Article 13(1) of Regulation No 1430/79 were not met in the present case.

Findings of the Court

Introductory observations

91 It is common ground between the parties that, in the context of the facts underlying the present case, no deception or obvious negligence can be attributed to the applicant. By contrast, they disagree as to whether the defendant made an error of assessment by finding, in the contested decision, that the circumstances of the case did not constitute a special situation within the meaning of

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Article 13(1) of Regulation No 1430/79.

92 In that regard, the case-law indicates that the existence of a special situation is established where it is clear from the circumstances of the case that the person liable is in an exceptional situation as compared with other operators engaged in the same business (see Case C-86/97 Trans-Ex-Import [1999] ECR I-1041, paragraphs 21 and 22, and De Haan, cited above in paragraph 76, paragraphs 52 and 53) and that, in the absence of such circumstances, that person would not have suffered the disadvantage caused by the a posteriori entry in the accounts of customs duties (Case 58/86 Coopérative Agricole d'Approvisionnement des Avirons [1987] ECR 1525, paragraph 22).

93 It is also clear from the case-law that, in order to determine whether the circumstances of the case constitute a special situation in which no deception or obvious negligence may be attributed to the person concerned within the meaning of Article 13(1) of Regulation No 1430/79, the Commission must assess all the relevant facts (see, to that effect, Case 160/84 Oryzomyli Kavallas and Others v Commission [1986] ECR 1633, paragraph 16, and France-aviation, cited above in paragraph 49, paragraph 34).

94 In paragraph 223 of the Turkish Televisions judgment, the Court also stated that in cases where the persons liable have relied, in support of their applications for remission, on the existence of serious errors on the part of the contracting parties in implementing an agreement binding the Community, that obligation implies that the Commission must base its decision as to whether those applications are justified on all the facts relating to the disputed imports of which it gained knowledge in the performance of its task of supervising and monitoring the implementation of that agreement. Likewise, it follows from that judgment (paragraph 224) that the Commission cannot, in the light of the obligation described above in paragraph 93, and of the principle of equity which underlies Article 13(1) of Regulation No 1430/79, disregard relevant information of which it has gained knowledge in the performance of its tasks and which, although not forming part of the administrative file at the stage of the national procedure, might have served to justify remission for the parties concerned.

95 Moreover, as is clear from paragraph 133 of Eyckeler & Malt, cited above in paragraph 41, although the Commission enjoys a margin of discretion in applying Article 13 (France-aviation, cited above in paragraph 49, paragraph 34), it is required to exercise that power by genuinely balancing, on the one hand, the Community interest in ensuring that the customs provisions are respected and, on the other, the interest of the bona fide importer in not suffering harm which goes beyond normal commercial risk. Consequently, when considering whether an application for remission is justified, the Commission cannot take account simply of the conduct of importers. It must also assess the impact on the resulting situation of its own conduct, which may itself have been wrongful.

96 It is in the light of those principles that the Court must determine whether the Commission committed a manifest error of assessment by finding in the contested decision that the circumstances pleaded by the applicant did not constitute a special situation within the meaning of Article 13(1) of Regulation No 1430/79.

Irregularities in the withdrawal of the disputed certificates as a special situation

97 It should be noted that, as is apparent in particular from the sixth, seventh and eighth recitals in the preamble to the contested decision, the withdrawal of the disputed certificates by the Indian authorities resulted in the suppression of the preferential tariffs from which the applicant benefited when the television sets were put into free circulation and, thus, formed the basis of the decision by the Italian customs authorities to carry out post-clearance recovery of the customs duties owed by the applicant in respect of those imports. Therefore, as the applicant itself concedes, the argument that the withdrawal of the disputed certificates led to a flawed administrative procedure

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raises the issue of the legality of the decision by the Italian authorities to carry out post-clearance recovery of the import duties.

98 As is clear from the case-law, the sole aim of Article 13(1) of Regulation No 1430/79 is to enable importers, when certain special conditions are satisfied and in the absence of deception or obvious negligence, to be exempted from payment of duties due from them and not to enable them to contest the actual principle of a customs debt being due (see Joined Cases 244/85 and 245/85 Cerealmangimi and Italgrani v Commission [1987] ECR 1303, paragraph 11, and Joined Cases C-121/91 and C-122/91 CT Control (Rotterdam) and JCT Benelux v Commission [1993] ECR I-3873, paragraph 43). The application of substantive Community customs law falls within the exclusive competence of the national customs authorities. Decisions adopted by those authorities, including decisions requiring post-clearance payment of customs duties not previously levied, may be challenged before the national courts under Article 243 of the Community Customs Code; those courts may make a reference to the Court of Justice pursuant to Article 234 EC (see, to that effect, Case T-195/97 Kia Motors Nederland and Broekman Motorships v Commission [1998] ECR II-2907, paragraph 36).

99 By contrast, the procedure before the Commission provided for in Articles 906 to 909 of Regulation No 2454/93 is, in accordance with Article 905 of that regulation, confined to an examination of whether the conditions for remission laid down in Article 13(1) of Regulation No 1430/79 have been met. Consequently, the only pleas or arguments which can be properly put forward by a person liable for customs duties who, like the applicant in the present case, requests annulment of the decision adopted at the end of that procedure are those which seek to show the existence of a special situation and/or the lack of deception or obvious negligence on its part. In no circumstances may an applicant rely, in relation to the contested decision, on pleas or arguments seeking to show that the decisions of the competent national authorities subjecting it to payment of the duties at issue were unlawful (CT Control (Rotterdam) and JCT Benelux v Commission, cited above in paragraph 98, paragraph 44).

100 Contrary to the applicant's submission, that situation does not adversely affect the judicial protection afforded to Community importers. As is clear from the above description of the division of powers between the national and Community authorities, the fact that, in the context of the procedure provided for in Article 905 et seq. of Regulation No 2454/93, it is impossible for the applicant to rely on arguments contesting the propriety of the withdrawal of the disputed certificates derives from the fact that the Commission is not competent to decide on that matter. Moreover, where appropriate, there is nothing to prevent the applicant from raising such arguments in proceedings before the competent national court seeking review of the legality of the decision of the Italian customs authorities.

101 In the light of the foregoing observations, the applicant's arguments seeking to establish that the alleged impropriety of the withdrawal of the disputed certificates constitutes a special situation within the meaning of Article 13(1) of Regulation No 1430/79 cannot be accepted.

The legitimate expectations and good faith of the applicant as constituting a special situation

- Legitimate expectations

102 It is settled case-law that reliance on the validity of certificates of origin which prove to be forged, falsified or invalid does not, of itself, constitute a special situation. Verifications carried out after importation would in large measure be deprived of their usefulness if the use of such certificates could, of itself, justify granting a remission (Van Gend & Loos v Commission, cited above in paragraph 79, paragraph 13). The converse result could discourage traders from adopting an inquiring attitude and make the public purse bear a risk which falls mainly on traders (Case C-446/93 SEIM [1996] ECR I-73, paragraph 45).

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103 That principle is reflected in Article 4(2)(c) of Regulation No 3799/86, from which it follows that reimbursement or remission of import duties is not to be granted where the only ground relied on in support of the application for reimbursement or remission is the `production, even in good faith, for the purpose of securing preferential tariff treatment of goods entered for free circulation, of documents subsequently found to be forged, falsified or not valid for the purpose of securing such preferential tariff treatment'.

104 Contrary to the assertions of the applicant, which has raised an objection of illegality in this regard, that provision does not restrict the scope of the principle of legitimate expectations and fairness which underlies Article 13(1) of Regulation No 1430/79 any more than is necessary. As the Court observed in the judgment in SEIM, cited above in paragraph 102 (paragraphs 46 and 47), `where an application based on the trader's ignorance of the fact that documents submitted were forged, falsified or not valid is supported by evidence of a special situation resulting from circumstances in which no deception or obvious negligence may be attributed to him, that application is to be submitted to the Commission, in accordance with Article 6 of Regulation No 3799/86, in order for it to take a decision. Accordingly, Article 4(2)(c) of Regulation No 3799/86 cannot be regarded as restricting the general principle of fairness laid down in Article 13(1) of Regulation No 1430/79 beyond what is necessary'.

105 It follows that the applicant's reliance on the validity of the disputed certificates does not, of itself, constitute a special situation within the meaning of Article 13(1) of Regulation No 1430/79.

106 Contrary to the applicant's assertion, that finding is not invalidated by the Council Decision of 28 May 1996, cited in paragraph 80 above.

107 It is clear from the express terms of that decision that it does not have any binding effect and is not intended to derogate from the existing rules on the remission and reimbursement of customs duties. In that decision, the Council merely requested the Commission to carry out a study with a view to finding an overall solution to the problems of post-clearance recovery of customs duties from Community importers where that recovery is the consequence of irregularities in the acts of the authorities in non-member countries. That decision does not therefore invalidate the principle that reliance on the validity of certificates of origin which prove to be forged, falsified or invalid does not, of itself, constitute a special situation.

108 Similarly, Eyckeler & Malt v Commission, cited above in paragraph 41, does not provide support for the applicant's submission regarding the protection of its reliance on the validity of the disputed certificates. In paragraph 162 of that judgment, the Court expressly referred to the case-law cited in paragraph 102 of the present judgment, while stating, in substance, in paragraph 163 that that case-law did not exclude the party concerned from putting forward other arguments in support of its application for remission.

109 Moreover, as regards the applicant's argument that its legitimate expectation that the disputed certificates were valid was based on the checks and declarations made by the Italian authorities, it must be observed that it follows from Regulation No 693/88 that the authorities in the State of exportation (in the present case, the Indian authorities) were the authorities competent to carry out, at the request of the customs authorities of the Member States, an a posteriori verification of the certificates of origin issued by them and, where necessary, to withdraw those certificates deemed to be invalid. Therefore, the decision to withdraw the disputed certificates should have been challenged in proceedings against the competent authorities in the Republic of India in the context of the judicial procedures provided for the settlement of such disputes in that State.

110 Finally, the applicant may not found its legitimate expectations as to the validity of the

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disputed certificates on - erroneous - information provided by the exporter. If that were to be the case, it would be impossible to carry out post-clearance recovery of customs debts in cases of fraud by the exporter because, in carrying out the disputed imports, the importer necessarily relies on information provided by the exporter.

- Good faith

111 While it is true that the applicant's good faith has not been called into question by the defendant, that circumstance cannot, of itself, constitute a special situation. It is apparent from Van Gend & Loos v Commission, cited above in paragraph 79 (paragraph 11), first, that Article 13(1) of Regulation No 1430/79 requires mandatorily that both conditions set out in that provision be met and, second, that those two conditions are independent. Therefore, the existence of good faith, already taken into account in the condition relating to the absence of deception or obvious negligence, cannot additionally constitute a special situation within the meaning of that provision.

112 The applicant is therefore incorrect in its assertion that the defendant ought to have held that its good faith constituted a special situation within the meaning of Article 13(1) of Regulation No 1430/79.

The pecuniary damage suffered by the applicant as constituting a special situation

113 Contrary to the applicant's submissions, the Commission did not make a manifest error of assessment by finding in the contested decision that the pecuniary damage suffered by the applicant as a result of the recovery of duties did not constitute a special situation within the meaning of Article 13(1) of Regulation No 1430/79.

114 The fact that the customs authorities of a Member State decide to make post-clearance recovery of customs duties following withdrawal, by the authorities of a non-member country, of certificates of origin which proved to be invalid after subsequent verifications by the authorities of that country, constitutes a normal commercial risk which must be taken into consideration by any trader who is aware of the rules. It is therefore the responsibility of traders to take steps to guard against such risks, in particular by making the necessary arrangements in their contractual relations with their suppliers and, where appropriate, by seeking compensation from the perpetrator of the fraud (see, to that effect, Case C-97/95 Pascoal & Filhos v Fazenda Publica [1997] ECR I-4209, paragraphs 59 and 60, and Joined Cases T-10/97 and T-11/97 Unifrigo Gadus and CPL Imperial 2 v Commission [1998] ECR II-2231, paragraphs 62 and 63).

115 That conclusion is all the more compelling given that the converse interpretation, namely that the damage suffered as a result of post-clearance recovery is capable of constituting a special situation, would jeopardise the very possibility of post-clearance recovery of customs duties, since that type of recovery, by definition, takes place well after the initial importation and subsequent sale of the imported goods, and would therefore prevent all recovery of outstanding duties.

Failures by the Indian authorities and the defendant to fulfil obligations as constituting a special situation

Introductory observations

116 According to the case-law, breaches by non-member countries and/or the Commission of their obligations to monitor application of specific importation arrangements may constitute a special situation within the meaning of Article 13(1) of Regulation No 1430/79 (see, to that effect, Eyckeler & Malt v Commission, cited above in paragraph 41, paragraph 162 et seq.; Primex Produkte Import-Export and Others v Commission, cited above in paragraph 65, paragraph 140 et seq.; Turkish Televisions judgment, paragraph 237 et seq.). It should, however, be borne in mind that in those judgments the Court reached that conclusion solely on the basis of the seriousness of the breaches and their

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implications for the legality of transactions effected under those arrangements. Those breaches had the effect of placing the applicants in those cases in exceptional situations when compared with other traders carrying out the same activity.

117 Moreover, it is clear from those judgments that in order to ascertain whether failures by a non-member country and/or the Commission to fulfil obligations are liable to constitute special situations within the meaning of Article 13(1) of Regulation No 1430/79, the true nature of the obligations imposed on those authorities and the Commission by the applicable legislation must be examined for each case at issue.

- Failures by the Indian authorities to fulfil obligations

118 As is clear from the description of the legal background to the case (see, in particular, paragraphs 12 to 15 above), the Indian authorities had, as the authorities of the country benefiting from the preferential treatment, a particularly important role to play in applying and supervising that system of preferential treatment and, in particular, with regard to compliance with the rules on product origins. Accordingly, under Article 15 of Regulation No 693/88, it was, in general terms, the responsibility of the Indian authorities to comply, and to ensure compliance, with the rules concerning the preparation and issue of certificates of origin. To that end, those authorities had to assist the Community by allowing the customs authorities of Member States to verify the authenticity of the certificate of origin or the accuracy of the information regarding the true origin of the products in question (Article 7(1) of that regulation). They could also carry out subsequent verifications of the certificates of origin issued by them. Under Article 13 of that regulation, they were additionally obliged to carry out such verifications at the request of Community customs authorities whenever those authorities had `reasonable doubt as to the authenticity to the document or as to the accuracy of the information regarding the true origin of the products in question' (see also, on the consequences of subsequent verifications, Article 27 of that regulation).

119 The applicant claims that the Indian authorities acted in breach of their obligations by, first, withdrawing the disputed certificates without any objective reason and without giving the exporter the opportunity to express its views prior to the withdrawal and, second, issuing the disputed certificates in full knowledge of all the facts necessary for applying the customs rules in question (Faroe Seafood and Others, cited in paragraph 86 of this judgment, paragraph 95) and, third, colluding with the exporters.

120 As to the applicant's first allegation, namely that the Indian authorities acted in breach of their obligation to inform and hear the exporter prior to withdrawing the disputed certificates, even assuming that such an obligation existed under Indian law and that the applicant could prove that no hearing had taken place before the withdrawal, that circumstance is not such as to constitute a special situation with respect to the applicant. As observed in paragraph 99 of this judgment, that line of argument is of no relevance to the present case since it relates to the validity of the withdrawal of the disputed certificates and, hence, the legality of the decision by the Italian customs authorities to carry out post-clearance recovery of the import duties. Moreover, even assuming that the applicant's argument ought to be taken into consideration, it is rebutted by the minutes of the meeting of 27 November 1992 between the representatives of the Community inspection mission and the Indian authorities, from which it is clear that the Indian authorities had heard, or at least intended to hear, the exporters before withdrawing the disputed certificates.

121 As to the other failures referred to by the applicant, the documents produced by the defendant prove that, in addition to the fact that the Indian authorities actively cooperated with the Commission services and those of the Member States as regards verification of the legality of exports of colour television sets to the Community, those authorities were not aware of all the facts needed to apply the rules in question and did not act in collusion with the exporters. It is clear from the report

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of the inspection mission carried out in India from 12 to 27 November 1992 and from the written correspondence between the Commission and the Indian authorities that those authorities were misled by the Indian exporters as regards compliance with the conditions governing issue of the certificates of origin. The applicant has, moreover, not provided any evidence to show that that was not the case in this instance.

- Failures by the Commission to fulfil obligations

122 The failures alleged against the defendant are of two kinds: first, the defendant purportedly failed to fulfil its general obligation to supervise and monitor application of the system of preferential treatment by the Indian authorities and, second, it purportedly failed to fulfil its obligation to warn the applicant of its doubts as to the validity of the certificates of origin issued by the Indian authorities for export of the colour television sets.

123 As to the alleged failure to fulfil the obligation to supervise and monitor application of that system, it must first be observed that, in contrast to the cases at issue in Turkish Televisions, in which the defendant carried out an essential function as regards supervision of the proper application of the EEC-Turkey Association Agreement (see, in particular, paragraphs 257 to 259 of the Turkish Televisions judgment), the defendant's powers with regard to the application of the system of preferential treatment with India were relatively limited. The obligation to ensure that the applicable rules were observed lay principally with the authorities of the Member States and the Indian authorities. Contrary to the applicant's assertion, neither Regulation No 3831/90 nor Regulation No 693/88 contain provisions which would have empowered, or indeed obliged, the defendant to supervise the issuing of certificates of origin by the Indian authorities or even to give instructions to those authorities. The defendant's role was confined to centralisation of the information received from the Member States and to coordination of their initiatives (in particular, inspections carried out in the beneficiary country) with the aim of ensuring compliance with the provisions on preferential treatment.

124 Moreover, although the applicant was provided with the inspection reports from the mission carried out in India in November 1992, the correspondence between the defendant and the Indian authorities, and the correspondence between the defendant and the national authorities throughout the procedure before the Court, it was not at any time able to provide conclusive evidence substantiating its allegations of failings on the part of the defendant. On the contrary, it is clear from those documents that the defendant acted promptly and diligently and complied with its duties in respect of provision of information and inspection of the irregularities which had marred a number of imports of colour television sets from India.

125 Furthermore, the applicant's assertion that the defendant did not carry out adequate checks in respect of the origin of the television sets at issue must be rejected. As observed in paragraph 118 of this judgment, it was the responsibility of the Indian authorities, and not the Commission, to carry out subsequent verifications, possibly following a request to that effect from the authorities of the Member States, of the origin of goods exported under the system of preferential treatment.

126 As regards the alleged breach of the obligation to warn the applicant of doubts as to the validity of the certificates of origin issued by the Indian authorities, there is no provision of Community law which expressly obliges the defendant to warn importers when it has doubts as to the validity of customs transactions effected by those importers under the system of preferential treatment (see, to that effect, in regard to the external transit regime, De Haan, cited above in paragraph 76, paragraph 36).

127 It is true that in paragraph 268 of the Turkish Televisions judgment, cited above in paragraph 30, the Court found that such an obligation on the Commission may in certain specific cases be

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inferred from its general duty of diligence toward traders. It must, however, be observed that the facts in the present case are not the same as those at issue in that judgment. In the cases giving rise to that judgment, the Commission was aware of the fact that, or seriously suspected that, the Turkish authorities had made serious errors in their application of the Association Agreement (in particular, by failing to transpose the legislation on the compensatory levy) and that those errors affected the validity of all exports of televisions sets to the Community. By contrast, in the present case, the Commission had never been informed of such errors on the part of the Indian authorities and, indeed, there is no evidence of such errors (see above, paragraphs 120 and 121).

128 Further, the Commission can be obliged, under its general duty of diligence, to issue a general warning to Community importers only when it has serious doubts as to the legality of a large number of exports effected under a system of preferential treatment.

129 It is evident that when the applicant carried out the disputed imports the defendant did not have any such doubts regarding imports of colour television sets from India. It is apparent from the correspondence between the Indian authorities and the defendant that, prior to October 1992, the defendant's doubts concerned only the validity of certain certificates of origin issued by the Indian authorities for television sets produced in India by a different supplier from that of the applicant. Consequently, it was only in October 1992 that the Community authorities extended their investigations to include other manufacturers of televisions sets, in particular the exporter, because they had doubts as to the validity of the certificates of origin issued for the export of colour television sets manufactured by those companies.

130 The Commission did not therefore fail in its obligations by not warning the applicant, prior to the disputed imports, of its doubts as to the validity of a number of certificates of origin issued by the Indian authorities.

131 The applicant claims, however, that, even assuming that the Commission was not obliged to warn it of its doubts as to the validity of the certificates of origin, the fact remains that, as is clear from De Haan, cited above in paragraph 76, the intentional failure to warn traders may constitute a special situation within the meaning of Article 13(1) of Regulation No 1430/79. The applicant observes that in paragraph 53 of that judgment, the Court of Justice held that `the demands of an investigation conducted by the customs authorities or the police constitute, in the absence of any deception or negligence on the part of the person liable, and where that person has not been informed that the investigation is being carried out, a special situation within the meaning of Article 13(1) of Regulation No 1430/79. Although it may be legitimate for the national authorities, in order better to dismantle a network, identify perpetrators of fraud and obtain or consolidate evidence, deliberately to allow offences or irregularities to be committed, to place on the person liable the burden of the customs debt arising from the choices made in connection with the prosecution of offences is inimical to the objective of fairness which underlies Article 905(1) of Regulation No 2454/93 in that it puts that person in an exceptional situation in comparison with other operators engaged in the same business'.

132 That argument cannot be accepted.

133 It suffices to observe that in the case at issue in De Haan, cited above in paragraph 76, the Netherlands authorities were already aware of, or at least had serious grounds for suspecting, the existence of a fraud even before the customs operations giving rise to the customs debt had been carried out. They were therefore in a position to warn the party concerned that a customs debt might be incurred, but deliberately chose not to do so in order better to dismantle the network, identify the perpetrators of the fraud and obtain or consolidate evidence.

134 That is clearly not the situation in the present case. It should be remembered that, as observed

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in paragraph 129 of this judgment, at the time when the applicant carried out the imports in question, the defendant did not have any doubts as to the validity of the certificates of origin issued to the exporter. Accordingly, the defendant and the national authorities were not acting deliberately in failing to inform the applicant and allowing a customs debt to be incurred.

Conclusion

135 In the light of the foregoing, the plea alleging infringement of Article 13(1) of Regulation No 1430/79 is without foundation.

General Conclusion

136 Since the two pleas raised by the applicant are unfounded, the present action must be dismissed.

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31988R0693-A19 : N 13
31988R0693-A20P5 : N 13
31988R0693-A27 : N 118
31988R0693-A27P1 : N 15
31988R0693-NIII : N 11
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31993R2454-A905 : N 3 49 100
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31993R2454-A905P2 : N 4

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31993R2454-A905P2L1 : N 58
31993R2454-A906 : N 3 99 100
31993R2454-A906BIS : N 5
31993R2454-A907 : N 3 99 100
31993R2454-A907L1 : N 4
31993R2454-A907P2 : N 4
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31993R2454-A908P2 : N 4
31993R2454-A909 : N 3 99 100
31996R2185-A08P3 : N 66 68
31997R0515-A12 : N 66 68
31997R0515-A20 : N 66 68
31997R0515-A21 : N 66 68
31998R1677 : N 5
61983J0098 : N 102 111
61984J0160 : N 93
61985J0244 : N 98
61986J0058 : N 92
61991J0121 : N 98 99
61992J0135 : N 50
61993J0446 : N 102 104 108
61994J0153 : N 119
61994A0346 : N 49 58 93 95
61995J0032 : N 50
61995J0097 : N 114
61996A0042 : N 65 95 108 116
61996A0050 : N 65 116
61997A0010 : N 114
61997J0086 : N 92
61997A0186 : N 49 55 94 116 123 127
61997A0195 : N 98
61997A0290 : N 58
61998J0061 : N 92 126 131 133

SUB Free movement of goods ; Customs Union ; Financial provisions ; Own resources

AUTLANG German

APPLICA Person

DEFENDA Commission ; Institutions

NATIONA Italy

NOTES Berrod, F. ; Meisse, E.: Tarif douanier commun, Europe 2002 Octobre Comm. no 333 p.20-21

PROCEDU Action for annulment - unfounded

DATES of document: 11/07/2002

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of application: 15/09/1999

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Order of the President of the Court
of 29 September 2000
Commission of the European Communities v Republic of Austria. Removal from the register. Case C-290/98.

In Case C-290/98,

Commission of the European Communities, represented by C. Tufvesson and V. Kreuschitz, Legal Advisers, acting as Agents, with an address for service in Luxembourg at the office of C. Gomez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Republic of Austria, represented by C. Stix-Hackl, Gesandte in the Ministry of Foreign Affairs, and P. Erlacher, Ministerialrat in the same ministry, acting as Agents, with an address for service in Luxembourg at the Austrian Embassy, 3 Rue des Bains,

defendant,

APPLICATION for a declaration that, by

- limiting the prohibition on money laundering contained in Paragraph 165 of the Strafgesetzbuch (Penal Code) to assets having a value of over ATS 100 000;

- not requiring customer identification when a securities account is opened as from 1 January 1994 (the date on which the Agreement on the European Economic Area entered into force), but only as from 1 August 1996;

- not requiring customer identification for all transactions into or out of an existing securities account, but only, under Paragraph 40(5) of the Bankwesengesetz (Bank Law), requiring that the customer's identity be established for deposits and purchases of securities for a securities account;

- not requiring customer identification whenever a savings account is opened on or after 1 January 1994;

- not requiring customer identification for all operations relating to a savings account book, whether opened before or after 1 January 1994,

the Republic of Austria has failed to fulfil its obligations under the EC Treaty and under Articles 2 and 3(1), (5) and (6) of Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering (OJ 1991 L 166, p. 77),

THE PRESIDENT OF THE COURT,

after hearing Advocate General Saggio,

makes the following

Order

1 By application lodged at the Court Registry on 28 July 1998, the Commission of the European Communities brought an action, pursuant to Article 169 of the EC Treaty (now Article 226 EC), for a declaration that, by

- limiting the prohibition on money laundering contained in Paragraph 165 of the Strafgesetzbuch (Penal Code) to assets having a value of over ATS 100 000;

- not requiring customer identification when a securities account is opened as from 1 January 1994 (the date on which the Agreement on the European Economic Area entered into force), but only as

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from 1 August 1996;

- not requiring customer identification for all transactions into or out of an existing securities account, but only, under Paragraph 40(5) of the Bankwesengesetz (Bank Law), requiring that the customer's identity be established for deposits and purchases of securities for a securities account;

- not requiring customer identification whenever a savings account is opened on or after 1 January 1994;

- not requiring customer identification for all operations relating to a savings account book, whether opened before or after 1 January 1994,

the Republic of Austria has failed to fulfil its obligations under the EC Treaty and under Articles 2 and 3(1), (5) and (6) of Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering (OJ 1991 L 166, p. 77).

2 By document lodged at the Court Registry on 19 July 2000, the Commission, in accordance with Article 78 of the Rules of Procedure, informed the Court that it was discontinuing the proceedings and applied, pursuant to the first subparagraph of Article 69(5) of the Rules, for the costs to be borne by the Republic of Austria.

3 By letter lodged at the Court Registry on 21 August 2000, the Republic of Austria took formal note of the Commission's discontinuance of the proceedings and informed the Court that it did not find it necessary to submit observations on that decision to discontinue.

4 Accordingly, it is appropriate to order the removal of the present case from the register.

5 The first subparagraph of Article 69(5) of the Rules of Procedure provides that a party who discontinues or withdraws from proceedings is to be ordered to pay the costs if they have been applied for in the other party's pleadings. However, upon application by the party who discontinues or withdraws from proceedings, the costs are to be borne by the other party if this appears justified by the conduct of that party.

6 In this case, the Commission's application and subsequent discontinuance of the proceedings were the result of the attitude of the Republic of Austria, since the Republic of Austria did not adopt the measures necessary to fulfil its obligations until after the application had been made.

7 The Republic of Austria must therefore be ordered to pay the costs.

On those grounds,

THE PRESIDENT OF THE COURT

hereby orders:

1. Case C-290/98 is removed from the register.

2. The Republic of Austria shall pay the costs.

DOCNUM 61998O0290

AUTHOR Court of Justice of the European Communities

FORM Order

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TREATY	European Economic Community
PUBREF	European Court reports 2000 Page I-07835
DOC	2000/09/29
LODGED	1998/07/28
JURCIT	31991L0308-A02 : N 1 31991L0308-A03P1 : N 1 31991L0308-A03P5 : N 1 31991L0308-A03P6 : N 1 31991Q0704(02)-A78 : N 2 31991Q0704(02)-A69P5L1 : N 5 - 7
SUB	Freedom of establishment and services ; Right of establishment ; Free movement of capital
AUTLANG	German
APPLICA	Commission ; Institutions
DEFENDA	Austria ; Member States
NATIONA	Austria
PROCEDU	Action for failure to fulfil obligations
ADVGEN	Saggio
JUDGRAP	Moitinho de Almeida
DATES	of document: 29/09/2000 of application: 28/07/1998

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Judgment of the Court (Sixth Chamber)
of 18 November 1999
Commission of the European Communities v Council of the European Union. Regulation (EC) no 515/97 - Legal basis - Article 235 of the EC Treaty (now Article 308 EC) or Article 100a of the EC Treaty (now, after amendment, Article 95 EC). Case C-209/97.

Own resources of the European Communities - Protection of the Community's financial interests - Fight against fraud - Regulation No 515/97 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters - Legal basis - Article 235 of the Treaty (now Article 308 EC)

(EC Treaty, Arts 100 and 209a (now, after amendment, Arts 95 EC and 280 EC) and Art. 235 (now Art. 308 EC); Council Regulation No 515/97)

$$Regulation No 515/97 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters was properly adopted on the basis of Article 235 of the Treaty (now Article 308 EC), since Article 100a of the Treaty (now, after amendment, Article 95 EC) is not applicable in this context.

Indeed, that measure lays down, in relation to the various fields covered, rules the aim and specific content of which, taken as a whole, are the fight against fraud, so that it seeks to protect the financial interests of the Community. That protection does not follow from the establishment of the customs union, but constitutes an independent objective which, under the scheme of the Treaty, is placed in Title II (financial provisions) of Part V relating to the Community institutions and not in Part III on Community policies, which includes the customs union and agriculture. Since Article 209a of the Treaty (now, after amendment, Article 280 EC), in the version applicable when Regulation No 515/97 was adopted, indicated the objective to be attained but did not confer on the Commission competence to set up a system of the kind at issue, recourse to Article 235 of the Treaty was justified.

Moreover, although Regulation No 515/97 provides for the creation of an automated information system called the `Customs Information System', the mere fact that such a system cannot be established unless principles harmonised at Community level concerning the protection of personal data are in force at national level is not a sufficient basis for Article 100a of the Treaty to apply, since such harmonisation of national laws is only an incidental effect of the legislation.

In Case C-209/97,

Commission of the European Communities, represented by M. Nolin and P. van Nuffel, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of C. Gomez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

applicant,

supported by

European Parliament, represented by J. Schoo, Head of Division in its Legal Service, and J.-L. Rufas Quintana, Principal Administrator in the same service, acting as Agents, with an address for service in Luxembourg at the General Secretariat of the European Parliament, Kirchberg,

intervener,

v

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Council of the European Union, represented by B. Hoff-Nielsen, Head of Division in its Legal Service, M.C. Giorgi, Legal Adviser, and F. Anton, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of A. Morbilli, Director-General of the Legal Affairs Directorate of the European Investment Bank, 100 Boulevard Konrad Adenauer, Kirchberg,

defendant,

supported by

French Republic, represented by M. Perrin de Brichambaut, Director of the Legal Affairs Directorate of the Ministry of Foreign Affairs, and F. Pascal, Central Administrative Attaché in the same ministry, acting as Agents, with an address for service in Luxembourg at the French Embassy, 8B Boulevard Joseph II,

intervener,

APPLICATION for the annulment of Council Regulation (EC) No 515/97 of 13 March 1997 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters (OJ 1997 L 82, p. 1),

THE COURT

(Sixth Chamber),

composed of: P.J.G. Kapteyn, acting for the President of the Sixth Chamber, G. Hirsch (Rapporteur) and H. Ragnemalm, Judges,

Advocate General: A. Saggio,

Registrar: R. Grass,

having regard to the Report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 11 March 1999,

gives the following

Judgment

Costs

39 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Commission has been unsuccessful, it must be ordered to pay the costs. In accordance with Article 69(4) of those rules, the Parliament and the French Republic are to bear their own costs.

On those grounds,

THE COURT

(Sixth Chamber)

hereby:

1. Dismisses the application;

2. Orders the Commission of the European Communities to pay the costs and the European Parliament and the French Republic to bear their own costs.

1 By application lodged at the Court Registry on 2 June 1997, the Commission of the European

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Communities brought an action under Article 173 of the EC Treaty (now, after amendment, Article 230 EC) for the annulment of Council Regulation (EC) No 515/97 of 13 March 1997 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters (OJ 1997 L 82, p. 1, hereinafter `the contested regulation').

2 Article 52 of the contested regulation repeals Council Regulation (EEC) No 1468/81 of 19 May 1981 (OJ 1981 L 144, p. 1), which was based on Article 43 of the EEC Treaty (now, after amendment, Article 37 EC) and Article 235 of the EEC Treaty (now Article 308 EC).

3 Regulation No 1468/81 was itself amended by Council Regulation (EEC) No 945/87 of 30 March 1987 (OJ 1987 L 90, p. 3), whose legal basis was likewise Articles 43 and 235 of the Treaty.

4 According to the third and fourth recitals in the preamble to the contested regulation, the Community legislature considered that the system established by Regulation No 1468/81 had proved effective but that it was necessary, in the light of experience gained, to replace it in its entirety.

5 The Commission thus submitted to the Council on 23 December 1992 a draft regulation whose legal basis was Article 43 of the EC Treaty, Article 100a of the EC Treaty (now, after amendment, Article 95 EC) and Article 113 of the EC Treaty (now, after amendment, Article 133 EC). During the negotiations within the Council, the Commission abandoned Article 113 since the provision in the draft justifying recourse to that article was deleted. After consulting the European Parliament, the Council unanimously decided, in accordance with the procedure laid down in Article 189a(1) of the EC Treaty (now Article 250(1) EC), to delete Article 100a of the Treaty and replace it with Article 235 of the Treaty. The Council thus adopted Articles 43 and 235 of the Treaty as the legal basis for the contested regulation.

6 The contested regulation, as stated in Article 1 thereof, lays down the ways in which the administrative authorities responsible for implementation of legislation on customs and agricultural matters in the Member States are to cooperate with each other and with the Commission in order to ensure compliance with that legislation within the framework of a Community system.

7 To that end, the contested regulation lays down, in Titles I and II, rules relating to assistance on request (Articles 4 to 12) and spontaneous assistance (Articles 13 to 16). Titles III and IV are respectively devoted to relations between the competent authorities of the Member States and the Commission (Articles 17 and 18) and to relations with third countries (Articles 19 to 22).

8 Title V (Articles 23 to 41) is divided into eight chapters. Chapter 1 establishes an automated information system called the `Customs Information System' (hereinafter `the CIS') to meet the requirements of the administrative authorities responsible for applying legislation on customs or agricultural matters, as well as those of the Commission (Article 23(1)). Article 23(2) states that the aim of the CIS is `to assist in preventing, investigating and prosecuting operations which are in breach of customs or agricultural legislation, by increasing, through more rapid dissemination of information, the effectiveness of the cooperation and control procedures of the competent authorities'. Under Article 23(3), the customs authorities of the Member States may use the technical infrastructure of the CIS in the performance of their duties in the framework of the customs cooperation referred to in Article K.1(8) of the Treaty on European Union (Articles K to K.9 of the Treaty on European Union have been replaced by Articles 29 EU to 42 EU). Finally, Article 23(6) provides that the Member States and the Commission are to take part in the CIS as `CIS partners'.

9 Chapters 2 to 8 of Title V of the contested regulation contain rules relating to the organisation and operation of the CIS. Thus, under Article 24, the CIS is to consist of a central database facility accessible via terminals in each Member State and at the Commission, and is to comprise

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exclusively data necessary to fulfil its aim as stated in Article 23(2), including personal data. In accordance with Article 29(1), direct access to data included in the CIS is to be reserved exclusively for the national authorities designated by each Member State and the departments designated by the Commission.

10 Chapter 5 of Title V is specifically devoted to the protection of personal data. Article 34(1) provides that, no later than the date on which the contested regulation first applies, each CIS partner intending to receive personal data from, or include such data in, the CIS is to adopt national legislation, or internal rules applicable to the Commission, guaranteeing the protection of the rights and freedoms of individuals with regard to the processing of personal data.

11 By order of the President of the Court of 29 September 1997, the French Government was granted leave to intervene in support of the form of order sought by the Council. By order of the President of the Court of 1 December 1997, the Parliament was granted leave to intervene in support of the form of order sought by the Commission.

12 In its application, the Commission relies on a single plea, to the effect that the legal basis adopted was inappropriate. In its submission, the Council should have based the contested regulation on Articles 43 and 100a of the Treaty, not on Articles 43 and 235.

13 A preliminary point to note is that, in accordance with settled case-law, in the context of the organisation of the powers of the Community the choice of the legal basis for a measure must be based on objective factors which are amenable to judicial review. Those factors include, in particular, the aim and content of the measure (see, in particular, Case C-300/89 Commission v Council [1991] ECR I-2867 (the `Titanium dioxide' case), paragraph 10, and Joined Cases C-164/97 and C-165/97 Parliament v Council [1999] ECR I-1139, paragraph 12).

14 The Commission submits that the contested regulation is intended to ensure the proper functioning of the customs union and thus of the internal market, a circumstance which justifies recourse to Article 100a of the Treaty. Moreover, the protection of the financial interests of the Community within the meaning of Article 209a of the EC Treaty (now, after amendment, Article 280 EC), hence the fight against fraud, is not an independent objective but follows from the establishment of the customs union.

15 The Parliament argues that the contested regulation goes beyond merely protecting the financial interests of the Community. In many respects, its grounds related to the approximation of the provisions laid down by law, regulation or administrative action of the Member States concerned with the establishment and functioning of the common market, within the meaning of Article 100a of the Treaty.

16 So far as concerns the content of the contested regulation, the Commission submits that it comprises, first, the improvement of mutual assistance between the Member States and the Commission to ensure the correct application of the law on customs and agricultural matters, and second, the creation, within the framework of the CIS, of a central database facility accessible to the Member States and the relevant Commission departments. In its submission, the legal basis for the enhanced cooperation is contained within Article 100a of the Treaty since that cooperation requires a real harmonisation of national laws. As regards the establishment of the CIS, the Commission maintains that while the CIS is not itself capable of harmonising national laws, it is nevertheless common ground that it could not operate without their harmonisation.

17 The Commission submits in the alternative that, if recourse to Article 235 of the Treaty had to be considered necessary given the creation of the CIS, the provisions relating to mutual assistance given on request or spontaneously should nevertheless have been based on Article 100a. The question of a possible dual legal basis therefore arises. In accordance with the Titanium dioxide judgment,

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only Article 100a is applicable in such a case.

18 According to the Parliament, the fact that a regulation setting up an instrument (database) which is placed in the service of mutual assistance within the framework of the internal market also serves to counter fraud affecting the financial interests of the Community cannot alter the legal basis, which is Article 100a of the Treaty.

19 The Council, by contrast, maintains that the aim of Regulation No 1468/81, unlike that of the contested regulation, was the proper functioning of the customs union and the common agricultural policy, which required close cooperation between the national administrative authorities. The objective of the contested regulation, on the other hand, is to combat fraud in the context of the customs union and the common agricultural policy, which calls for cooperation between the same authorities. The protection of the financial interests of the Community, introduced by Article 209a of the Treaty, does not follow from the establishment of the customs union but constitutes an independent objective.

20 As regards content, the Council contends that the contested regulation reflects the objective of protecting the financial interests of the Community since it sets up a system to combat fraud which also respects civil liberties, the two aspects being inextricably linked. So far as concerns the fight against fraud, the new system is administrative in nature, constitutes a Community entity and is designed to strengthen the operational character of customs cooperation between Member States. Since that system goes beyond simple customs cooperation, Article 235 of the Treaty had to be relied on: the competence conferred on the Community by Article 209a, in the version in force when the contested regulation was adopted, was not an adequate basis for a measure of that kind.

21 The French Government maintains that the contested regulation is not designed to harmonise national provisions but to combat fraud in the context of the customs union and the common agricultural policy. While the establishment of the CIS results in the introduction of certain specific rules concerning data protection, that does not in its submission mean that the aim of the contested regulation consists in harmonising data protection in the Community.

22 In the present case it is necessary, in order to ascertain the aim of the contested regulation, to take account of the legislative changes from the adoption of Regulation No 1468/81 up until the contested regulation.

23 First, the objective of Regulation No 1468/81 was to ensure the proper functioning of the customs union and the common agricultural policy. In order to attain that objective, the regulation set out rules concerning mutual administrative assistance, in particular in order to prevent and punish infringements of customs and agricultural legislation and to detect any activity which was or seemed to be contrary to that legislation.

24 Next, the amendment of Regulation No 1468/81 by Regulation No 945/87 was founded on the consideration that the importance of combating fraud with ramifications in several Member States justified the reinforcement of the scope of action of the Commission and the Member States in that field (second recital in the preamble to Regulation No 945/87).

25 Finally, the contested regulation states, in the first recital in its preamble, that `combating fraud in the context of the customs union and the common agricultural policy calls for close cooperation between the administrative authorities responsible in each Member State for the application of provisions adopted in those fields;... it also calls for appropriate cooperation between these national authorities and the Commission, which is responsible for ensuring the application of the Treaty and the provisions adopted by virtue thereof; ... effective cooperation in this field strengthens the protection of the financial interests of the Community'.

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26 According to the second recital in its preamble, `rules should therefore be drawn up whereby the Member States' administrative authorities assist each other and cooperate with the Commission in order to guarantee the proper application of customs and agricultural regulations and legal protection for the Community's financial interests, in particular by preventing and investigating breaches of those regulations and by investigating operations which are or appear contrary to those regulations'.

27 A comparison of Regulations Nos 1468/81 and 945/87 and the contested regulation reveals that, while the title has remained practically unchanged, the aim of the legislation has progressively evolved. While the cooperation was initially directed, in particular, at the functioning of legislation on customs and agricultural matters, the enhanced cooperation laid down, most recently, in the contested regulation is designed, first and foremost, to combat fraud and thus seeks to protect the financial interests of the Community.

28 It should be noted that the relevant Treaty provisions have also changed. Article 209a of the Treaty, inserted by the Treaty on European Union, states that the Member States are to take the same measures to counter fraud affecting the financial interests of the Community as they take to counter fraud affecting their own financial interests.

29 Contrary to the Commission's assertion, the protection of the financial interests of the Community does not follow from the establishment of the customs union, but constitutes an independent objective which, under the scheme of the Treaty, is placed in Title II (financial provisions) of Part V relating to the Community institutions and not in Part III on Community policies, which includes the customs union and agriculture.

30 Since the entry into force of Article 209a of the Treaty, the objective of protecting the financial interest of the Community has been implemented by regulations such as 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) or regulations which seek to lay down specific rules applicable only to given sectors.

31 The contested regulation is such legislation. The Council considered that, in the context of the customs union and the common agricultural policy, specific rules additional to the generally applicable legislation had to be adopted in order to protect financial interests.

32 As regards the content of the contested regulation, that measure lays down a system of cooperation both between the administrative authorities of the Member States and between those authorities and the Commission, under which the former assist each other by transmitting, in accordance with the detailed rules laid down in the regulation, information concerning operations which are or appear contrary to customs or agricultural legislation, or by conducting appropriate administrative enquiries (Titles I, II and III of the contested regulation). Furthermore, a specific infrastructure, namely the CIS, whose essential elements are described in paragraphs 8, 9 and 10 of this judgment, allows the rapid and systematic exchange of information forwarded to the Commission.

33 It is apparent from the contested regulation that, taken as a whole, its aim and specific content is the fight against fraud in the context of the customs union and the common agricultural policy, so that it seeks to protect the financial interests of the Community. Since Article 209a of the Treaty, in the version applicable when the contested regulation was adopted, indicated the objective to be attained but did not confer on the Community competence to set up a system of the kind at issue, recourse to Article 235 of the Treaty was justified.

34 It should be noted in this regard that, contrary to the assertions of the Commission and the Parliament, Article 100a is not applicable in the present case.

35 It is settled case-law that recourse to Article 100a is not justified where the measure to be

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adopted has only the incidental effect of harmonising market conditions within the Community (see, in particular, Case C-70/88 Parliament v Council [1991] ECR I-4529, paragraph 17, and Case C-155/91 Commission v Council [1993] ECR I-939, paragraph 19).

36 While, in accordance with the 15th recital in the preamble to the contested regulation, the Member States must, in order to take part in the CIS, adopt legislation on the rights and freedoms of individuals with regard to the processing of personal data and are required, pending the national measures transposing 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 1995 L 281, p. 31), to guarantee a level of protection based on the principles of that directive, it is also clear, as the French Government has pointed out and the Commission has acknowledged, that the CIS does not itself harmonise national laws.

37 The mere fact that the CIS cannot be established unless principles harmonised at Community level concerning the protection of personal data are in force at national level and that the Member States and the Commission must guarantee a level of protection based on the principles contained in Directive 95/46 is not a sufficient basis for Article 100a of the Treaty to apply, since such harmonisation of national laws was only an incidental effect of the legislation.

38 It is therefore to be concluded that, since Article 235 of the Treaty constitutes the correct basis for adoption of the contested regulation, the application must be dismissed.

DOCNUM	61997J0209
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
PUBREF	European Court reports 1999 Page I-08067
DOC	1999/11/18
LODGED	1997/06/02
JURCIT	11992E043 : N 2 3 5 11992E235 : N 2 3 5 33 38 11992E100A : N 34 35 37 11992E209A : N 28 30 33 31997R0515 : N 1 24 27 31 - 33 36 31997R0515-A01 : N 5 31997R0515-A04 : N 7 31997R0515-A05 : N 7 31997R0515-A06 : N 7 31997R0515-A07 : N 7 31997R0515-A08 : N 7 31997R0515-A09 : N 7 31997R0515-A10 : N 7

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31997R0515-A11 : N 7
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31997R0515-A13 : N 7
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31997R0515-A15 : N 7
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31997R0515-A23P6 : N 8
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31997R0515-A24 : N 8 9
31997R0515-A25 : N 8
31997R0515-A26 : N 8
31997R0515-A27 : N 8
31997R0515-A28 : N 8
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31997R0515-A52 : N 2
31997R0515-C1 : N 25
31997R0515-C2 : N 26
31997R0515-C3 : N 4
31997R0515-C4 : N 4
31997R0515-C15 : N 36
31981R1468 : N 2 22 23 27
31987R0945 : N 3 24 27
31987R0945-C2 : N 25
31995R2988 : N 30
31995L0046 : N 36 37
61989J0300-N10 : N 13

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	61997J0164-N12 : N 13 61991J0155-N19 : N 35 61988J0070-N17 : N 35
CONCERNS	Confirms 31997R0515 -
SUB	Free movement of goods ; Customs Union ; Provisions governing the Institutions
AUTLANG	French
APPLICA	Commission ; Institutions
DEFENDA	Council ; Institutions
NOTES	Munoz, R.: La jurisprudence de la Cour de justice et du Tribunal de première instance, Revue du marché unique européen 1999 no 4 p.205-207 ; Van Es, Sylvia: Samenwerking autoriteiten bij de naleving van landbouwvoorschriften, Nederlandse staatscourant 1999 no 247 p.4 ; Berrod, F. ; Pietri, Martin: Europe 2000 Janvier Comm. no 1 p.9
PROCEDU	Action for annulment - unfounded
ADVGEN	Saggio
JUDGRAP	Hirsch
DATES	of document: 18/11/1999 of application: 02/06/1997

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Opinion of Mr Advocate General Saggio delivered on 11 March 1999. Commission of the European Communities v Council of the European Union. Regulation (EC) no 515/97 - Legal basis - Article 235 of the EC Treaty (now Article 308 EC) or Article 100a of the EC Treaty (now, after amendment, Article 95 EC). Case C-209/97.

1 In this action, the Commission is seeking the annulment of Council Regulation (EC) No 515/97 of 13 March 1997 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters. (1) At issue is the legal basis of the regulation, adopted on the basis of Articles 43 and 235 of the EC Treaty. The applicant takes the view that the contested regulation should have been adopted instead on the basis of Articles 43 and 100a of the EC Treaty. By orders of the President of the Court of 29 September 1997 and 1 December 1997, the European Parliament and the French Government were granted leave to intervene in support of the forms of order sought by the Commission and the Council respectively.

2 The establishment of the correct legal basis of the contested measure is not merely a matter of form. The legal basis serves to define the procedure to be followed in that particular context as regards both the role of the institutions taking part in the legislative process and the majority required to adopt the measure. It is a well-known fact that Article 235 simply provides for the Parliament to be consulted and for the Council to act unanimously; Article 100a establishes that the Council is to act in accordance with the co-decision procedure referred to in Article 189b, which entails qualified majority voting and greater participation by the Parliament in the adoption of the measure. In these circumstances, it is clear therefore that the choice of legal basis affects the drafting process and may thus also affect the content of the measure. Consequently, in accordance with settled case-law, if it were to be found that an incorrect legal basis had been chosen, this would represent a breach of essential procedural requirements such as to render the measure unlawful under Article 173 of the EC Treaty.

Legal framework

3 On 13 March 1997 the Council adopted Council Regulation (EC) No 515/97 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters (hereinafter referred to as `the regulation'). Article 52 of the regulation expressly repeals Council Regulation (EEC) No 1468/81 of 19 May 1981 (2) bearing the same title and adopted on the legal basis of Articles 43 and 235 of the EEC Treaty.

4 During the procedure leading to adoption of the measure, the Council, in making several amendments to the text of the draft proposal from the Commission, also decided unanimously to modify the legal basis suggested in the proposal, in particular replacing Article 100a with Article 235. The measure was therefore adopted in accordance with the consultation procedure referred to in Article 189a of the Treaty instead of the co-decision procedure referred to in Article 189b.

5 Certain points in the preamble to the regulation are important in this connection. The first recital states that `combating fraud in the context of the customs union and the common agricultural policy calls for close cooperation between the administrative authorities responsible in each Member State for the application of provisions adopted in those fields; ... it also calls for appropriate cooperation between these national authorities and the Commission, which is responsible for ensuring the application of the Treaty and the provisions adopted by virtue thereof; ... effective cooperation in this field strengthens the protection of the financial interests of the Community'.

The next recital adds that `rules should therefore be drawn up whereby the Member States' administrative authorities assist each other and cooperate with the Commission in order to guarantee the proper

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application of customs and agricultural regulations and legal protection for the Community's financial interests, in particular by preventing and investigating breaches of those regulations and by investigating operations which are or appear contrary to those regulations'.

The twelfth recital states that `with a view to securing the rapid and systematic exchange of information forwarded to the Commission, there is a need to set up a computerised customs information system at Community level; ... in that context sensitive data concerning frauds and irregularities in the customs and agricultural domains should be stored in a central database accessible to the Member States, while ensuring that the confidential nature of the information exchanged, in particular data of a personal nature, is respected; ... given the justifiable sensitivity of the issue, there should be clear and transparent rules to protect the freedom of the individual'. The next recital adds that `customs authorities have daily to apply both Community and non-Community provisions; ... it is therefore desirable to have available a single infrastructure for applying these provisions'.

Finally, the last recital states that `the provisions of this regulation refer both to the application of the rules of the common agricultural policy and to the application of customs legislation; ... the system set up under this regulation constitutes an integral Community entity; ... since the provisions of the Treaty specifically covering customs matters do not empower the Community to set up such a system, it is necessary to invoke Article 235'.

6 Article 1(1) of the regulation states that `[t]his regulation lays down the ways in which the administrative authorities responsible for implementation of the legislation on customs and agricultural matters in the Member States shall cooperate with each other and with the Commission in order to ensure compliance with that legislation within the framework of a Community system'.

To that end, the regulation lays down a series of rules relating to assistance on request (Title 1) and spontaneous assistance (Title II). Titles III and IV are devoted to relations between the national administrative authorities and the Commission and to relations with third countries respectively. Title V, which is divided into eight chapters, establishes an automated information system called the `Customs Information System' (`the CIS'). Under Article 23(1), the system is to `meet the requirements of the administrative authorities responsible for applying the legislation on customs or agricultural matters, as well as those of the Commission'. Article 23(2) states that the aim of the CIS is to `assist in preventing, investigating and prosecuting operations which are in breach of customs or agricultural legislation, by increasing, through more rapid dissemination of information, the effectiveness of the cooperation and control procedures of the competent authorities referred to in this Regulation'. Article 23(3) adds that, `[t]he customs authorities of the Member States may use the technical infrastructure of the CIS in the performance of their duties in the framework of the customs cooperation referred to in Article K.1 (8) of the Treaty on European Union'. Finally, Article 23(6) provides that Member States and the Commission are to be `CIS partners'.

7 The operation and organisation of the CIS are governed by Articles 24 to 42. The CIS is to consist of a central database accessible via terminals in each Member State and at the Commission. The system is to comprise exclusively data, including personal data, necessary to fulfil its aim as stated in Article 23. Direct access to such data is to be reserved exclusively for the national authorities designated by each Member State and the departments designated by the Commission (Article 29(1)). Personal data included in the database is to be protected under national legislation or internal rules applicable to the Commission, `guaranteeing the protection of the rights and freedoms of individuals' (Article 34(1)).

Analysis of the regulation

8 Coming now to the substance of the case. I should first point out that, in accordance with settled

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case-law, in the context of the organisation of the powers of the Community the choice of the legal basis for a measure cannot depend simply on an institution's conviction as to the object pursued, but must be based on objective factors which are amenable to judicial review. Those factors include in particular the aim and content of the measure. (3) It is necessary, therefore, to consider whether the intended aims and the content of the regulation, are such as to justify invoking Article 235 which, it is clear from the terms in which it is couched, is a residual provision. It may therefore be used as the legal basis for a measure only where no other provision of the Treaty gives the Community institutions the necessary power to adopt it. (4)

9 The Commission and the Council disagree on both the aspects mentioned above. The Council holds that the aim of the regulation is to combat fraud in the context of the protection of the financial interests of the Community and that the content is the establishment of an independent Community body. The Commission, for its part, maintains that the regulation constitutes a form of harmonisation of legislation, at least in the domain of personal-data protection, and that it is intended to ensure the proper functioning of the internal market.

10 To be more precise the Commission submits that the regulation is intended to ensure the correct application of customs and agricultural legislation and therefore, by definition, the proper functioning of the internal market, hence the need to have recourse to Article 100a of the Treaty. The Commission adds that the fight against fraud, and therefore the protection of the financial interests of the Community, is not an independent objective but follows from the establishment of the customs union. As regards the content of the regulation, the Commission submits that it comprises two parts: first the improvement of mutual assistance between Member States, and second, the establishment of the CIS. In its view recourse to Article 235 is not justified in either case: as regards the first part, it argues that this is a matter of harmonising the Member States' legislation on mutual assistance between the administrative authorities to ensure the correct application of the law on customs and agricultural matters; as regards the CIS, the Commission submits that the operation and use of the system require harmonised action by the Member States, while the role of the Commission, although it is a partner in the system on the same footing as the Member States, is limited simply to coordinating the activities of the national administrative authorities. In any case, even if recourse to Article 235 were to be considered necessary for the establishment of the CIS, the correct legal base would, nevertheless be Article 100a as recourse to several legal bases is precluded if one of them provides for the use of the cooperation rather than the consultation procedure. The Commission concludes by requesting the Court to annul the contested regulation on the ground that it is in breach of essential procedural requirements. This opinion is shared by the Parliament which observes that the contested regulation is intended to approximate national legislation, adding that the CIS is not an independent body but simply an instrument at the service of the Community, so that its establishment should not have affected the choice of legal basis.

11 For its part, the Council observes that the contested regulation has as its objective the establishment of a legally independent body at Community level. It maintains that a comparison between that regulation and the previous one, Regulation No 1468/81, which it replaced shows that it was intended to re-draft the text, with a single objective for the entire system, namely to protect the financial interests of the Community. Moreover, it claims, that objective is referred to specifically in Article 209a of the Treaty, introduced by the Single European Act, although in its present form it does not confer the necessary powers on the Community institutions to achieve such an objective. Hence the need to invoke Article 235 of the Treaty. The Council states that the protection of the financial interests of the Community does not follow from the establishment of the customs union but constitutes an independent objective. This is confirmed by the position in the Treaty of Article 209a, not among the provisions on customs union but among the financial provisions. On the content of the regulation, the Council maintains that it creates an entire new system for

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the protection of the financial interests of the Community, based on the coordinated activities of the national administrative authorities and the Commission and also on the functioning of the CIS infrastructure. It is therefore an independent Community body, the establishment of which, the Council claims, goes beyond simply harmonising national legislation; hence the need to invoke Article 235 of the Treaty. As regards the provisions for the protection of personal data, the Council contends that they do not constitute a separate part of the regulation, and do not pursue separate objectives but are linked to the general system of which they form a part. The French Republic, intervening in support of the Council, observes that the purpose of the regulation is not the approximation of legislation but the fight against fraud in the context of customs and agriculture, and that the establishment of the CIS is the most important part of the contested regulation.

12 I believe that the submissions of the Council and France are correct. Indeed, as regards the objectives of the regulation, it is clear from the preamble (first and twentieth recitals) that the entire system established by the regulation is intended to promote the protection of the financial interests of the Community. In the system of the Treaty, that objective is completely independent of the functioning of the customs union and therefore of the internal market. It is sufficient here to consider the position in the Treaty of Article 109a: it is in Title II (Financial Provisions) in Part Five of the Treaty (Institutions of the Community) and not in Chapter 1 of Title I in Part Three, on the customs union. The protection of the financial interests of the Community is therefore a horizontal objective which, through the regulation in issue, is pursued specifically in the area of the fight against fraud in customs and agricultural matters. Moreover, the fact that the protection of the financial interests of the Community is an independent objective, quite distinct from the operation of the customs union, is borne out by the legislative practice prior to the regulation and in particular by the adoption of other `horizontal' regulations which have Article 235 as their legal basis. (5)

While it is true that cooperation between the administrative authorities of the Member States, and between them and the Commission, may be conducive to the proper functioning of the internal market, the link is nevertheless entirely indirect and as such cannot justify recourse to a provision, Article 100a, which concerns instead measures which have as their object the establishment and functioning of the internal market. It appears from the Court's case-law that recourse to Article 100a is not justified where the measure to be adopted has only the incidental effect of harmonising market conditions within the Community. The mere fact that the establishment or functioning of the internal market is affected is not sufficient for Article 100a of the Treaty to apply. (6) In the case at issue, we are dealing with a regulation which has as its objective the protection of the financial interests of the Community and which affects market conditions only indirectly. Therefore, even if it were to be held that the regulation also serves internal market objectives, inasmuch as it coordinates action by national administrations to ensure correct application of customs and agricultural regulations, those objectives are merely ancillary in relation to the main objective of the regulation, with the result that Article 100a cannot constitute the proper legal basis for its adoption. (7) The objective of protecting the financial interests of the Community is dealt with specifically in Article 209a which, however, in the form at present in force, (8) while it does set out the aims to be achieved, does not confer the necessary powers of action on the Community institutions, hence the need to invoke Article 235.

13 As regards the content of the regulation, it is quite consistent with the objectives set out above. The text lays down a complex system for the prevention and prosecution of breaches of Community customs and agricultural regulations. This system is based, on the one hand, on cooperation between the administrative authorities of the Member States and between those authorities and the Commission in accordance with the detailed rules laid down in the regulation; and on the other, on an infrastructure essential for this purpose, the CIS, which is set up specifically to assist the activities both

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of the national administrations and the Commission. The Commission's role in the general system is far from marginal, as may be seen from a number of provisions in the regulation (Articles 23(3) and (4), 29, 30 etc.). Furthermore, in Title IV, the regulation sets out rules governing relations with third countries, indicating the conditions and detailed rules for joint action by the national administrative authorities, the Commission and the administrative authorities of the third countries in question (Article 19 et seq.).

14 That being so, there appears to be ample justification for the statement in the last recital of the preamble to the regulation that the system set up under the regulation constitutes an `integral Community entity', an independent body, the establishment of which does not require any `harmonisation of national legislation' within the meaning of Article 100a of the Treaty (now Article 95 EC).

15 Finally, as regards the provisions of the regulation on the protection of personal data within the framework of the rules on the functioning of the CIS, suffice it to say that the text of the regulation does not include any harmonisation of national legislation in this area. In a context where the operation of the administrative system for ensuring compliance with agricultural and customs legislation might pose risks to the freedoms of individuals, the regulation requests the CIS partners (the Member States and the Commission) to adopt measures `guaranteeing the protection of the rights and freedoms of individuals with regard to the processing of personal data' (Article 34). As regards the use of such data, the regulation requires CIS partners to observe certain rules concerning in particular the individuals' right of access to the data contained in the CIS. Clearly these rules, although directly applicable, are ancillary measures essential to the proper functioning of a system from which they cannot be separated for the purpose of determining independently whether their legal basis is correct. (9)

Conclusion

16. In the light of the foregoing considerations, I propose that the Court should:

- dismiss the application; - order the Commission to pay the Council's costs; - order each of the interveners to bear its own costs.

(1) - OJ 1997 L 82, p. 1.

(2) - OJ 1981 L 144, p. 1, amended by Council Regulation (EEC) No 945/87 of 30 March 1987.

(3) - See judgments in Case C-300/89 Commission v Council [1991] ECR I-2867, paragraph 10; Case C-295/90 Parliament v Council [1992] ECR I-4193, paragraph 13; Case C-155/91 Commission v Council [1993] ECR I-939, paragraph 7; Case C-271/94 Parliament v Council [1996] ECR I-1689, paragraph 14.

(4) - For settled case-law on the matter, see judgments in Cases C-350/92 Spain v Council [1995] ECR I-1985; C-271/94 Parliament v Council [1996] I-1689 cited above, paragraph 13.

(5) - See 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), and 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).

(6) - Judgment in Case C-70/88 Parliament v Council [1991] ECR I-4529, paragraph 17; judgment in Case C-155/91 Commission v Council, cited above, paragraph 19, and Opinion of Advocate General Tesauro, point 4, where he states that `Article 100a should be regarded as relevant for the purposes of adopting a given measure only if that measure has as its object the establishment and functioning of the internal market, that is to say, only if it lays down rules specifically on the conditions of competition or trade within the Community'.

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(7) - Judgment in Case C-271/94 Parliament v Council, cited above, paragraph 32.

(8) - The text of Article 209a (now Article 280 EC) is, in fact, amended by the Treaty of Amsterdam, which adds two new paragraphs (4 and 5). The first states that the Council, acting in accordance with the co-decision procedure and after consulting the Court of Auditors, `shall adopt the necessary measures in the fields of the prevention of and fight against fraud affecting the financial interests of the Community with a view to affording effective and equivalent protection in the Member States. These measures shall not concern the application of national criminal law or the national administration of justice'. So, after the Amsterdam Treaty comes into force, it will no longer be necessary to have recourse to Article 235 to adopt measures to protect the financial interests of the Community.

(9) - This conclusion, namely that measures which are to govern the processing of personal data within a complex system of controls to ensure compliance with customs legislation cannot be evaluated separately them from the system of which they are an integral part, is confirmed by the practice adopted by the Commission itself. See Article 6 of the Proposal for a Council Regulation (EC, Euratom) establishing a European Fraud Investigation Office, submitted by the Commission on 4 December 1998 (OJ 1999 C 21, p. 10), with Article 235 of the Treaty as the legal basis.

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JURCIT	11992E043 : N 1 11992E235 : N 1 2 4 8 12 11992E100A : N 1 2 4 12 11992E189B : N 2 4 11992E173 : N 2 11992E209A : N 12 31997R0515 : N 1 12 31997R0515-A01P1 : N 6 31997R0515-A19 : N 13 31997R0515-A23P1 : N 6 31997R0515-A23P2 : N 6 31997R0515-A23P3 : N 13 31997R0515-A23P4 : N 13 31997R0515-A23P6 : N 6 31997R0515-A24 : N 7 31997R0515-A25 : N 7

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31997R0515-A26 : N 7
31997R0515-A27 : N 7
31997R0515-A28 : N 7
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31997R0515-A30 : N 7 13
31997R0515-A31 : N 7
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31997R0515-A34 : N 7
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31997R0515-A39 : N 7
31997R0515-A40 : N 7
31997R0515-A41 : N 7
31997R0515-A42 : N 7
31997R0515-A29P1 : N 7 13
31997R0515-A34P1 : N 7 15
31997R0515-A52 : N 3
31997R0515-C1 : N 5
31997R0515-C2 : N 5
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31997R0515-C13 : N 5
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61989J0300-N10 : N 8
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61991J0155-N07 : N 8
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61991C0155-N04 : N 12
61994J0271-N13 : N 8
61994J0271-N14 : N 8
61994J0271-N32 : N 12
61992J0350 : N 8
61988J0070-N17 : N 12

SUB Free movement of goods ; Customs Union ; Provisions governing the Institutions

AUTLANG Italian

APPLICA Commission ; Institutions

DEFENDA Council ; Institutions

PROCEDU Action for annulment - unfounded

ADVGEN Saggio

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JUDGRAP Hirsch

DATES of document: 11/03/1999
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Judgment of the Court (Fifth Chamber)
of 13 July 1993
Adrianus Thijssen v Controledienst voor de verzekeringen. Reference for a preliminary ruling: Raad van State - Belgium. Freedom of establishment - Exercise of official authority. Case C-42/92.

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Freedom of movement for persons ° Freedom of establishment ° Derogations ° Activities connected with the exercise of public authority ° Approved commissioners of insurance undertakings pursuing their activities in Belgium ° Not included

(EEC Treaty, Art. 55, first paragraph)

The derogation from the freedom of establishment provided for in the first paragraph of Article 55 of the Treaty, which excludes from the application of the provisions on freedom of establishment activities which in a Member State are connected, even occasionally, with the exercise of official authority, must be restricted to activities which in themselves are directly and specifically connected with the exercise of official authority.

That is not the case for the activities of approved commissioners with insurance undertakings and private provident associations when they are exercised in a context such as that which operates in Belgium, where vis-à-vis the Insurance Inspectorate, which is a public body participating in the exercise of official authority and endowed with powers of regulation, supervision and direction, the approved commissioner, who is freely appointed by the insurance undertaking and is remunerated by it, has merely an auxiliary and preparatory role to play, notwithstanding the fact that his activities are subject to the supervision of the Insurance Inspectorate, that he must swear an oath and that he may impose a veto with suspensory effect on the implementation of decisions adopted by the undertaking.

In Case C-42/92,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Raad van State (Belgium) for a preliminary ruling in the proceedings pending before that court between

Adrianus Thijssen

and

Controledienst voor de Verzekeringen,

on the interpretation of the first paragraph of Article 55 of the EEC Treaty,

THE COURT (Fifth Chamber),

composed of: G.C. Rodríguez Iglesias, President of the Chamber, R. Joliet, J.C. Moitinho de Almeida, F. Grévisse and D.A.O. Edward, Judges,

Advocate General: C.O. Lenz,

Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

° Adrianus Thijssen, by Georges van Hecke, of the Brussels Bar,

° the Belgian Government, by J. Devadder, Director of Administration at the Ministry of Foreign Affairs, External Trade and Cooperation, acting as Agent, assisted by J. Putzeys, S. Gehlen and X. Leurquin, of the Brussels Bar,

° the United Kingdom, by S. Cochrane, of the Treasury Solicitor' s Department, acting as Agent, assisted by Nicholas Paines, of the Bar of England and Wales,

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° the Commission of the European Communities, by Antonio Caeiro, Legal Adviser, and Ben Smulders, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the applicant in the main proceedings, the United Kingdom and the Commission, at the hearing on 18 February 1993,

after hearing the Opinion of the Advocate General at the sitting on 24 March 1993,

gives the following

Judgment

1 By order of 21 January 1992, received at the Court on 17 February 1992, the Raad van State (Belgium) referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of the first paragraph of Article 55 of the Treaty.

2 This question was raised in the course of proceedings between Adrianus Thijssen and the Controledienst voor de Verzekeringen (hereinafter "the Insurance Inspectorate") on the matter of refused admission to the office of approved commissioner, as introduced by Articles 38 to 40 of the Belgian Law of 9 July 1975 on the regulation of insurance undertakings (Belgisch Staatsblad, 29 July 1975, hereinafter "the Law of 1975").

3 According to the case-file, by letter dated 24 September 1986 Mr Thijssen applied for the office of approved commissioner in response to an invitation for applications from the Insurance Inspectorate. The documents attached to Mr Thijssen' s letter showed that he was of Netherlands nationality. By letter of 6 November 1986, the President of the Insurance Inspectorate replied to Mr Thijssen that his application had been turned down because he did not fulfil the nationality requirement laid down by Article 2(1)(1) of Regulation No 6 of the Insurance Inspectorate (Belgisch Staatsblad, 26 March 1986, hereinafter "Regulation No 6").

4 Mr Thijssen brought an action before the Raad van State for annulment of this decision, his sole submission being that the rejection of his application on the ground that he was not of Belgian nationality violated Articles 52 and 55 of the Treaty. He emphasizes in this regard that according to the judgment of the Court of Justice of 21 June 1974 in Case 2/74 Reyners v Belgium [1974] ECR 631), Article 52 of the Treaty has direct effect.

5 The defendant in the main proceedings argues that by virtue of the first paragraph of Article 55 of the Treaty the right of establishment does not apply to the office of approved commissioner.

6 The Raad van State considered that the outcome of the proceedings turned on the interpretation of Community law, and decided to ask the Court for a preliminary ruling on the following question:

> "Does the derogation from the principle of freedom of establishment provided for in the first paragraph of Article 55 of the EEC Treaty apply to the office of approved commissioner introduced by Articles 38 to 40 of the Law of 9 July 1975 on the regulation of insurance undertakings?"

7 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, 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.

8 As a preliminary matter, it should be recalled that the first paragraph of Article 55 of the Treaty excludes from the application of the provisions on freedom of establishment activities which in a Member State are connected, even occasionally, with the exercise of official authority. Nevertheless, as the Court ruled in Reyners (cited above, at paragraph 45), the derogation provided for in Article 55 must be restricted to activities which in themselves are directly and specifically connected

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with the exercise of official authority.

9 Accordingly, the object of the question referred by the court requesting the preliminary ruling is to ascertain whether activities of the kind exercised by an approved commissioner pursuant to the Law of 1975 entail direct and specific participation in the exercise of official authority. To reply to this question, it is necessary to consider the nature of the duties carried out by approved commissioners under that Law, as they have been described by the national court.

10 Article 29(1) of the Law of 1975 establishes the Insurance Inspectorate as a body governed by public law, with legal personality and subject to the authority of the Ministry of Economic Affairs. According to the second paragraph thereof, the Insurance Inspectorate has the task of supervising the application of the Law and its implementing regulations. By Article 29(4), the Insurance Inspectorate has the power to make regulations. It thus determines the obligations which must be imposed on insurance undertakings in order "to ensure that their activities are conducted in accordance with the principles of insurance practice, the precepts of equity and the general interests of insured parties and beneficiaries under contracts of insurance".

11 It is not disputed that the Insurance Inspectorate exercises official authority. Its supervisory function serves to protect insured parties and the public interest. It can intervene directly in the management of insurance undertakings by imposing preventive and positive measures.

12 Under its regulatory powers, the Insurance Inspectorate adopted Regulation No 2 of 20 November 1978 concerning the admission of approved commissioners (Belgisch Staatsblad, 15 December 1978), which it subsequently repealed by Regulation No 6.

13 In contrast to Regulation No 2, which entitled nationals of other Member States, inter alia, to perform the duties of approved commissioner, Article 2(1) of Regulation No 6 provides as follows:

> "In order to be approved by the Inspectorate for the performance of the duties of approved commissioner in regulated undertakings, a candidate must

1. be of Belgian nationality,

..."

14 It is therefore established that the nationality requirement, which is not mentioned in the Law of 1975, was introduced only in 1986, by means of a regulation adopted by the Insurance Inspectorate.

15 Furthermore, Regulation No 6 gives no explanation why such a requirement should be necessary. In response to a question put by the Court, the Belgian Government observed merely that in 1986 it had been deemed necessary to add the condition of Belgian nationality. According to Article 20 of Regulation No 6, approved commissioners who are nationals of other Member States and were already admitted when the regulation entered into force retain their approved status.

16 Finally, Article 38 of the Law of 1975 requires Belgian insurance companies or associations to appoint at least one commissioner from among the members of the Institute of Auditors, which was established by the Law of 22 July 1953, who have been approved by the Insurance Inspectorate. The same applies to Belgian undertakings in the form of mutual insurance societies or non-profit-making associations and to foreign insurance undertakings, which are required to appoint, for the purposes of managing their operations in Belgium, an approved commissioner chosen from the same group of persons.

17 According to Article 39 of the Law of 1975, approved commissioners must take a special written oath. Article 40 provides that

> "Approved commissioners shall carry out their duties under the supervision of the Insurance Inspectorate.

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The approved commissioners shall immediately bring to the notice of the directors, managers or general agent of the undertaking, and of the Insurance Inspectorate, any infringement of this Law or of its implementing regulations, as well as any other matter which appears to them capable of prejudicing the financial position of the undertaking.

In addition to their general duties as commissioners, as laid down in the legislation on commercial companies and in the undertaking' s own statutes, the commissioners shall, whenever the Insurance Inspectorate so requests, and in the absence of such a request at least once a year, provide the Inspectorate with a report on the financial position and management of the undertaking.

Should an approved commissioner obtain knowledge of a decision by the undertaking the implementation of which might constitute an offence, he shall veto such implementation and refer the matter to the Insurance Inspectorate forthwith. His veto shall have suspensory effect for a period of eight days."

18 As the Belgian Government emphazized in its submissions, the activities of an internal auditor or "ordinary commissioner", as the Government describes it, are not connected with the exercise of official authority. The duties of an ordinary commissioner consist in fact in auditing the finances and the annual accounts of the company and presenting to the general meeting a report on the audits so carried out on the basis of the documents and information which he is entitled to obtain from the responsible officers of the undertaking.

19 Approved commissioners are freely appointed by insurance undertakings from among the commissioners duly approved by the Insurance Inspectorate and are also remunerated by them. They enjoy the confidence of both the insurance undertaking and the supervisory authorities.

20 With regard to the duties of the commissioners mentioned in paragraph 17, above, to prepare a report for the Insurance Inspectorate, either on a regular basis or at the request of the latter, to bring to the notice of the Inspectorate any unusual occurrences, and to inform the insurance undertaking of possible offences or facts which might jeopardize its financial position, it should be noted that, as the applicant in the main proceedings pointed out during the Hearing, other public bodies have similar duties, yet are not regarded for that reason as exercising official authority. This is the case for credit and financial institutions which, under Article 6 of Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering (OJ 1991 L 166, p. 77), are bound to inform the authorities if there is suspicion of money laundering.

21 As to the veto which an approved commissioner may enter against the implementation of a decision where such implementation could constitute an offence, it must be noted that a commissioner is obliged to refer the matter forthwith to the Insurance Inspectorate. While his veto has suspensory effect for a period of eight days, the final decision on the matter lies with the Insurance Inspectorate, which is thus in no way bound by the commissioner' s veto and, within the limits of its powers, will take such measures as the situation requires. Finally, it must be noted that, as is clearly set out in Article 40 of the Law of 1975, the approved commissioners perform their duties under the supervision of the Insurance Inspectorate.

22 Consequently, the auxiliary and preparatory functions of an approved commissioner vis-à-vis the Insurance Inspectorate ° which itself is the body which exercises official authority by taking the final decision ° cannot be regarded as having a direct and specific connection with the exercise of official authority within the meaning of the first paragraph of Article 55 of the Treaty.

23 Accordingly, the reply to the question put by the Raad van State must be that the first paragraph of Article 55 of the EEC Treaty is to be interpreted as meaning that the derogation from the right of establishment contained therein does not apply to the office of approved commissioner,

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as described in the order referring the question to the Court.

Costs

24 The costs incurred by the Belgian Government, the United Kingdom 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 proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the question referred to it by the Belgian Raad van State by order of 21 January 1992, hereby rules:

The first paragraph of Article 55 of the EEC Treaty is to be interpreted as meaning that the derogation contained therein does not apply to the office of approved commissioner, as described in the order referring the question to the Court.

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NATCOUR	*A9* Raad van State (Belgie), 4e kamer, arrest no 38.532 van 21/01/1992 (A.38.532/IV-11.873) ; *P1* Raad van State (Belgie), 4e kamer, arrest no 38.532 van 14/12/1993 (A.35343/IV-11.873) ; - Administration publique 1994 M p.14 (résumé) ; - Tijdschrift voor bestuurswetenschappen en publiekrecht 1994 p.431 (résumé)
NOTES	A.B.: Revue de la banque 1993 p.478 ; Wouters, Jan: Erkende commissarissen bij financiele instellingen en vrije vestiging in Europees gemeenschapsverband, Tijdschrift voor rechtspersoon en vennootschap 1993 p.466-474 ; Martínez Sanchez, Antonio: Excepciones al derecho de establecimiento derivadas de actividades relacionadas con el ejercicio de poder publico. Interpretacion del art. 55 del Tratado CEE, Gaceta Jurídica de la C.E. y de la Competencia - Boletín 1993 no 89 p.25-28 ; Van Schoubroeck, C.: Revue de droit commercial belge 1994 p.135-138 ; Claassens, Hubert: Place aux commissaires agréés non belges auprès des entreprises d'assurance en Belgique, Revue de droit commercial belge 1994 p.138-140 ; Boutard-Labarde, Marie-Chantal: Chronique de jurisprudence du Tribunal et de la Cour de justice des Communautés européennes. Libre circulation des personnes et des services, Journal du droit international 1994 p.497-498 ; Klesta Dosi, Laurence: La nuova giurisprudenza civile commentata 1994 II p.294-295 ; Cusimano, Roberto ; Gallo, Daniele: I centri di assistenza fiscale e l'ordinamento comunitario del mercato e della concorrenza, Il fisco : giornale tributario di legislazione e attualità 2005 p.9-47
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