



ADVANCED EU LAW – DROI2055-2

Cases & Materials

Faculté de Droit, de Science Politique et de Criminologie

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WELCOME

Dear students,

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

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

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

This reader contains case law and legislation, as well as basic outlines for each lecture meant to help you maintain some structure in the materials covered in class sessions. At the same time, the materials chosen are only a starting point for reflection and discussion; they are above all meant to trigger your input during class sessions.

Do not hesitate to contact me at pieter.vancleynbreugel@ulg.ac.be or during class breaks. I look forward to meeting you in class every Friday of the first term!

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COURSE SCHEDULE AND SETUP

Eleven two hour lecture sessions will be organised, which will take place during our regular time-slot on Fridays from 10.30 to 13.00.

In addition to the lectures, a visit to the Court of Justice in Luxembourg will be organised on Wednesday 22 November. The visit forms part of the course – for organisational purposes, you will be asked to register explicitly for this visit during the first class. More practical information on the visit and the programme will be communicated to you in due course.

The following lectures will be organised in the *Séminaire 10* classroom (B31 – Sart Tilman campus):

1. Course introduction – the role of law in European integration – **How to read and summarise a judgment – preparing a case note** (22/09)
2. Perfecting the internal market: horizontalising free movement rights (29/09)
3. Perfecting the internal market: economic freedoms v. social rights? (6/10)
4. Perfecting the internal market: data protection (20/10)
5. Improving EU institutional functioning: transparency and access to documents: buzzwords or reality? (27/10) – **Submission case note 1**
6. Improving EU institutional functioning: fundamental rights protection in post-Lisbon EU law (10/11)

Individual feedback on written assignment (8/11 or 10/11)

7. Improving EU institutional functioning: enhanced cooperation as new institutional reality? (17/11)

Visit to the Court of Justice in Luxembourg (22/11)

8. Beyond market integration: legal foundations of the Economic and Monetary Union (24/11) – **Submission case note 2**

Individual feedback on written assignment (29/11 or 1/12)

9. Beyond market integration: Economic and Monetary Union in crisis (1/12)
10. Beyond market integration: saving the EMU outside and inside the EU legal order (8/12)
11. The EU law implications of a “Brexit” (15/12)

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

PRACTICAL INFORMATION

a. Course format

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

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

b. Course materials – class preparation

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

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

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

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

- K. Davies, *Understanding EU law*, Oxford, Routledge, 6th Edition, 2015, 184 pp. (a clear English-language introduction to European Union law).
- P. Craig and G. De Búrca, *EU law. Text, cases and materials*, Oxford, Oxford University Press, 6th Edition, 2015, 1380 p. (the standard textbook in the field, covers a lot of ground not necessarily covered in this class, yet it may also offer a background framework to help you in your studies).

- R. Schütze, *An introduction to European Law*, Cambridge, Cambridge University Press, 2015, 2nd Edition, 380 p. (another clear introduction to EU law, both from institutional and substantive law perspectives)
- K. Lenaerts and P. Van Nuffel, *European Union Law*, London, Sweet & Maxwell, 3rd Edition, 2011, 1334 p. (a very complete textbook, covering every area in an in-depth fashion; as such, it offers a true encyclopaedia for anyone wanting to understand a field of EU law in a detailed way).

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

c. Time slots

As mentioned above, the regular course time slot is Friday morning from **10.30 to 13.00** in the *Séminaire 10* classroom (B31 – Sart Tilman campus). In addition, a visit to the Court (22/11) and two complementary feedback moments (29/11 or 1/12 and 15/12) on your written assignment (see d.) will be organised.

d. Written assignments – two case notes

As an English-language course, the Advanced EU law sessions also want to teach you how to write in a foreign language. In order to accomplish that aim, you will be required to prepare two short papers over the course of the semester. Those papers are set up as reflection papers in the format of a case note. The first case note will be on any judgment of your choice covered in lectures 2-3-4. The second case note covers any judgment of your choice covered in lectures 5-6-7.

Those case notes offer an opportunity to test your skills in identifying the key points in a judgment. I will ask you to pick one of the judgments covered in class and to prepare a five to eight pages case note on that judgment. In that case note, you are required to summarise and analyse the judgment according to the following structure:

- I. Relevant facts
- II. Judgment (+ potentially preceded by analysis of Advocate General's Opinion)
- III. Analysis: questions covered include – yet are not limited to – the following:
 - a. Did the Court follow its earlier case law or did it establish a new precedent?
 - b. Did the Court take into account special factual circumstances?
 - c. What future questions does the judgment raise or neglect in being reasoned the way it is?
 - d. What kind of action is to be taken by either the Court or other institutions of the European Union in order to remedy some of the problems you have identified with the judgment?

The challenge of this assignment is to offer a clear and sharp analysis of a judgment covering the facts in five to eight pages covering all three elements. On eCampus, you will find a number of examples of *Common Market Law Review* case notes, which constitute the standard format in this respect. In the first class, I will give you a set of examples and provide you with more detailed instructions in this regard. It goes without saying that, whenever the cases have already been commented on in this venue, you are still expected to offer your proper – and somewhat original – analysis to the case.

Being able to summarise and structure a case is one of the key learning goals of this course. The case note therefore counts for a total of **8 points out of 20 to be awarded in this case note**. Both case notes will be graded individually on a scale of 20; the second case note will explicitly take into account any improvements made in terms of writing style and analysis and a bonus can be allocated if significant improvement can be noticed.

Do not be afraid of the workload and challenges associated with this process. The judgments to be summarised will have been discussed to some extent in the course sessions and the writing process will be supervised by me over the course of the semester. The main purpose of this course is to offer you guidance and supervision throughout this process. That is why I will correct the case notes and offer you individual feedback on your written work on two occasions. Doing so will allow you to receive **individual feedback** and to improve your English writing and analysis skills as part of this course. Over the course of the semester, two feedback moments will be scheduled. In a 15 minute feedback session, I will offer you points for improvement and give you guidance as to how to improve your writing skills in the future. More information on how to schedule those appointments will be communicated via eCampus.

In terms of practical instructions, case notes have to be prepared in *Times New Roman*, font 12, spacing 1.15, and may not exceed eight pages. The structure to be followed is the above (roman numbers I, II and III, followed by a, b and c as subdivisions). You are expected to submit the written version via eCampus on **Fridays 27/10 and 24/11 at 10.00 am at the latest, accompanied by a written version to be deposited with Mme Caroline Langevin, B33, 2nd floor, secretariat Institut d'Etudes Juridiques Européennes.**

e. Exam

In addition to the two case notes, which count for 8 of your 20 final points, an oral exam will be organised during the January exam period, during which 12 points can be earned. At this stage, you will have 30 minutes of preparation time. You will receive two general questions relating to the course themes, which you can discuss during the oral exam session (which will last about 20 minutes). I may also ask you small questions relating to other subject-matters covered in class. The purpose will be to have an informed discussion on the subject-matter of the course, which is why the exam questions will be kept vague. The point of those questions is to offer a starting point for an informed discussion on the topics covered by this course. Preparation will be open-book; you can bring your annotated course materials and legislation to the exam.

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

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

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

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

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

LEARNING GOALS

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

In terms of knowledge,

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

In terms of practical skills,

- you will actively learn how to read, interpret and understand judgments by the Court of Justice;
- you will be able to summarise a judgment and prepare a case note on the matter; your progress in developing English writing skills will be supervised and monitored over the course of the semester;
- you will take part, in writing, in discussions on the subject matter in English;
- you will develop be able to follow, in a more informed way, debates on the future of the European Union.

In terms of critical reflection skills,

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

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

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

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

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

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

Materials to read:

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

Lecture 1 outline:

- a. Introduction to the course
 1. Course theme
 2. Course setup
 3. Practical information
- b. The importance of law in European integration
 1. Public international law basis – Treaty setup
 2. Going beyond public international law: defining EU law
 3. Primary v. secondary law
- c. The key features of EU law: primacy and direct effect
 1. Van Gend & Loos: direct effect of EU law
 2. Costa/Enel: primacy of EU law
 3. Consequences of direct effect and primacy
 4. Limits of direct effect and primacy: the curious case of directives
- d. Building on primacy and direct effect: 'integration through law'
 1. A complex hierarchy of norms: fundamental rights at the apex?

2. The scope of EU law vis-à-vis Member State law
3. The politics of law

Questions for discussion:

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

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

Parties

IN CASE 26/62

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

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

AND

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

Subject of the case

ON THE FOLLOWING QUESTIONS :

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

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

Grounds

I - PROCEDURE

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

II - THE FIRST QUESTION

A - JURISDICTION OF THE COURT

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

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

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

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

THIS ARGUMENT, TOO, IS THEREFORE UNFOUNDED .

B - ON THE SUBSTANCE OF THE CASE

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

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

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

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

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

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

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

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

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

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

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

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

III - THE SECOND QUESTION

A - THE JURISDICTION OF THE COURT

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

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

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

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

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

B - ON THE SUBSTANCE

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

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

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

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

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

Decision on costs

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

Operative part

THE COURT

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

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

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

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

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

Parties

IN CASE 6/64

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

FLAMINIO COSTA AND

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

Subject of the case

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

Grounds

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

ON THE APPLICATION OF ARTICLE 177

ON THE SUBMISSION REGARDING THE WORKING OF THE QUESTION

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

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

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

ON THE SUBMISSION THAT AN INTERPRETATION IS NOT NECESSARY

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

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

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

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

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

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

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

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

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

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

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

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

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

ON THE INTERPRETATION OF ARTICLE 102

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

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

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

ON THE INTERPRETATION OF ARTICLE 93

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

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

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

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

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

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

ON THE INTERPRETATION OF ARTICLE 53

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

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

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

ON THE INTERPRETATION OF ARTICLE 37

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

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

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

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

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

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

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

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

Decision on costs

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

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

Operative part

THE COURT

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

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

AND ALSO RULES :

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

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

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

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

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

AND FURTHER DECLARES :

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

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

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

CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

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

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

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

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

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

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

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

TITLE I

DIGNITY

Article 1

Human dignity

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

Article 2

Right to life

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

Article 3

Right to the integrity of the person

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

Article 4

Prohibition of torture and inhuman or degrading treatment or punishment

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

Article 5

Prohibition of slavery and forced labour

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

TITLE II

FREEDOMS

Article 6

Right to liberty and security

Everyone has the right to liberty and security of person.

Article 7

Respect for private and family life

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

Article 8

Protection of personal data

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

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

Article 9

Right to marry and right to found a family

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

Article 10

Freedom of thought, conscience and religion

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

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

Article 11

Freedom of expression and information

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

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

Article 12

Freedom of assembly and of association

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

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

Article 13

Freedom of the arts and sciences

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

Article 14

Right to education

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

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

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

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

Article 15

Freedom to choose an occupation and right to engage in work

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

Article 16

Freedom to conduct a business

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

Article 17

Right to property

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

Article 18

Right to asylum

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

Article 19

Protection in the event of removal, expulsion or extradition

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

TITLE III

EQUALITY

Article 20

Equality before the law

Everyone is equal before the law.

Article 21

Non-discrimination

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

Article 22

Cultural, religious and linguistic diversity

The Union shall respect cultural, religious and linguistic diversity.

Article 23

Equality between women and men

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

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

Article 24

The rights of the child

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

Article 25

The rights of the elderly

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

Article 26

Integration of persons with disabilities

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

TITLE IV

SOLIDARITY

Article 27

Workers' right to information and consultation within the undertaking

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

Article 28

Right of collective bargaining and action

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

Article 29

Right of access to placement services

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

Article 30

Protection in the event of unjustified dismissal

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

Article 31

Fair and just working conditions

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

Article 32

Prohibition of child labour and protection of young people at work

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

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

Article 33

Family and professional life

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

Article 34

Social security and social assistance

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

Article 35

Health care

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

Article 36

Access to services of general economic interest

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

Article 37

Environmental protection

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

Article 38

Consumer protection

Union policies shall ensure a high level of consumer protection.

TITLE V

CITIZENS' RIGHTS

Article 39

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

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

Article 40

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

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

Article 41

Right to good administration

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

Article 42

Right of access to documents

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

Article 43

European Ombudsman

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

Article 44

Right to petition

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

Article 45

Freedom of movement and of residence

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

Article 46

Diplomatic and consular protection

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

TITLE VI

JUSTICE

Article 47

Right to an effective remedy and to a fair trial

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

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

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

Article 48

Presumption of innocence and right of defence

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

Article 49

Principles of legality and proportionality of criminal offences and penalties

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

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

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

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

Article 50

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

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

TITLE VII

GENERAL PROVISIONS GOVERNING THE INTERPRETATION AND APPLICATION OF THE CHARTER

Article 51

Field of application

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

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

Article 52

Scope and interpretation of rights and principles

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

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

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

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

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

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

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

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

Article 53

Level of protection

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

Article 54

Prohibition of abuse of rights

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

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

2. PERFECTING THE INTERNAL MARKET

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

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

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

Secondly, the internal market fundamental freedoms guarantee access to other Member States' markets for economically active persons coming from another Member State, yet also facilitate the relocation of businesses to Member States where labour or social security legislation is less burdensome. It has therefore often been argued that the EU internal market fails to take social rights seriously, despite balancing or reconciliation initiatives undertaken by the Court of Justice. It can therefore be questioned to what extent economic as well as social rights are taken care of as a matter of EU internal market law.

Thirdly, the free movement advantages have necessitated the adoption of secondary legislation in a number of related fields, ensuring that businesses and citizens would engage in cross-border trade and transactions. In a digitalising economy, the transfer and processing of individuals' personal data have become especially troublesome in that regard. The abolition of regulatory obstacles has created possibilities to transfer personal information and to use them

for commercial purposes. Responding to those challenges, the European Union developed, within its internal market policies and politics strategies, a regulatory framework for the protection of personal data. A more perfect internal market would indeed have to pay attention to those data and the control an individual wants to continue exerting over those data.

LECTURE 2: THE HORIZONTAL APPLICATION OF EU FREE MOVEMENT RIGHTS

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

Materials to read:

- Court of Justice, 12 December 1974, Case 36/74, *B.N.O. Walrave and L.J.N. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo*, ECLI:EU:C:1974:140.
- Court of Justice, 17 July 2008, Case C-94/07, *Andrea Raccanelli v Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV.*, ECLI:EU:C:2008:425.
- Court of Justice, 12 July 2012, Case C-171/11, *Fra.bo SpA v Deutsche Vereinigung des Gas- und Wasserfaches eV (DVGW) - Technisch-Wissenschaftlicher Verein*, ECLI:EU:C:2012:453.
- Commission Proposal of 25 May 2016 for a Regulation of the European Parliament and of the Council on addressing geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (via eCampus).

Lecture 2 outline:

- a. Foundations of the internal market
 1. Negative v. positive integration
 2. Negative integration: fundamental freedoms
 3. Applying the fundamental freedoms
 - i. Direct discrimination
 - ii. Indirect discrimination
 - iii. Restrictive rules
- b. The internal market and free movement rights
 1. Direct effect
 2. Vertical direct effect
- c. Beyond vertical direct effect?
 1. Private regulatory bodies – Fra.bo
 2. Associations and professional bodies – Walrave and Koch, Bosman, Wouters
 3. Trade unions – Viking and Laval

4. Private employers – Angonese and Raccanelli
5. Private individuals? – corporate law harmonisation
- d. The scope of ‘horizontal’ direct effect in EU free movement law
 1. Direct discrimination on the basis of nationality
 2. Indirect discrimination on the basis of nationality
 3. Restrictive rules
- e. The limits of the present ‘horizontal’ direct effect status-quo
 1. Legal basis for the current setup?
 2. Mixed contexts: difficulties in distinguishing vertical and horizontal situations
 3. Alternatives for horizontal situations?
- f. Moving beyond limited ‘horizontal’ direct effect?
 1. Alternative 1: EU secondary legislation
 - i. Services Directive
 - ii. Geo-blocking proposal
 2. Alternative 2: the horizontal effect of the Charter of Fundamental Rights?
 3. Alternative 3: Treaty modifications?
 4. Alternative 4: extra-legal policy modifications...
- g. Legal limits to horizontal direct effect?
 1. Subsidiarity
 2. Coherence
 3. Private law differentiation?

Questions for discussion:

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

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

Parties

IN CASE 36/74

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

1 . BRUNO NILS OLAF WALRAVE

2 . LONGINUS JOHANNES NORBERT KOCH

AND

1 . ASSOCIATION UNION CYCLISTE INTERNATIONALE

2 . KONINKLIJKE NEDERLANDSCHE WIELREN UNIE

3 . FEDERACION ESPANOLA CICLISMO

Subject of the case

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

Grounds

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Decision on costs

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

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

Operative part

ON THOSE GROUNDS,

THE COURT

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

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

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

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

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

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

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

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

In Case C-94/07,

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

Andrea Raccanelli

v

Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV,

THE COURT (Fifth Chamber),

[...]

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

gives the following

Judgment

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

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

Legal context

Community legislation

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

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

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

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

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

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

...

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

National legislation

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

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

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

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

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

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

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

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

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

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

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

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

14 The letter was worded as follows:

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

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

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

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

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

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

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

...'

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

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

18 MPG rejects those claims.

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

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

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

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

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

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

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

The questions referred for a preliminary ruling

Admissibility of the reference for a preliminary ruling

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

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

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

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

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

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

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

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

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

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

Substance

Question 1

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

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

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

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

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

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

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

Question 2

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

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

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

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

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

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

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

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

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

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

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

Question 3

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

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

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

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

Costs [...]

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

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

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

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

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

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

In Case C-171/11,

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

Fra.bo SpA

v

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

THE COURT (Fourth Chamber),

[...]

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

gives the following

Judgment

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

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

German legal context

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The questions referred for a preliminary ruling

The first question

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The second question

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

Costs

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

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

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

LECTURE 3: ECONOMIC FREEDOMS AND SOCIAL RIGHTS IN THE INTERNAL MARKET

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

Materials to read:

- Court of Justice, 12 June 2003, Case C-112/00, *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich*, ECLI:EU:C:2003:333.
- Court of Justice, 11 December 2007, Case C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*, ECLI:EU:C:2007:772.
- Court of Justice, 18 December 2007, Case C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet*, ECLI:EU:C:2007:809.
- Court of Justice, 11 November 2014, C-333/13, *Elisabeta Dano and Florin Dano v Jobcenter Leipzig*, ECLI:EU:C:2014:2358.

Lecture 3 outline:

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

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

Questions for discussion:

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

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

In Case C-112/00,

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

Eugen Schmidberger, Internationale Transporte und Planzüge

and

Republik Österreich,

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

THE COURT,

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

Advocate General: F.G. Jacobs,

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

after considering the written observations submitted on behalf of:

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

having regard to the Report for the Hearing,

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

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

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

gives the following

Judgment

1.

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

2.

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

National law

3.

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

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

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

4.

Paragraph 6 of the VslgG provides:

'Meetings whose purpose runs counter to the criminal law or which, if held, are likely to endanger public order or the common weal are to be banned by the authorities.'

5.

Paragraph 16 of the VslgG provides:

'For the purposes of the present law, the usual meaning of "the authority" is:

(a) in places within their competence, the Federal Police;

(b) in the place where the Landeshauptmann [head of government of the Land] has his seat of government, where there is no Federal Police presence, the Sicherheitsdirektion [the security services];
...

(c) in all other places, the Bezirksverwaltungsbehörde [district administrative authority]’.

6.

Paragraph 42(1) of the Straßenverkehrsordnung (Highway Code) of 1960, as subsequently amended (‘the StVO’), prohibits the transport by road of heavy goods trailers on Saturdays from 15.00 hrs to midnight and on Sundays and bank holidays from midnight to 22.00 hrs where the maximum permitted total weight of the heavy goods vehicle or of the trailer exceeds 3.5 tonnes. Further, according to Paragraph 42(2), during the periods stated in Paragraph 42(1) the movement of heavy goods vehicles, articulated lorries and rigid-chassis lorries having a maximum permitted total weight in excess of 7.5 tonnes is prohibited. Certain exceptions are permitted, in particular for the transport of milk, perishable foodstuffs or animals for slaughter (except for the transport of cattle on motorways).

7.

Under Paragraph 42(6) of the StVO, the movement of heavy goods vehicles having a maximum permitted total weight in excess of 7.5 tonnes is prohibited between 22.00 hrs and 05.00 hrs. The journeys made by vehicles emitting noise below a certain level are not affected by that prohibition.

8.

Pursuant to Paragraph 45(2) et seq. of the StVO, derogations in respect of road use may be granted in respect of individual applications and subject to certain conditions.

9.

Paragraph 86 of the StVO provides:

‘Marches. Unless provided otherwise, where it is intended to use a road for outdoor meetings, public or customary marches, local fêtes, parades or other such assemblies, these must be declared in advance by their organisers to the authority ...’.

The main proceedings and the questions referred for a preliminary ruling

10.

According to the file in the main proceedings, on 15 May 1998 the Transitforum Austria Tirol, an association ‘to protect the biosphere in the Alpine region’, gave notice to the Bezirkshauptmannschaft Innsbruck (Innsbruck provincial government) under Paragraph 2 of the VslgG and Paragraph 86 of the StVO of a demonstration to be held from 11.00 hrs on Friday 12 June 1998 to 15.00 hrs on Saturday 13 June 1998 on the Brenner motorway (A13), resulting in that motorway being closed to all traffic on the section from the Europabrücke service area to the Schönberg toll station (Austria).

11.

On the same day, the chairman of that association gave a press conference following which the Austrian and German media disseminated information concerning the closure of the Brenner motorway. The German and Austrian motoring organisations were also notified and they too offered practical information to motorists, advising them in particular to avoid that motorway during the period in question.

12.

On 21 May 1998, the Bezirkshauptmannschaft requested the Sicherheitsdirektion für Tirol (Directorate of security for Tyrol) to provide instructions concerning the proposed demonstration. On 3 June 1998,

the Sicherheitsdirektor issued an order that it was not to be banned. On 10 June 1998, there was a meeting of members of various local authorities in order to ensure that the demonstration would be free of trouble.

13.

Considering that that demonstration was lawful as a matter of Austrian law, the Bezirkshauptmannschaft decided not to ban it, but it did not consider whether its decision might infringe Community law.

14.

The demonstration took place at the stated place and time. Consequently, heavy goods vehicles which should have used the Brenner motorway were immobilised from 09.00 hrs on Friday 12 June 1998. The motorway was reopened to traffic on Saturday 13 June 1998 at approximately 15.30 hrs, subject to the prohibition on the movement of lorries in excess of 7.5 tonnes during certain hours on Saturdays and Sundays applicable under Austrian legislation.

15.

Schmidberger is an international transport undertaking based at Rot an der Rot (Germany) which operates six articulated heavy goods vehicles with 'reduced noise and soot emission'. Its main activity is the transport of timber from Germany to Italy and steel from Italy to Germany. Its vehicles generally use the Brenner motorway for that purpose.

16.

Schmidberger brought an action before the Landesgericht Innsbruck (Innsbruck Regional Court) (Austria) seeking damages of ATS 140 000 against the Republic of Austria on the basis that five of its lorries were unable to use the Brenner motorway for four consecutive days because, first, Thursday 11 June 1998 was a bank holiday in Austria, whilst 13 and 14 June 1998 were a Saturday and Sunday, and second, the Austrian legislation prohibits the movement of lorries in excess of 7.5 tonnes most of the time at weekends and on bank holidays. That motorway is the sole transit route for its vehicles between Germany and Italy. The failure on the part of the Austrian authorities to ban the demonstration and to intervene to prevent that trunk route from being closed amounted to a restriction of the free movement of goods. Since it could not be justified by the protesters' right to freedom of expression and freedom of assembly the restriction was a breach of Community law in respect of which the Member State concerned incurred liability. In the present case, the damage suffered by Schmidberger consisted of the immobilisation of its heavy goods vehicles (ATS 50 000), the fixed costs in respect of the drivers (ATS 5 000) and a loss of profit arising from concessions on payment allowed to customers on account of the substantial delays in transporting the goods and the failure to make six journeys between Germany and Italy (ATS 85 000).

17.

The Republic of Austria contended that the claim should be rejected on the grounds that the decision not to ban the demonstration was taken following a detailed examination of the facts, that information as to the date of the closure of the Brenner motorway had been announced in advance in Austria, Germany and Italy, and that the demonstration did not result in substantial traffic jams or other incidents. The restriction on free movement arising from a demonstration is permitted provided that the obstacle it creates is neither permanent nor serious. Assessment of the interests involved should lean in favour of the freedoms of expression and assembly, since fundamental rights are inviolable in a democratic society.

18.

Having found that Schmidberger had not shown either that its lorries would have had to use the Brenner motorway on 12 and 13 June 1998 or that it had not been possible, after it had become aware that the demonstration was due to take place, to change its routes in order to avoid loss, the Landesgericht Innsbruck dismissed the action by judgment of 23 September 1999 on the grounds that the transport company had neither discharged the burden (under Austrian substantive law) of making out and proving its claim for pecuniary loss nor complied with its obligation (under Austrian procedural law) to present

all the facts on which the application was based and which were necessary for the dispute to be determined.

19.

Schmidberger then lodged an appeal against that judgment before the Oberlandesgericht Innsbruck, which considers that it is necessary to have regard to the requirements of Community law where, as in the present case, claims are made which are, at least in part, founded on Community law.

20.

It considers that it is necessary in that regard to determine first whether the principle of the free movement of goods, possibly in conjunction with Article 5 of the Treaty, requires a Member State to keep open major transit routes and whether that obligation takes precedence over fundamental rights such as the freedom of expression and the freedom of assembly guaranteed by Articles 10 and 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR').

21.

If so, the national court asks, secondly, whether the breach of Community law thus established is sufficiently serious to give rise to State liability. Questions of interpretation arise in particular in determining the degree of precision and clarity of Article 5 as well as Articles 30, 34 and 36 of the Treaty.

22.

In the present case State liability might be incurred as a result of either legislative defect - the Austrian legislature having failed to adapt the legislation on freedom of assembly to comply with the obligations arising under Community law, in particular under the principle of the free movement of goods - or by reason of administrative fault - the competent national authorities being required by the obligation of cooperation and loyalty laid down by Article 5 of the Treaty to interpret national law in such a way as to comply with the requirements of that Treaty as regards the free movement of goods, in so far as those obligations arising from Community law are directly applicable.

23.

Thirdly, the court seeks guidance as to the nature and extent of the right to compensation based on State liability. It asks how stringent are the requirements as to proof of the cause and amount of the damage occasioned by a breach of Community law resulting from legislation or administrative action and wishes to know, in particular, whether a right to compensation also exists where the amount of the damage can only be assessed by general estimate.

24.

Lastly, the referring court harbours doubts as to the national requirements for establishing a right to compensation based on State liability. It asks whether the Austrian rules on the burden and standard of proof and on the obligation to submit all facts necessary for the determination of the dispute comply with the principle of legal effectiveness, in so far as the rights based on Community law cannot always be defined *ab initio* in their entirety and the applicant faces genuine difficulty in stating correctly all the facts required under Austrian law. Thus, in the present case, the content of the right to compensation based on State liability is so unclear, as regards its nature and extent, as to make a reference for a preliminary ruling necessary. The reasoning of the court ruling at first instance is likely to curtail claims based on Community law by rejecting the application on the basis of principles of national law and circumventing on purely formal grounds relevant questions of Community law.

25.

Considering that the resolution of the dispute thus required an interpretation of Community law, the Oberlandesgericht Innsbruck decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

‘1. Are the principles of the free movement of goods under Article 30 et seq. of the EC Treaty (now Article 28 et seq. EC), or other provisions of Community law, to be interpreted as meaning that a Member State is obliged, either absolutely or at least as far as reasonably possible, to keep major transit routes clear of all restrictions and impediments, *inter alia*, by requiring that a political demonstration to be held on a transit route, of which notice has been given, may not be authorised or must at least be later dispersed, if or as soon as it can also be held at a place away from the transit route with a comparable effect on public awareness?

2. Where, on account of the failure by a Member State to indicate in its national provisions on freedom of assembly and the right to exercise it that, in the weighing of freedom of assembly against the public interest, the principles of Community law, primarily the fundamental freedoms and, in this particular case, the provisions on the free movement of goods, are also to be observed, a political demonstration of 28 hours' duration is authorised and held which, in conjunction with a pre-existing national generally applicable ban on holiday driving, causes an essential intra-Community goods transit route to be closed, *inter alia*, to the majority of heavy goods traffic for four days, with a short interruption of a few hours, does that failure constitute a sufficiently serious infringement of Community law in order to establish liability on the part of the Member State under the principles of Community law, provided that the other requirements for such liability are met?

3. Where a national authority decides that there is nothing in the provisions of Community law, in particular those concerning the free movement of goods and the general duty of cooperation and solidarity under Article 5 of the EC Treaty (now Article 10 EC), to preclude, and thus no ground on which to ban, a political demonstration of 28 hours' duration which, in conjunction with a pre-existing national generally applicable ban on holiday driving, causes an essential intra-Community goods transit route to be closed, *inter alia*, to the majority of heavy goods traffic for four days, with a short interruption of a few hours, does that decision constitute a sufficiently serious infringement of Community law in order to establish liability on the part of the Member State under the principles of Community law, provided that the other requirements for such liability are met?

4. Is the objective of an officially authorised political demonstration, namely that of working for a healthy environment and of drawing attention to the danger to public health caused by the constant increase in the transit traffic of heavy goods vehicles, to be deemed to be of a higher order than the provisions of Community law on the free movement of goods under Article 28 EC?

5. Is there loss giving rise to a claim founded on State liability where the person incurring the loss can prove that he was in a position to earn income, in the present case from the international transport of goods by means of the heavy goods vehicles operated by him but rendered idle by the 28 hour demonstration, yet is unable to prove the loss of a specific transport journey?

6. If the reply to Question 4 is in the negative:

In order to comply with the obligation of cooperation and solidarity incumbent under Article 5 of the EC Treaty (now Article 10 EC) on national authorities, in particular the courts, and with the principle of effectiveness, must application of national rules of substantive or procedural law curtailing the ability to assert claims which are well founded under Community law, such as in the present case a claim founded on State liability, be deferred pending full elucidation of the substance of the claim at Community law, if necessary following a reference to the Court of Justice for a preliminary ruling?

Admissibility

26.

The Republic of Austria harbours doubts as to the admissibility of the present reference and submits essentially that the questions referred by the Oberlandesgericht Innsbruck are purely hypothetical and irrelevant to the determination of the dispute in the main proceedings.

27.

The legal action brought by Schmidberger, seeking to establish the liability of a Member State for breach of Community law, requires the company to adduce evidence of genuine damage resulting from the alleged breach.

28.

Before the two national courts successively seised of the dispute Schmidberger failed to establish either the existence of specific individual loss - by substantiating with specific evidence the statement that its heavy goods vehicles had to use the Brenner motorway on the days when the demonstration took place there, as part of transport operations between Germany and Italy - or, if appropriate, that it had complied with its obligation to mitigate the damage that it claims to have suffered, by explaining why it was not able to choose a route other than the one closed.

29.

In those circumstances, answers to the questions referred are not necessary in order to enable the referring court to decide the case or, at least, the request for a preliminary ruling is premature as long as the facts have not been found and relevant evidence has not been fully adduced before that court.

30.

In that regard, according to settled case-law, the procedure provided for by Article 234 EC is an instrument of cooperation between the Court of Justice and national courts by means of which the former provides the latter with interpretation of such Community law as is necessary for them to give judgment in cases upon which they are called to adjudicate (see, *inter alia*, Joined Cases C-297/88 and C-197/89 *Dzodzi* [1990] ECR I-3763, paragraph 33; Case C-231/89 *Gmurzynska-Bscher* [1990] ECR I-4003, paragraph 18; Case C-83/91 *Meilicke* [1992] ECR I-4871, paragraph 22, and Case C-413/99 *Baumbast and R* [2002] ECR I-7091, paragraph 31).

31.

In the context of that cooperation, it is for the national court seised of the dispute, which alone has direct knowledge of the facts giving rise to the dispute and must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of Community law, the Court of Justice is, in principle, bound to give a ruling (see, *inter alia*, Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 59; Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 38; Case C-153/00 *Der Weduwe* [2002] ECR I-11319, paragraph 31, and Case C-318/00 *Bacardi-Martini and Cellier des Dauphins* [2003] ECR I-905, paragraph 41).

32.

However, the Court has also held that, in exceptional circumstances, it can examine the conditions in which the case was referred to it by the national court (see, to that effect, *PreussenElektra*, cited above, paragraph 39). The spirit of cooperation which must prevail in preliminary ruling proceedings requires the national court for its part to have regard to the function entrusted to the Court of Justice, which is to contribute to the administration of justice in the Member States and not to give opinions on general or hypothetical questions (*Bosman*, paragraph 60; *Der Weduwe*, paragraph 32, and *Bacardi-Martini and Cellier des Dauphins*, paragraph 42).

33.

Thus, the Court has held that it has no jurisdiction to give a preliminary ruling on a question submitted by a national court where it is quite obvious that the interpretation or the assessment of the validity of a provision of Community law sought by that court bears no relation to the actual facts of the main action or its purpose, or where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see *Bosman*, paragraph 61, and *Bacardi-Martini and Cellier des Dauphins*, paragraph 43).

34.

In the present case, it is by no means clear that the questions referred by the national court fall within one or other of the situations referred to in the case-law cited in the preceding paragraph.

35.

The action brought by Schmidberger seeks compensation from the Republic of Austria for the damage which the alleged breach of Community law is said to have caused it, consisting in the fact that the Austrian authorities did not ban the demonstration which resulted in the Brenner motorway being closed to all traffic for a continuous period of almost 30 hours.

36.

It follows that the request for an interpretation of Community law made by the national court has undeniably arisen in the context of a genuine dispute between the parties to the main proceedings and which cannot therefore be regarded as hypothetical.

37.

Furthermore, it is apparent from the order for reference that the national court has set out in precise and detailed terms the reasons why it considers it necessary for the determination of the dispute before it to refer to the Court various questions on the interpretation of Community law including, in particular, that relating to the factors to be taken into account when taking evidence of the damage allegedly suffered by Schmidberger.

38.

Moreover, it follows from the observations submitted by the Member States in response to the notification of the order for reference and by the Commission pursuant to Article 23 of the EC Statute of the Court of Justice that the information in that order enabled them properly to state their position on all the questions submitted to the Court.

39.

It is clear from the second paragraph of Article 234 EC that it is for the national court to decide at what stage in the proceedings it is appropriate for that court to refer a question to the Court of Justice for a preliminary ruling (see Joined Cases 36/80 and 71/80 *Irish Creamery Milk Suppliers Association and Others* [1981] ECR 735, paragraph 5, and Case C-236/98 *JämO* [2000] ECR I-2189, paragraph 30).

40.

It is equally undeniable that the referring court has defined to the requisite legal standard both the factual and legal context of its request for interpretation of Community law and that it has provided the Court with all the information necessary to enable it to reply usefully to that request.

41.

Furthermore, it is logical that the referring court requests the Court, first, to determine which types of damage can be taken into consideration for the purposes of State liability for breach of Community law - and, in particular, requests it to clarify the question whether compensation is in respect only of damage in fact suffered or if it also covers loss of profit based on general estimates, and whether and to what extent the victim must try to avoid or mitigate that loss -, before that court rules on the specific evidence recognised as being relevant by the Court in the assessment of the damage in fact suffered by Schmidberger.

42.

Lastly, in the context of an action for liability on the part of a Member State, the referring court not only asks the Court about the requirement that there be damage and the forms which that may take and the detailed rules of evidence in that regard, but also considers it necessary to pose several questions on the other requirements to be met in making out a claim based on such liability and, in particular, as to

whether the conduct of the relevant national authorities in the main case constitutes a breach of Community law and whether that breach is such as to entitle the alleged victim to compensation.

43.

In the light of the foregoing, it cannot be maintained that as regards the main proceedings the Court is called upon to rule on a question which is purely hypothetical or irrelevant for the purposes of the decision which the national court is called upon to give.

44.

On the contrary, it follows from those considerations that the questions referred by that court meet an objective need for the purpose of settling the dispute before it, in the course of which it is called upon to give a decision capable of taking account of the Court's judgment, and the information provided to the latter, in particular in the order for reference, enables it to reply usefully to those questions.

45.

Consequently, the reference for a preliminary ruling made by the Oberlandesgericht Innsbruck is admissible.

The questions referred for a preliminary ruling

46.

It should be noted at the outset that the questions referred by the national court raise two distinct, albeit related, issues.

47.

First, the Court is asked to rule on whether the fact that the Brenner motorway was closed to all traffic for almost 30 hours without interruption, in circumstances such as those at issue in the main proceedings, amounts to a restriction of the free movement of goods and must therefore be regarded as a breach of Community law. Second, the questions relate more specifically to the circumstances in which the liability of a Member State may be established in respect of damage caused to individuals as a result of an infringement of Community law.

48.

On the latter question, the national court asks in particular for clarification of whether, and if so to what extent, in circumstances such as those of the case before it, the breach of Community law - if made out - is sufficiently manifest and serious to give rise to liability on the part of the Member State concerned. It also asks the Court about the nature and evidence of the damage to be compensated.

49.

Given that, logically, this second series of questions need be examined only if the first issue, as defined in the first sentence of paragraph 47 of the present judgment, is answered in the affirmative, the Court must first give a ruling on the various points raised by that issue, which is essentially the subject of the first and fourth questions.

50.

In the light of the evidence in the file of the main case sent by the referring court and the written and oral observations presented to the Court, those questions must be understood as seeking to determine whether the fact that the authorities of a Member State did not ban a demonstration with primarily environmental aims which resulted in the complete closure of a major transit route, such as the Brenner motorway, for almost 30 hours without interruption amounts to an unjustified restriction of the free movement of goods which is a fundamental principle laid down by Articles 30 and 34 of the Treaty, read together, if necessary, with Article 5 thereof.

Whether there is a restriction of the free movement of goods

51.

It should be stated at the outset that the free movement of goods is one of the fundamental principles of the Community.

52.

Thus, Article 3 of the EC Treaty (now, after amendment, Article 3 EC), inserted in the first part thereof, entitled 'Principles', provides in subparagraph (c) that for the purposes set out in Article 2 of the Treaty the activities of the Community are to include an internal market characterised by the abolition, as between Member States, of obstacles to *inter alia* the free movement of goods.

53.

The second paragraph of Article 7a of the EC Treaty (now, after amendment, Article 14 EC) provides that the internal market is to comprise an area without internal frontiers in which the free movement of goods is ensured in accordance with the provisions of the Treaty.

54.

That fundamental principle is implemented primarily by Articles 30 and 34 of the Treaty.

55.

In particular, Article 30 provides that quantitative restrictions on imports and all measures having equivalent effect are prohibited between Member States. Similarly, Article 34 prohibits, between Member States, quantitative restrictions on exports and all measures having equivalent effect.

56.

It is settled case-law since the judgment in Case 8/74 *Dassonville* [1974] ECR 837, paragraph 5) that those provisions, taken in their context, must be understood as being intended to eliminate all barriers, whether direct or indirect, actual or potential, to trade flows in intra-Community trade (see, to that effect, Case C-265/95 *Commission v France* [1997] ECR I-6959, paragraph 29).

57.

In this way the Court held in particular that, as an indispensable instrument for the realisation of a market without internal frontiers, Article 30 does not prohibit only measures emanating from the State which, in themselves, create restrictions on trade between Member States. It also applies where a Member State abstains from adopting the measures required in order to deal with obstacles to the free movement of goods which are not caused by the State (*Commission v France*, cited above, paragraph 30).

58.

The fact that a Member State abstains from taking action or, as the case may be, fails to adopt adequate measures to prevent obstacles to the free movement of goods that are created, in particular, by actions by private individuals on its territory aimed at products originating in other Member States is just as likely to obstruct intra-Community trade as is a positive act (*Commission v France*, cited above, paragraph 31).

59.

Consequently, Articles 30 and 34 of the Treaty require the Member States not merely themselves to refrain from adopting measures or engaging in conduct liable to constitute an obstacle to trade but also, when read with Article 5 of the Treaty, to take all necessary and appropriate measures to ensure that that fundamental freedom is respected on their territory (*Commission v France*, cited above, paragraph 32). Article 5 of the Treaty requires the Member States to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the Treaty and to refrain from any measures which could jeopardise the attainment of the objectives of that Treaty.

60.

Having regard to the fundamental role assigned to the free movement of goods in the Community system, in particular for the proper functioning of the internal market, that obligation upon each Member State to ensure the free movement of products in its territory by taking the measures necessary and appropriate for the purposes of preventing any restriction due to the acts of individuals applies without the need to distinguish between cases where such acts affect the flow of imports or exports and those affecting merely the transit of goods.

61.

Paragraph 53 of the judgment in *Commission v France*, cited above, shows that the case giving rise to that judgment concerned not only imports but also the transit through France of products from other Member States.

62.

It follows that, in a situation such as that at issue in the main proceedings, where the competent national authorities are faced with restrictions on the effective exercise of a fundamental freedom enshrined in the Treaty, such as the free movement of goods, which result from actions taken by individuals, they are required to take adequate steps to ensure that freedom in the Member State concerned even if, as in the main proceedings, those goods merely pass through Austria en route for Italy or Germany.

63.

It should be added that that obligation of the Member States is all the more important where the case concerns a major transit route such as the Brenner motorway, which is one of the main land links for trade between northern Europe and the north of Italy.

64.

In the light of the foregoing, the fact that the competent authorities of a Member State did not ban a demonstration which resulted in the complete closure of a major transit route such as the Brenner motorway for almost 30 hours on end is capable of restricting intra-Community trade in goods and must, therefore, be regarded as constituting a measure of equivalent effect to a quantitative restriction which is, in principle, incompatible with the Community law obligations arising from Articles 30 and 34 of the Treaty, read together with Article 5 thereof, unless that failure to ban can be objectively justified.

Whether the restriction may be justified

65.

In the context of its fourth question, the referring court asks essentially whether the purpose of the demonstration on 12 and 13 June 1998 - during which the demonstrators sought to draw attention to the threat to the environment and public health posed by the constant increase in the movement of heavy goods vehicles on the Brenner motorway and to persuade the competent authorities to reinforce measures to reduce that traffic and the pollution resulting therefrom in the highly sensitive region of the Alps - is such as to frustrate Community law obligations relating to the free movement of goods.

66.

However, even if the protection of the environment and public health, especially in that region, may, under certain conditions, constitute a legitimate objective in the public interest capable of justifying a restriction of the fundamental freedoms guaranteed by the Treaty, including the free movement of goods, it should be noted, as the Advocate General pointed out at paragraph 54 of his Opinion, that the specific aims of the demonstration are not in themselves material in legal proceedings such as those instituted by Schmidberger, which seek to establish the liability of a Member State in respect of an alleged breach of Community law, since that liability is to be inferred from the fact that the national authorities did not prevent an obstacle to traffic from being placed on the Brenner motorway.

67.

Indeed, for the purposes of determining the conditions in which a Member State may be liable and, in particular, with regard to the question whether it infringed Community law, account must be taken only of the action or omission imputable to that Member State.

68.

In the present case, account should thus be taken solely of the objective pursued by the national authorities in their implicit decision to authorise or not to ban the demonstration in question.

69.

It is apparent from the file in the main case that the Austrian authorities were inspired by considerations linked to respect of the fundamental rights of the demonstrators to freedom of expression and freedom of assembly, which are enshrined in and guaranteed by the ECHR and the Austrian Constitution.

70.

In its order for reference, the national court also raises the question whether the principle of the free movement of goods guaranteed by the Treaty prevails over those fundamental rights.

71.

According to settled case-law, fundamental rights form an integral part of the general principles of law the observance of which the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories. The ECHR has special significance in that respect (see, *inter alia*, Case C-260/89 *ERT* [1991] ECR I-2925, paragraph 41; Case C-274/99 P *Connolly v Commission* [2001] ECR I-1611, paragraph 37, and Case C-94/00 *Roquette Frères* [2002] ECR I-9011, paragraph 25).

72.

The principles established by that case-law were reaffirmed in the preamble to the Single European Act and subsequently in Article F.2 of the Treaty on European Union (*Bosman*, cited above, paragraph 79). That provision states that '[t]he Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.'

73.

It follows that measures which are incompatible with observance of the human rights thus recognised are not acceptable in the Community (see, *inter alia*, *ERT*, cited above, paragraph 41, and Case C-299/95 *Kremzow* [1997] ECR I-2629, paragraph 14).

74.

Thus, since both the Community and its Member States are required to respect fundamental rights, the protection of those rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty such as the free movement of goods.

75.

It is settled case-law that where, as in the main proceedings, a national situation falls within the scope of Community law and a reference for a preliminary ruling is made to the Court, it must provide the national courts with all the criteria of interpretation needed to determine whether that situation is compatible with the fundamental rights the observance of which the Court ensures and which derive in particular from the ECHR (see to that effect, *inter alia*, Case 12/86 *Demirel* [1987] ECR 3719, paragraph 28).

76.

In the present case, the national authorities relied on the need to respect fundamental rights guaranteed by both the ECHR and the Constitution of the Member State concerned in deciding to allow a restriction to be imposed on one of the fundamental freedoms enshrined in the Treaty.

77.

The case thus raises the question of the need to reconcile the requirements of the protection of fundamental rights in the Community with those arising from a fundamental freedom enshrined in the Treaty and, more particularly, the question of the respective scope of freedom of expression and freedom of assembly, guaranteed by Articles 10 and 11 of the ECHR, and of the free movement of goods, where the former are relied upon as justification for a restriction of the latter.

78.

First, whilst the free movement of goods constitutes one of the fundamental principles in the scheme of the Treaty, it may, in certain circumstances, be subject to restrictions for the reasons laid down in Article 36 of that Treaty or for overriding requirements relating to the public interest, in accordance with the Court's consistent case-law since the judgment in Case 120/78 *Rewe-Zentral* ('*Cassis de Dijon*') [1979] ECR 649.

79.

Second, whilst the fundamental rights at issue in the main proceedings are expressly recognised by the ECHR and constitute the fundamental pillars of a democratic society, it nevertheless follows from the express wording of paragraph 2 of Articles 10 and 11 of the Convention that freedom of expression and freedom of assembly are also subject to certain limitations justified by objectives in the public interest, in so far as those derogations are in accordance with the law, motivated by one or more of the legitimate aims under those provisions and necessary in a democratic society, that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued (see, to that effect, Case C-368/95 *Familiapress* [1997] ECR I-3689, paragraph 26, Case C-60/00 *Carpenter* [2002] ECR I-6279, paragraph 42, and Eur. Court HR, *Steel and Others v. The United Kingdom* judgment of 23 September 1998, *Reports of Judgments and Decisions* 1998-VII, § 101).

80.

Thus, unlike other fundamental rights enshrined in that Convention, such as the right to life or the prohibition of torture and inhuman or degrading treatment or punishment, which admit of no restriction, neither the freedom of expression nor the freedom of assembly guaranteed by the ECHR appears to be absolute but must be viewed in relation to its social purpose. Consequently, the exercise of those rights may be restricted, provided that the restrictions in fact correspond to objectives of general interest and do not, taking account of the aim of the restrictions, constitute disproportionate and unacceptable interference, impairing the very substance of the rights guaranteed (see, to that effect, Case C-62/90 *Commission v Germany* [1992] ECR I-2575, paragraph 23, and Case C-404/92 *P X v Commission* [1994] ECR I-4737, paragraph 18).

81.

In those circumstances, the interests involved must be weighed having regard to all the circumstances of the case in order to determine whether a fair balance was struck between those interests.

82.

The competent authorities enjoy a wide margin of discretion in that regard. Nevertheless, it is necessary to determine whether the restrictions placed upon intra-Community trade are proportionate in the light of the legitimate objective pursued, namely, in the present case, the protection of fundamental rights.

83.

As regards the main case, it should be emphasised at the outset that the circumstances characterising it are clearly distinguishable from the situation in the case giving rise to the judgment in *Commission v France*, cited above, referred to by Schmidberger as a relevant precedent in the course of its legal action against Austria.

84.

By comparison with the points of fact referred to by the Court at paragraphs 38 to 53 of the judgment in *Commission v France*, cited above, it should be noted, first, that the demonstration at issue in the main proceedings took place following a request for authorisation presented on the basis of national law and after the competent authorities had decided not to ban it.

85.

Second, because of the presence of demonstrators on the Brenner motorway, traffic by road was obstructed on a single route, on a single occasion and during a period of almost 30 hours. Furthermore, the obstacle to the free movement of goods resulting from that demonstration was limited by comparison with both the geographic scale and the intrinsic seriousness of the disruption caused in the case giving rise to the judgment in *Commission v France*, cited above.

86.

Third, it is not in dispute that by that demonstration, citizens were exercising their fundamental rights by manifesting in public an opinion which they considered to be of importance to society; it is also not in dispute that the purpose of that public demonstration was not to restrict trade in goods of a particular type or from a particular source. By contrast, in *Commission v France*, cited above, the objective pursued by the demonstrators was clearly to prevent the movement of particular products originating in Member States other than the French Republic, by not only obstructing the transport of the goods in question, but also destroying those goods in transit to or through France, and even when they had already been put on display in shops in the Member State concerned.

87.

Fourth, in the present case various administrative and supporting measures were taken by the competent authorities in order to limit as far as possible the disruption to road traffic. Thus, in particular, those authorities, including the police, the organisers of the demonstration and various motoring organisations cooperated in order to ensure that the demonstration passed off smoothly. Well before the date on which it was due to take place, an extensive publicity campaign had been launched by the media and the motoring organisations, both in Austria and in neighbouring countries, and various alternative routes had been designated, with the result that the economic operators concerned were duly informed of the traffic restrictions applying on the date and at the site of the proposed demonstration and were in a position timeously to take all steps necessary to obviate those restrictions. Furthermore, security arrangements had been made for the site of the demonstration.

88.

Moreover, it is not in dispute that the isolated incident in question did not give rise to a general climate of insecurity such as to have a dissuasive effect on intra-Community trade flows as a whole, in contrast to the serious and repeated disruptions to public order at issue in the case giving rise to the judgment in *Commission v France*, cited above.

89.

Finally, concerning the other possibilities envisaged by Schmidberger with regard to the demonstration in question, taking account of the Member States' wide margin of discretion, in circumstances such as those of the present case the competent national authorities were entitled to consider that an outright ban on the demonstration would have constituted unacceptable interference with the fundamental rights of the demonstrators to gather and express peacefully their opinion in public.

90.

The imposition of stricter conditions concerning both the site - for example by the side of the Brenner motorway - and the duration - limited to a few hours only - of the demonstration in question could have been perceived as an excessive restriction, depriving the action of a substantial part of its scope. Whilst the competent national authorities must endeavour to limit as far as possible the inevitable effects upon free movement of a demonstration on the public highway, they must balance that interest with that of the demonstrators, who seek to draw the aims of their action to the attention of the public.

91.

An action of that type usually entails inconvenience for non-participants, in particular as regards free movement, but the inconvenience may in principle be tolerated provided that the objective pursued is essentially the public and lawful demonstration of an opinion.

92.

In that regard, the Republic of Austria submits, without being contradicted on that point, that in any event, all the alternative solutions which could be countenanced would have risked reactions which would have been difficult to control and would have been liable to cause much more serious disruption to intra-Community trade and public order, such as unauthorised demonstrations, confrontation between supporters and opponents of the group organising the demonstration or acts of violence on the part of the demonstrators who considered that the exercise of their fundamental rights had been infringed.

93.

Consequently, the national authorities were reasonably entitled, having regard to the wide discretion which must be accorded to them in the matter, to consider that the legitimate aim of that demonstration could not be achieved in the present case by measures less restrictive of intra-Community trade.

94.

In the light of those considerations, the answer to the first and fourth questions must be that the fact that the authorities of a Member State did not ban a demonstration in circumstances such as those of the main case is not incompatible with Articles 30 and 34 of the Treaty, read together with Article 5 thereof.

The conditions for liability of the Member State

95.

It follows from the answer given to the first and fourth questions that, having regard to all the circumstances of a case such as that before the referring court, the competent national authorities cannot be said to have committed a breach of Community law such as to give rise to liability on the part of the Member State concerned.

96.

In those circumstances, there is no need to rule on the other questions referred concerning some of the conditions necessary for a Member State to incur liability for damage caused to individuals by that Member State's infringement of Community law.

Costs

97.

The costs incurred by the Austrian, Greek, Italian, Netherlands and Finnish Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main action, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Oberlandesgericht Innsbruck by order of 1 February 2000, hereby rules:

The fact that the authorities of a Member State did not ban a demonstration in circumstances such as those of the main case is not incompatible with Articles 30 and 34 of the EC Treaty (now, after amendment, Articles 28 EC and 29 EC), read together with Article 5 of the EC Treaty (now Article 10 EC).

Case C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*

In Case C-438/05,

REFERENCE for a preliminary ruling under Article 234 EC from the Court of Appeal (England and Wales) (Civil Division) (United Kingdom), made by decision of 23 November 2005, received at the Court on 6 December 2005, in the proceedings

International Transport Workers' Federation,

Finnish Seamen's Union,

v

Viking Line ABP,

OÜ Viking Line Eesti,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, A. Rosas, K. Lenaerts, U. Lohmus and L. Bay Larsen, Presidents of Chambers, R. Schintgen (Rapporteur), R. Silva de Lapuerta, K. Schiemann, J. Makarczyk, P. Kūris, E. Levits and A. Ó Caoimh, Judges,

Advocate General: M. Poiares Maduro,

Registrar: L. Hewlett, Principal Administrator,

[...]

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation first, of Article 43 EC, and secondly, of Council Regulation (EEC) No 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries (OJ 1986 L 378, p. 1).

2 The reference has been made in connection with a dispute between the International Transport Workers' Federation ('ITF') and the Finnish Seamen's Union (Suomen Merimies-Unioni ry, 'FSU'), on the one hand, and Viking Line ABP ('Viking') and its subsidiary OÜ Viking Line Eesti ('Viking Eesti'), on the other, concerning actual or threatened collective action liable to deter Viking from reflagging one of its vessels from the Finnish flag to that of another Member State.

Legal context

Community law

3 Article 1(1) of Regulation No 4055/86 provides:

'Freedom to provide maritime transport services between Member States and between Member States and third countries shall apply in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.'

National law

4 According to the order for reference, Article 13 of the Finnish constitution, which confers on all individuals the freedom to form trade unions and freedom of association in order to safeguard other interests, has been interpreted as allowing trade unions to initiate collective action against companies in order to defend workers' interests.

5 In Finland, however, the right to strike is subject to certain limitations. Thus, according to Finland's Supreme Court, it may not be relied on, inter alia, where the strike is *contra bonos mores* or is prohibited under national law or under Community law.

The dispute in the main proceedings and questions referred

6 Viking, a company incorporated under Finnish law, is a large ferry operator. It operates seven vessels, including the *Rosella* which, under the Finnish flag, plies the route between Tallinn (Estonia) and Helsinki (Finland).

7 FSU is a Finnish union of seamen which has about 10 000 members. The crew of the *Rosella* are members of the FSU. FSU is affiliated to the ITF, which is an international federation of transport workers' unions with its headquarters in London (United Kingdom). The ITF groups together 600 unions in 140 different States.

8 According to the order for reference, one of the principal ITF policies is its 'Flag of Convenience' ('FOC') policy. The primary objectives of this policy are, on the one hand, to establish a genuine link between the flag of the ship and the nationality of the owner and, on the other, to protect and enhance the conditions of seafarers on FOC ships. ITF considers that a vessel is registered under a flag of convenience where the beneficial ownership and control of the vessel is found to lie in a State other than the State of the flag. In accordance with the ITF policy, only unions established in the State of beneficial ownership have the right to conclude collective agreements covering the vessel concerned. The FOC campaign is enforced by boycotts and other solidarity actions amongst workers.

9 So long as the *Rosella* is under the Finnish flag, Viking is obliged under Finnish law and the terms of a collective bargaining agreement to pay the crew wages at the same level as those applicable in Finland. Estonian crew wages are lower than Finnish crew wages. The *Rosella* was running at a loss as a result of direct competition from Estonian vessels operating on the same route with lower wage costs. As an alternative to selling the vessel, Viking sought in October 2003 to reflag it by registering it in either Estonia or Norway, in order to be able to enter into a new collective agreement with a trade union established in one of those States.

10 In accordance with Finnish law, Viking gave notice of its plans to the FSU and to the crew of the *Rosella*. During meetings between the parties, FSU made clear that it was opposed to those plans.

11 On 4 November 2003, FSU sent an email to ITF which referred to the plan to reflag the *Rosella*. The email further stated that 'the *Rosella* was beneficially owned in Finland and that FSU therefore kept the right to negotiate with Viking'. FSU asked ITF to pass this information on to all affiliated unions and to request them not to enter into negotiations with Viking.

12 On 6 November 2003, ITF sent a circular ('the ITF circular') to its affiliates asking them to refrain from entering into negotiations with Viking or Viking Eesti. The affiliates were expected to follow this recommendation because of the principle of solidarity between trade unions and the sanctions which they could face if they failed to comply with that circular.

13 The manning agreement for the *Rosella* expired on 17 November 2003 and therefore FSU was, as from that date, no longer under an obligation of industrial peace under Finnish law. Consequently, it gave notice of a strike requiring Viking, on the one hand, to increase the manning on the *Rosella* by eight and, on the other, to give up its plans to reflag the *Rosella*.

14 Viking conceded the extra eight crew but refused to give up its plans to reflag.

15 FSU was still not prepared, however, to agree to a renewal of the manning agreement and, by letter of 18 November 2003, it indicated that it would only accept such renewal on two conditions: first, that Viking, regardless of a possible change of the *Rosella*'s flag, gave an undertaking that it would continue to follow Finnish law, the collective bargaining agreement, the general agreement and the manning agreement on the *Rosella* and, second, that the possible change of flag would not lead to any laying-off of employees on any Finnish flag vessel belonging to Viking, or to changes to the terms and conditions of employment without the consent of the employees. In press statements FSU justified its position by the need to protect Finnish jobs.

16 On 17 November 2003, Viking started legal proceedings before the employment tribunal (Finland) for a declaration that, contrary to the view of the FSU, the manning agreement remained binding on the parties. On the basis of its view that the manning agreement was at an end, FSU gave notice, in accordance with Finnish law on industrial dispute mediation, that it intended to commence strike action in relation to the *Rosella* on 2 December 2003.

17 On 24 November 2003, Viking learnt of the existence of the ITF circular. The following day it brought proceedings before the Court of First Instance of Helsinki (Finland) to restrain the planned strike action. A preparatory hearing date was set for 2 December 2003.

18 According to the referring court, FSU was fully aware of the fact that its principal demand, that in the event of reflagging the crew should continue to be employed on the conditions laid down by Finnish law and the applicable collective agreement, would render reflagging pointless, since the whole purpose of such reflagging was to enable Viking to reduce its wage costs. Furthermore, a consequence of reflagging the *Rosella* to Estonia would be that Viking would, at least as regards the *Rosella*, no longer be able to claim State aid which the Finnish Government granted to Finnish flag vessels.

19 In the course of conciliation proceedings, Viking gave an undertaking, at an initial stage, that the reflagging would not involve any redundancies. Since FSU nevertheless refused to defer the strike, Viking put an end to the dispute on 2 December 2003 by accepting the trade union's demands and discontinuing judicial proceedings. Furthermore, it undertook not to commence reflagging prior to 28 February 2005.

20 On 1 May 2004, the Republic of Estonia became a member of the European Union.

21 Since the *Rosella* continued to run at a loss, Viking pursued its intention to reflag the vessel to Estonia. Because the ITF circular remained in force, on account of the fact that the ITF had never withdrawn it, the request to affiliated unions from the ITF in relation to the *Rosella* consequently remained in effect.

22 On 18 August 2004, Viking brought an action before the High Court of Justice of England and Wales, Queen's Bench Division (Commercial Court) (United Kingdom), requesting it to declare that the action taken by ITF and FSU was contrary to Article 43 EC, to order the withdrawal of the ITF circular and to order FSU not to infringe the rights which Viking enjoys under Community law.

23 By decision of 16 June 2005, that court granted the form of order sought by Viking, on the grounds that the actual and threatened collective action by the ITF and FSU imposed restrictions on freedom of establishment contrary to Article 43 EC and, in the alternative, constituted unlawful restrictions on freedom of movement for workers and freedom to provide services under Articles 39 EC and 49 EC.

24 On 30 June 2005, ITF and FSU brought an appeal against that decision before the referring court. In support of their appeal they claimed, inter alia, that the right of trade unions to take collective action to preserve jobs is a fundamental right recognised by Title XI of the EC Treaty and, in particular, Article 136 EC, the first paragraph of which provides that '[t]he Community and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion'.

25 It was argued that the reference to the European Social Charter and the Community Charter of the Fundamental Social Rights of Workers incorporated a reference to the right to strike recognised by those legal

instruments. Consequently, the trade unions had the right to take collective action against an employer established in a Member State to seek to persuade him not to move part or all of his undertaking to another Member State.

26 The question therefore arises whether the Treaty intends to prohibit trade union action where it is aimed at preventing an employer from exercising his right of establishment for economic reasons. By analogy with the Court's rulings regarding Title VI of the Treaty (Case C-67/96 *Albany* [1999] ECR I-5751; Joined Cases C-180/98 to C-184/98 *Pavlov and Others* [2000] ECR I-6451; and Case C-222/98 *Van der Woude* [2000] ECR I-7111), it is argued that Title III of the Treaty and the articles relating to free movement of persons and of services do not apply to 'genuine trade union activities'.

27 In those circumstances, since it considered that the outcome of the case before it depended on the interpretation of Community law, the Court of Appeal (England and Wales) (Civil Division) decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

'Scope of the free movement provisions'

(1) Where a trade union or association of trade unions takes collective action against a private undertaking so as to require that undertaking to enter into a collective bargaining agreement with a trade union in a particular Member State which has the effect of making it pointless for that undertaking to re-flag a vessel in another Member State, does that action fall outside the scope of Article 43 EC and/or Regulation No 4055/86 by virtue of the EC's social policy including, inter alia, Title XI of the EC Treaty and, in particular, by analogy with the Court's reasoning in ... *Albany* (paragraphs 52 to 64)?

Horizontal direct effect

(2) Do Article 43 EC and/or Regulation No 4055/86 have horizontal direct effect so as to confer rights on a private undertaking which may be relied on against another private party and, in particular, a trade union or association of trade unions in respect of collective action by that union or association of unions?

Existence of restrictions on free movement

(3) Where a trade union or association of trade unions takes collective action against a private undertaking so as to require that undertaking to enter into a collective bargaining agreement with a trade union in a particular Member State, which has the effect of making it pointless for that undertaking to re-flag a vessel in another Member State, does that action constitute a restriction for the purposes of Article 43 EC and/or Regulation No 4055/86?

(4) Is a policy of an association of trade unions which provides that vessels should be flagged in the registry of the country in which the beneficial ownership and control of the vessel is situated so that the trade unions in the country of beneficial ownership of a vessel have the right to conclude collective bargaining agreements in respect of that vessel, a directly discriminatory, indirectly discriminatory or non-discriminatory restriction under Article 43 EC or Regulation No 4055/86?

(5) In determining whether collective action by a trade union or association of trade unions is a directly discriminatory, indirectly discriminatory or non-discriminatory restriction under Article 43 EC or Regulation No 4055/86, is the subjective intention of the union taking the action relevant or must the national court determine the issue solely by reference to the objective effects of that action?

Establishment/services

(6) Where a parent company is established in Member State A and intends to undertake an act of establishment by reflagging a vessel to Member State B to be operated by an existing wholly owned subsidiary in Member State B which is subject to the direction and control of the parent company:

(a) is threatened or actual collective action by a trade union or association of trade unions which would seek to render the above a pointless exercise capable of constituting a restriction on the parent company's right of establishment under Article 43, and

(b) after reflagging of the vessel, is the subsidiary entitled to rely on Regulation No 4055/86 in respect of the provision of services by it from Member State B to Member State A?

Justification

Direct discrimination

(7) If collective action by a trade union or association of trade unions is a directly discriminatory restriction under Article 43 EC or Regulation No 4055/86, can it, in principle, be justified on the basis of the public policy exception set out in Article 46 EC on the basis that:

(a) the taking of collective action (including strike action) is a fundamental right protected by Community law; and/or

(b) the protection of workers?

The policy of [ITF]: objective justification

(8) Does the application of a policy of an association of trade unions which provides that vessels should be flagged in the registry of the country in which the beneficial ownership and control of the vessel is situated so that the trade unions in the country of beneficial ownership of a vessel have the right to conclude collective bargaining agreements in respect of that vessel, strike a fair balance between the fundamental social right to take collective action and the freedom to establish and provide services, and is it objectively justified, appropriate, proportionate and in conformity with the principle of mutual recognition?

FSU's actions: objective justification

(9) Where:

– a parent company in Member State A owns a vessel flagged in Member State A and provides ferry services between Member State A and Member State B using that vessel;

– the parent company wishes to re-flag the vessel to Member State B to apply terms and conditions of employment which are lower than in Member State A;

– the parent company in Member State A wholly owns a subsidiary in Member State B and that subsidiary is subject to its direction and control;

– it is intended that the subsidiary will operate the vessel once it has been re-flagged in Member State B with a crew recruited in Member State B covered by a collective bargaining agreement negotiated with an ITF affiliated trade union in Member State B;

– the vessel will remain beneficially owned by the parent company and be bareboat chartered to the subsidiary;

– the vessel will continue to provide ferry services between Member State A and Member State B on a daily basis;

– a trade union established in Member State A takes collective action so as to require the parent and/or subsidiary to enter into a collective bargaining agreement with it which will apply terms and conditions acceptable to the union in Member State A to the crew of the vessel even after reflagging and which has the effect of making it pointless for the parent to re-flag the vessel to Member State B,

does that collective action strike a fair balance between the fundamental social right to take collective action and the freedom to establish and provide services and is it objectively justified, appropriate, proportionate and in conformity with the principle of mutual recognition?

(10) Would it make any difference to the answer to [Question] 9 if the parent company provided an undertaking to a court on behalf of itself and all the companies within the same group that they will not by reason of the reflagging terminate the employment of any person employed by them (which undertaking did not require the renewal of short term employment contracts or prevent the redeployment of any employee on equivalent terms and conditions)?'

The questions referred

Preliminary observations

28 It must be borne in mind that, in accordance with settled case-law, in the context of the cooperation between the Court and the national courts provided for in Article 234 EC, it is solely for the national court before which a dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. However, the Court has regarded itself as not having jurisdiction to give a preliminary ruling on a question submitted by a national court where it is quite obvious, inter alia, that the interpretation of Community law sought by that court bears no relation to the actual facts of the main action or its purpose or where the problem is hypothetical (see Case C-415/93 *Bosman* [1995] ECR I-4921 and Case C-350/03 *Schulte* [2005] ECR I-9215, paragraph 43).

29 In the present case, the reference for a preliminary ruling concerns the interpretation, first, of provisions of the Treaty on freedom of establishment, and secondly, of Regulation No 4055/86 applying the principle of freedom to provide services to maritime transport.

30 However, since the question on freedom to provide services can arise only after the reflagging of the *Rosella* envisaged by Viking, and since, on the date on which the questions were referred to the Court, the vessel had not yet been re-flagged, the reference for a preliminary ruling is hypothetical and thus inadmissible in so far as it relates to the interpretation of Regulation No 4055/86.

31 In those circumstances, the questions referred by the national court can be answered only in so far as they concern the interpretation of Article 43 EC.

The first question

32 By its first question, the national court is essentially asking whether Article 43 EC must be interpreted as meaning that collective action initiated by a trade union or a group of trade unions against an undertaking in order to induce that undertaking to enter into a collective agreement, the terms of which are liable to deter it from exercising freedom of establishment, falls outside the scope of that article.

33 In this regard, it must be borne in mind that, according to settled case-law, Articles 39 EC, 43 EC and 49 EC do not apply only to the actions of public authorities but extend also to rules of any other nature aimed at regulating in a collective manner gainful employment, self-employment and the provision of services (see Case 36/74 *Walrave and Koch* [1974] ECR 1405, paragraph 17; Case 13/76 *Donà* [1976] ECR 1333, paragraph 17; *Bosman*, paragraph 82; Joined Cases C-51/96 and C-191/97 *Deliège* [2000] ECR I-2549, paragraph 47; Case C-281/98 *Angonese* [2000] ECR I-4139, paragraph 31; and Case C-309/99 *Wouters and Others* [2002] ECR I-1577, paragraph 120).

34 Since working conditions in the different Member States are governed sometimes by provisions laid down by law or regulation and sometimes by collective agreements and other acts concluded or adopted by private persons, limiting application of the prohibitions laid down by these articles to acts of a public authority would risk creating inequality in its application (see, by analogy, *Walrave and Koch*, paragraph 19; *Bosman*, paragraph 84; and *Angonese*, paragraph 33).

35 In the present case, it must be stated, first, that the organisation of collective action by trade unions must be regarded as covered by the legal autonomy which those organisations, which are not public law entities, enjoy pursuant to the trade union rights accorded to them, inter alia, by national law.

36 Secondly, as FSU and ITF submit, collective action such as that at issue in the main proceedings, which may be the trade unions' last resort to ensure the success of their claim to regulate the work of Viking's employees collectively, must be considered to be inextricably linked to the collective agreement the conclusion of which FSU is seeking.

37 It follows that collective action such as that described in the first question referred by the national court falls, in principle, within the scope of Article 43 EC.

38 This view is not called into question by the various arguments put forward by FSU, ITF and certain Member States which submitted observations to the Court to support the position contrary to that set out in the previous paragraph.

39 First of all, the Danish Government submits that the right of association, the right to strike and the right to impose lock-outs fall outside the scope of the fundamental freedom laid down in Article 43 EC since, in accordance with Article 137(5) EC, as amended by the Treaty of Nice, the Community does not have competence to regulate those rights.

40 In that respect it is sufficient to point out that, even if, in the areas which fall outside the scope of the Community's competence, the Member States are still free, in principle, to lay down the conditions governing the existence and exercise of the rights in question, the fact remains that, when exercising that competence, the Member States must nevertheless comply with Community law (see, by analogy, in relation to social security, Case C-120/95 *Decker* [1998] ECR I-1831, paragraphs 22 and 23, and Case C-158/96 *Kohll* [1998] ECR I-1931, paragraphs 18 and 19; in relation to direct taxation, Case C-334/02 *Commission v France* [2004] ECR I-2229, paragraph 21, and Case C-446/03 *Marks & Spencer* [2005] ECR I-10837, paragraph 29).

41 Consequently, the fact that Article 137 EC does not apply to the right to strike or to the right to impose lock-outs is not such as to exclude collective action such as that at issue in the main proceedings from the application of Article 43 EC.

42 Next, according to the observations of the Danish and Swedish Governments, the right to take collective action, including the right to strike, constitutes a fundamental right which, as such, falls outside the scope of Article 43 EC.

43 In that regard, it must be recalled that the right to take collective action, including the right to strike, is recognised both by various international instruments which the Member States have signed or cooperated in, such as the European Social Charter, signed at Turin on 18 October 1961 – to which, moreover, express reference is made in Article 136 EC – and Convention No 87 concerning Freedom of Association and Protection of the Right to Organise, adopted on 9 July 1948 by the International Labour Organisation – and by instruments developed by those Member States at Community level or in the context of the European Union, such as the Community Charter of the Fundamental Social Rights of Workers adopted at the meeting of the European Council held in Strasbourg on 9 December 1989, which is also referred to in Article 136 EC, and the Charter of Fundamental Rights of the European Union proclaimed in Nice on 7 December 2000 (OJ 2000 C 364, p. 1).

44 Although the right to take collective action, including the right to strike, must therefore be recognised as a fundamental right which forms an integral part of the general principles of Community law the observance of which the Court ensures, the exercise of that right may none the less be subject to certain restrictions. As is reaffirmed by Article 28 of the Charter of Fundamental Rights of the European Union, those rights are to be protected in accordance with Community law and national law and practices. In addition, as is apparent from paragraph 5 of this judgment, under Finnish law the right to strike may not be relied on, in particular, where the strike is *contra bonos mores* or is prohibited under national law or Community law.

45 In that regard, the Court has already held that the protection of fundamental rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty, such as the free movement of goods (see Case C-112/00 *Schmidberger* [2003] ECR I-5659, paragraph 74) or freedom to provide services (see Case C-36/02 *Omega* [2004] ECR I-9609, paragraph 35).

46 However, in *Schmidberger* and *Omega*, the Court held that the exercise of the fundamental rights at issue, that is, freedom of expression and freedom of assembly and respect for human dignity, respectively, does not fall outside the scope of the provisions of the Treaty and considered that such exercise must be reconciled with the requirements relating to rights protected under the Treaty and in accordance with the principle of proportionality (see, to that effect, *Schmidberger*, paragraph 77, and *Omega*, paragraph 36).

47 It follows from the foregoing that the fundamental nature of the right to take collective action is not such as to render Article 43 EC inapplicable to the collective action at issue in the main proceedings.

48 Finally, FSU and ITF submit that the Court's reasoning in *Albany* must be applied by analogy to the case in the main proceedings, since certain restrictions on freedom of establishment and freedom to provide services are inherent in collective action taken in the context of collective negotiations.

49 In that regard, it should be noted that in paragraph 59 of *Albany*, having found that certain restrictions of competition are inherent in collective agreements between organisations representing employers and workers, the Court nevertheless held that the social policy objectives pursued by such agreements would be seriously undermined if management and labour were subject to Article 85(1) of the EC Treaty (now, Article 81(1) EC) when seeking jointly to adopt measures to improve conditions of work and employment.

50 The Court inferred from this, in paragraph 60 of *Albany*, that agreements concluded in the context of collective negotiations between management and labour in pursuit of such objectives must, by virtue of their nature and purpose, be regarded as falling outside the scope of Article 85(1) of the Treaty.

51 The Court must point out, however, that that reasoning cannot be applied in the context of the fundamental freedoms set out in Title III of the Treaty.

52 Contrary to the claims of FSU and ITF, it cannot be considered that it is inherent in the very exercise of trade union rights and the right to take collective action that those fundamental freedoms will be prejudiced to a certain degree.

53 Furthermore, the fact that an agreement or an activity are excluded from the scope of the provisions of the Treaty on competition does not mean that that agreement or activity also falls outside the scope of the Treaty provisions on the free movement of persons or services since those two sets of provisions are to be applied in different circumstances (see, to that effect, Case C-519/04 P *Meca-Medina and Majcen v Commission* [2006] ECR I-6991).

54 Finally, the Court has held that the terms of collective agreements are not excluded from the scope of the Treaty provisions on freedom of movement for persons (Case C-15/96 *Schöningh-Kougebetopoulou* [1998] ECR I-47; Case C-35/97 *Commission v France* [1998] ECR I-5325; and Case C-400/02 *Merida* [2004] ECR I-8471).

55 In the light of the foregoing, the answer to the first question must be that Article 43 EC is to be interpreted as meaning that, in principle, collective action initiated by a trade union or a group of trade unions against an undertaking in order to induce that undertaking to enter into a collective agreement, the terms of which are liable to deter it from exercising freedom of establishment, is not excluded from the scope of that article.

The second question

56 By that question, the referring court is asking in essence whether Article 43 EC is such as to confer rights on a private undertaking which may be relied on against a trade union or an association of trade unions.

57 In order to answer that question, the Court would point out that it is clear from its case-law that the abolition, as between Member States, of obstacles to freedom of movement for persons and freedom to provide services would be compromised if the abolition of State barriers could be neutralised by obstacles resulting from the exercise, by associations or organisations not governed by public law, of their legal autonomy (*Walrave and Koch*, paragraph 18; *Bosman*, paragraph 83; *Deliège*, paragraph 47; *Angonese*, paragraph 32; and *Wouters and Others*, paragraph 120).

58 Moreover, the Court has ruled, first, that the fact that certain provisions of the Treaty are formally addressed to the Member States does not prevent rights from being conferred at the same time on any individual who has an interest in compliance with the obligations thus laid down, and, second, that the prohibition on prejudicing a fundamental freedom laid down in a provision of the Treaty that is mandatory in nature, applies in particular to all agreements intended to regulate paid labour collectively (see, to that effect, *Case 43/75 Defrenne* [1976] ECR 455, paragraphs 31 and 39).

59 Such considerations must also apply to Article 43 EC which lays down a fundamental freedom.

60 In the present case, it must be borne in mind that, as is apparent from paragraphs 35 and 36 of the present judgment, the collective action taken by FSU and ITF is aimed at the conclusion of an agreement which is meant to regulate the work of Viking's employees collectively, and, that those two trade unions are organisations which are not public law entities but exercise the legal autonomy conferred on them, *inter alia*, by national law.

61 It follows that Article 43 EC must be interpreted as meaning that, in circumstances such as those in the main proceedings, it may be relied on by a private undertaking against a trade union or an association of trade unions.

62 This interpretation is also supported by the case-law on the Treaty provisions on the free movement of goods, from which it is apparent that restrictions may be the result of actions by individuals or groups of such individuals rather than caused by the State (see *Case C-265/95 Commission v France* [1997] ECR I-6959, paragraph 30, and *Schmidberger*, paragraphs 57 and 62).

63 The interpretation set out in paragraph 61 of the present judgment is also not called into question by the fact that the restriction at issue in the proceedings before the national court stems from the exercise of a right conferred by Finnish national law, such as, in this case, the right to take collective action, including the right to strike.

64 It must be added that, contrary to the claims, in particular, of ITF, it does not follow from the case-law of the Court referred to in paragraph 57 of the present judgment that that interpretation applies only to quasi-public organisations or to associations exercising a regulatory task and having quasi-legislative powers.

65 There is no indication in that case-law that could validly support the view that it applies only to associations or to organisations exercising a regulatory task or having quasi-legislative powers. Furthermore, it must be pointed out that, in exercising their autonomous power, pursuant to their trade union rights, to negotiate with employers or professional organisations the conditions of employment and pay of workers, trade unions participate in the drawing up of agreements seeking to regulate paid work collectively.

66 In the light of those considerations, the answer to the second question must be that Article 43 EC is capable of conferring rights on a private undertaking which may be relied on against a trade union or an association of trade unions.

The third to tenth questions

67 By those questions, which can be examined together, the national court is essentially asking the Court of Justice whether collective action such as that at issue in the main proceedings constitutes a restriction within the meaning of Article 43 EC and, if so, to what extent such a restriction may be justified.

The existence of restrictions

68 The Court must first point out, as it has done on numerous occasions, that freedom of establishment constitutes one of the fundamental principles of the Community and that the provisions of the Treaty guaranteeing that freedom have been directly applicable since the end of the transitional period. Those provisions secure the right of establishment in another Member State not merely for Community nationals but also for the companies or firms referred to in Article 48 EC (*Case 81/87 Daily Mail and General Trust* [1988] ECR 5483, paragraph 15).

69 Furthermore, the Court has considered that, even though the provisions of the Treaty concerning freedom of establishment are directed mainly to ensuring that foreign nationals and companies are treated in the host Member State in the same way as nationals of that State, they also prohibit the Member State of origin from

hindering the establishment in another Member State of one of its nationals or of a company incorporated under its legislation which also comes within the definition contained in Article 48 EC. The rights guaranteed by Articles 43 EC to 48 EC would be rendered meaningless if the Member State of origin could prohibit undertakings from leaving in order to establish themselves in another Member State (*Daily Mail and General Trust*, paragraph 16).

70 Secondly, according to the settled case-law of the Court, the definition of establishment within the meaning of those articles of the Treaty involves the actual pursuit of an economic activity through a fixed establishment in another Member State for an indefinite period and registration of a vessel cannot be separated from the exercise of the freedom of establishment where the vessel serves as a vehicle for the pursuit of an economic activity that includes fixed establishment in the State of registration (Case C-221/89 *Factortame and Others* [1991] ECR I-3905, paragraphs 20 to 22).

71 The Court concluded from this that the conditions laid down for the registration of vessels must not form an obstacle to freedom of establishment within the meaning of Articles 43 EC to 48 EC (*Factortame and Others*, paragraph 23).

72 In the present case, first, it cannot be disputed that collective action such as that envisaged by FSU has the effect of making less attractive, or even pointless, as the national court has pointed out, Viking's exercise of its right to freedom of establishment, inasmuch as such action prevents both Viking and its subsidiary, Viking Eesti, from enjoying the same treatment in the host Member State as other economic operators established in that State.

73 Secondly, collective action taken in order to implement ITF's policy of combating the use of flags of convenience, which seeks, primarily, as is apparent from ITF's observations, to prevent shipowners from registering their vessels in a State other than that of which the beneficial owners of those vessels are nationals, must be considered to be at least liable to restrict Viking's exercise of its right of freedom of establishment.

74 It follows that collective action such as that at issue in the main proceedings constitutes a restriction on freedom of establishment within the meaning of Article 43 EC.

Justification of the restrictions

75 It is apparent from the case-law of the Court that a restriction on freedom of establishment can be accepted only if it pursues a legitimate aim compatible with the Treaty and is justified by overriding reasons of public interest. But even if that were the case, it would still have to be suitable for securing the attainment of the objective pursued and must not go beyond what is necessary in order to attain it (see, inter alia, Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 37, and *Bosman*, paragraph 104).

76 ITF, supported, in particular, by the German Government, Ireland and the Finnish Government, maintains that the restrictions at issue in the main proceedings are justified since they are necessary to ensure the protection of a fundamental right recognised under Community law and their objective is to protect the rights of workers, which constitutes an overriding reason of public interest.

77 In that regard, it must be observed that the right to take collective action for the protection of workers is a legitimate interest which, in principle, justifies a restriction of one of the fundamental freedoms guaranteed by the Treaty (see, to that effect, *Schmidberger*, paragraph 74) and that the protection of workers is one of the overriding reasons of public interest recognised by the Court (see, inter alia, Joined Cases C-369/96 and C-376/96 *Arblade and Others* [1999] ECR I-8453, paragraph 36; Case C-165/98 *Mazzoleni and ISA* [2001] ECR I-2189, paragraph 27; and Joined Cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98 *Finalarte and Others* [2001] ECR I-7831, paragraph 33).

78 It must be added that, according to Article 3(1)(c) and (j) EC, the activities of the Community are to include not only an 'internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital', but also 'a policy in the social sphere'. Article 2 EC states that the Community is to have as its task, inter alia, the promotion of 'a harmonious, balanced and sustainable development of economic activities' and 'a high level of employment and of social protection'.

79 Since the Community has thus not only an economic but also a social purpose, the rights under the provisions of the Treaty on the free movement of goods, persons, services and capital must be balanced against the objectives pursued by social policy, which include, as is clear from the first paragraph of Article 136 EC, inter alia, improved living and working conditions, so as to make possible their harmonisation while improvement is being maintained, proper social protection and dialogue between management and labour.

80 In the present case, it is for the national court to ascertain whether the objectives pursued by FSU and ITF by means of the collective action which they initiated concerned the protection of workers.

81 First, as regards the collective action taken by FSU, even if that action – aimed at protecting the jobs and conditions of employment of the members of that union liable to be adversely affected by the reflagging of the *Rosella* – could reasonably be considered to fall, at first sight, within the objective of protecting workers, such a view would no longer be tenable if it were established that the jobs or conditions of employment at issue were not jeopardised or under serious threat.

82 This would be the case, in particular, if it transpired that the undertaking referred to by the national court in its 10th question was, from a legal point of view, as binding as the terms of a collective agreement and if it was of such a nature as to provide a guarantee to the workers that the statutory provisions would be complied with and the terms of the collective agreement governing their working relationship maintained.

83 In so far as the exact legal scope to be attributed to an undertaking such as that referred to in the 10th question is not clear from the order for reference, it is for the national court to determine whether the jobs or conditions of employment of that trade union's members who are liable to be affected by the reflagging of the *Rosella* were jeopardised or under serious threat.

84 If, following that examination, the national court came to the conclusion that, in the case before it, the jobs or conditions of employment of the FSU's members liable to be adversely affected by the reflagging of the *Rosella* are in fact jeopardised or under serious threat, it would then have to ascertain whether the collective action initiated by FSU is suitable for ensuring the achievement of the objective pursued and does not go beyond what is necessary to attain that objective.

85 In that regard, it must be pointed out that, even if it is ultimately for the national court, which has sole jurisdiction to assess the facts and interpret the national legislation, to determine whether and to what extent such collective action meets those requirements, the Court of Justice, which is called on to provide answers of use to the national court, may provide guidance, based on the file in the main proceedings and on the written and oral observations which have been submitted to it, in order to enable the national court to give judgment in the particular case before it.

86 As regards the appropriateness of the action taken by FSU for attaining the objectives pursued in the case in the main proceedings, it should be borne in mind that it is common ground that collective action, like collective negotiations and collective agreements, may, in the particular circumstances of a case, be one of the main ways in which trade unions protect the interests of their members (European Court of Human Rights, *Syndicat national de la police belge v Belgium*, of 27 October 1975, Series A, No 19, and *Wilson, National Union of Journalists and Others v United Kingdom* of 2 July 2002, 2002-V, § 44).

87 As regards the question of whether or not the collective action at issue in the main proceedings goes beyond what is necessary to achieve the objective pursued, it is for the national court to examine, in particular, on the one hand, whether, under the national rules and collective agreement law applicable to that action, FSU did not have other means at its disposal which were less restrictive of freedom of establishment in order to bring to a successful conclusion the collective negotiations entered into with Viking, and, on the other, whether that trade union had exhausted those means before initiating such action.

88 Secondly, in relation to the collective action seeking to ensure the implementation of the policy in question pursued by ITF, it must be emphasised that, to the extent that that policy results in shipowners being prevented from registering their vessels in a State other than that of which the beneficial owners of those vessels are nationals, the restrictions on freedom of establishment resulting from such action cannot be objectively justified. Nevertheless, as the national court points out, the objective of that policy is also to protect and improve seafarers' terms and conditions of employment.

89 However, as is apparent from the file submitted to the Court, in the context of its policy of combating the use of flags of convenience, ITF is required, when asked by one of its members, to initiate solidarity action against the beneficial owner of a vessel which is registered in a State other than that of which that owner is a national, irrespective of whether or not that owner's exercise of its right of freedom of establishment is liable to have a harmful effect on the work or conditions of employment of its employees. Therefore, as Viking argued during the hearing without being contradicted by ITF in that regard, the policy of reserving the right of collective negotiations to trade unions of the State of which the beneficial owner of a vessel is a national is also applicable where the vessel is registered in a State which guarantees workers a higher level of social protection than they would enjoy in the first State.

90 In the light of those considerations, the answer to the third to tenth questions must be that Article 43 EC is to be interpreted to the effect that collective action such as that at issue in the main proceedings, which seeks to induce an undertaking whose registered office is in a given Member State to enter into a collective work agreement with a trade union established in that State and to apply the terms set out in that agreement to the employees of a subsidiary of that undertaking established in another Member State, constitutes a restriction within the meaning of that article. That restriction may, in principle, be justified by an overriding reason of public interest, such as the protection of workers, provided that it is established that the restriction is suitable for ensuring the attainment of the legitimate objective pursued and does not go beyond what is necessary to achieve that objective.

Costs

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

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

1. **Article 43 EC is to be interpreted as meaning that, in principle, collective action initiated by a trade union or a group of trade unions against a private undertaking in order to induce that undertaking to enter into a collective agreement, the terms of which are liable to deter it from exercising freedom of establishment, is not excluded from the scope of that article.**
2. **Article 43 EC is capable of conferring rights on a private undertaking which may be relied on against a trade union or an association of trade unions.**
3. **Article 43 EC is to be interpreted to the effect that collective action such as that at issue in the main proceedings, which seeks to induce a private undertaking whose registered office is in a given Member State to enter into a collective work agreement with a trade union established in that State and to apply the terms set out in that agreement to the employees of a subsidiary of that undertaking established in another Member State, constitutes a restriction within the meaning of that article.**

That restriction may, in principle, be justified by an overriding reason of public interest, such as the protection of workers, provided that it is established that the restriction is suitable for ensuring the attainment of the legitimate objective pursued and does not go beyond what is necessary to achieve that objective.

Case C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet*

In Case C-341/05,

REFERENCE for a preliminary ruling under Article 234 EC from the Arbetsdomstolen (Sweden), made by decision of 15 September 2005, received at the Court on 19 September 2005, in the proceedings

Laval un Partneri Ltd

v

Svenska Byggnadsarbetareförbundet,

Svenska Byggnadsarbetareförbundets avd. 1, Byggettan,

Svenska Elektrikerförbundet,

THE COURT (Grand Chamber),

[...]

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 12 EC and 49 EC and Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (OJ 1997 L 18, p. 1).

2 The reference was made in the context of proceedings between Laval un Partneri Ltd ('Laval'), a company incorporated under Latvian law and having its registered office in Riga (Latvia), on the one hand, and Svenska Byggnadsarbetareförbundet (Swedish building and public works trade union, 'Byggnads'), Svenska Byggnadsarbetareförbundet avdelning 1, Byggettan (local branch No 1 of that trade union, 'Byggettan') and Svenska Elektrikerförbundet (Swedish electricians' trade union, 'Elektrikerna'), on the other, brought by Laval for the purposes of obtaining, first, a declaration that the collective action by Byggnads and Byggettan affecting all Laval's worksites and the Elektrikerna sympathy action consisting of blockading all electrical work being carried out is unlawful, second, an order that such action should cease, and, third, an order that the trade unions pay compensation for the loss suffered by Laval.

Legal context

Community law

3 Recitals 6, 13, 17 and 22 in the preamble to Directive 96/71 state:

'... the transnationalisation of the employment relationship raises problems with regard to the legislation applicable to the employment relationship; ... it is in the interests of the parties to lay down the terms and conditions governing the employment relationship envisaged;

... the laws of the Member States must be coordinated in order to lay down a nucleus of mandatory rules for minimum protection to be observed in the host country by employers who post workers to perform temporary work in the territory of a Member State where the services are provided; ... such coordination can be achieved only by means of Community law;

... the mandatory rules for minimum protection in force in the host country must not prevent the application of terms and conditions of employment which are more favourable to workers;

... this Directive is without prejudice to the law of the Member States concerning collective action to defend the interests of trades and professions’.

4 Article 1 of Directive 96/71 provides:

‘1. This Directive shall apply to undertakings established in a Member State which, in the framework of the transnational provision of services, post workers, in accordance with paragraph 3, to the territory of a Member State.

...

3. This Directive shall apply to the extent that the undertakings referred to in paragraph 1 take one of the following transnational measures:

(a) ...

or

(b) post workers to an establishment or to an undertaking owned by the group in the territory of a Member State, provided there is an employment relationship between the undertaking making the posting and the worker during the period of posting

...’

5 Article 3 of that directive provides:

‘Terms and conditions of employment

1. Member States shall ensure that, whatever the law applicable to the employment relationship, the undertakings referred to in Article 1(1) guarantee workers posted to their territory the terms and conditions of employment covering the following matters which, in the Member State where the work is carried out, are laid down:

– by law, regulation or administrative provision,

and/or

– by collective agreements or arbitration awards which have been declared universally applicable within the meaning of paragraph 8, in so far as they concern the activities referred to in the Annex:

(a) maximum work periods and minimum rest periods;

(b) minimum paid annual holidays;

(c) the minimum rates of pay, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes;

(d) the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings;

(e) health, safety and hygiene at work;

- (f) protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people;
- (g) equality of treatment between men and women and other provisions on non-discrimination.

For the purposes of this directive, the concept of minimum rates of pay referred to in paragraph 1(c) is defined by the national law and/or practice of the Member State to whose territory the worker is posted.

...

7. Paragraphs 1 to 6 shall not prevent application of terms and conditions of employment which are more favourable to workers.

Allowances specific to the posting shall be considered to be part of the minimum wage, unless they are paid in reimbursement of expenditure actually incurred on account of the posting, such as expenditure on travel, board and lodging.

8. "Collective agreements or arbitration awards which have been declared universally applicable" means collective agreements or arbitration awards which must be observed by all undertakings in the geographical area and in the profession or industry concerned.

In the absence of a system for declaring collective agreements or arbitration awards to be of universal application within the meaning of the first subparagraph, Member States may, if they so decide, base themselves on:

- collective agreements or arbitration awards which are generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned,

and/or

- collective agreements which have been concluded by the most representative employers' and labour organisations at national level and which are applied throughout national territory,

provided that their application to the undertakings referred to in Article 1(1) ensures equality of treatment on matters listed in the first subparagraph of paragraph 1 of this Article between those undertakings and the other undertakings referred to in this subparagraph which are in a similar position.

Equality of treatment, within the meaning of this Article, shall be deemed to exist where national undertakings in a similar position:

- are subject, in the place in question or in the sector concerned, to the same obligations as posting undertakings as regards the matters listed in the first subparagraph of paragraph 1, and
- are required to fulfil such obligations with the same effects.

...

10. This Directive shall not preclude the application by Member States, in compliance with the Treaty, to national undertakings and to the undertakings of other States, on a basis of equality of treatment, of:

- terms and conditions of employment on matters other than those referred to in the first subparagraph of paragraph 1 in the case of public policy provisions;
- terms and conditions of employment laid down in the collective agreements or arbitration awards within the meaning of paragraph 8 and concerning activities other than those referred to in the Annex.'

6 According to Article 4 of Directive 96/71:

‘Cooperation on information

1. For the purposes of implementing this directive, Member States shall, in accordance with national legislation and/or practice, designate one or more liaison offices or one or more competent national bodies.
2. Member States shall make provision for cooperation between the public authorities which, in accordance with national legislation, are responsible for monitoring the terms and conditions of employment referred to in Article 3. Such cooperation shall in particular consist in replying to reasoned requests from those authorities for information on the transnational hiring-out of workers, including manifest abuses or possible cases of unlawful transnational activities.

The Commission and the public authorities referred to in the first subparagraph shall cooperate closely in order to examine any difficulties which might arise in the application of Article 3(10).

Mutual administrative assistance shall be provided free of charge.

3. Each Member State shall take the appropriate measures to make the information on the terms and conditions of employment referred to in Article 3 generally available.
4. Each Member State shall notify the other Member States and the Commission of the liaison offices and/or competent bodies referred to in paragraph 1.’

National law

The transposition of Directive 96/71

7 It is apparent from the Court’s file that Sweden does not have a system for declaring collective agreements universally applicable, and, in order to avoid the creation of discriminatory situations, Swedish law does not require foreign undertakings to apply Swedish collective agreements, since not all Swedish employers are bound by a collective agreement.

8 Directive 96/71 was transposed in Sweden by the Law on the posting of workers (lag om utstationering av arbetstagare (1999:678) (‘Law on the posting of workers’)). According to the procedural documents, terms and conditions of employment applicable to posted workers in relation to Article 3(1), first subparagraph, (a), (b) and (d) to (g) of Directive 96/71 are laid down by law within the meaning of the first indent of the first subparagraph of Article 3(1) of the directive. The Swedish legislation does not provide, however, for minimum rates of pay as referred to in the Article 3(1), first subparagraph, (c).

9 It is clear from the file that the liaison office (Arbetsmiljöverket, ‘the liaison office’), set up in accordance with Article 4(1) of Directive 96/71, is responsible, inter alia, for informing interested persons of the existence of collective agreements that may be applicable in the event of workers being posted to Sweden and for referring such interested persons to the parties to the collective agreement for further information.

The right to take collective action

10 Chapter 2 of the Swedish Basic Law (Regeringsformen) sets out the freedoms and fundamental rights enjoyed by citizens. Under Article 17 thereof, workers’ associations, employers and employers’ associations have the right to take collective action, unless otherwise provided by law or agreement.

11 The Law on workers’ participation in decisions (Medbestämmandelagen, ‘the MBL’) of 10 June 1976 lays down rules applicable to the right of association and of negotiation, collective agreements, mediation of collective labour disputes and the obligation of social peace, and contains provisions restricting the right of trade unions to take collective action.

12 It is apparent from Article 41 of the MBL that there is a mandatory social truce between employers and workers bound by a collective agreement and it is prohibited, inter alia, to take collective action with the aim of

obtaining amendments to the agreement. However, collective action is authorised where management and labour have not entered into a collective agreement between themselves.

13 Article 42 of the MBL provides:

‘Employers’ or workers’ associations shall not be entitled to organise or encourage illegal collective action in any way whatsoever. Nor shall they be entitled to participate in any illegal collective action, by providing support or in any other way. An association which is itself bound by a collective agreement shall also, in the event of collective action which its members are preparing to take or are taking, seek to prevent such action or help to bring it to an end.

If any illegal collective action is taken, third parties shall be prohibited from participating in it.

The provisions of the first two sentences of the first paragraph shall apply only if an association takes collective action by reason of terms and conditions of employment falling directly within the scope of the present Law’.

14 As the case-law on the first paragraph of Article 42 of the MBL, it is prohibited to take collective action with the aim of having a collective agreement between other parties set aside or amended. In the ‘*Britannia*’ judgment (1989, No 120), the Arbetsdomstolen held that that prohibition extends to collective action taken in Sweden in order to have a collective agreement concluded between foreign parties in a workplace abroad set aside or amended, if such collective action is prohibited by the foreign legislation applicable to the signatories to that collective agreement.

15 By the ‘Lex Britannia’, which entered into force on 1 July 1991, the legislature sought to reduce the scope of the principle expounded in the *Britannia* judgment. The Lex Britannia consists of three provisions inserted into the MBL, namely Articles 25a, 31a and the third paragraph of Article 42.

16 It is apparent from the explanations provided by the national court that, since the introduction of the third paragraph of Article 42 of the MBL, collective action against a foreign employer carrying out temporary activities in Sweden is no longer prohibited where, considered as a whole, the particular situation suggests that the link with that Member State is too tenuous for the MBL to be deemed to apply directly to the terms and conditions of employment in question.

The collective agreement for the building sector

17 Byggnads is a trade union which groups together workers in the construction sector in Sweden. According to Byggnads’ observations, in 2006, it comprised 31 local sections, including Byggettan, and had a membership of 128 000, 95 000 being of working age. Its membership included carpenters and builders, masons, parquet layers, workers in the construction and road sector, and plumbers. Around 87% of building sector workers were affiliated to that trade union.

18 A collective agreement was entered into between, on the one hand, Byggnads, in its capacity as the central organisation representing building workers, and the central organisation for employers in the construction sector (Sveriges Bygginindustrier) (‘the collective agreement for the building sector’).

19 The collective agreement for the building sector contains specific rules relating to working time and annual leave, matters in which collective agreements may depart from the legislative provisions. In addition, the agreement includes provisions relating to temporary unemployment and waiting time, reimbursement of travelling expenses and subsistence allowances, employment protection, training leave and training.

20 Being a party to the collective agreement for the building sector also requires the undertakings concerned to accept a number of pecuniary obligations. Thus, they are required to pay to Byggettan a sum equal to 1.5% of total gross wages for the purposes of the pay review which that section of the trade union carries out, and to the insurance company, FORA, sums representing first, 0.8% of total gross wages for the purposes of a charge ‘Tilläggsören’ [penny supplement] or ‘special building supplement’, and, second, a further 5.9% for the purposes of a number of insurance premiums.

21 The 'tilläggsören' or 'special building supplement' is intended to finance group life insurance contracts, contingency contracts and insurance contracts covering accidents occurring outside working hours, the research fund for Swedish building undertakings (Svenska Byggbranschens Utvecklingsfond), the Galaxen organisation, managed by employers and which has as its objective the adaptation of work places for persons with reduced mobility and the re-training of such persons, the promotion of training development in building trades and administrative and management costs.

22 The various insurance contracts proposed by FORA guarantee workers supplementary retirement insurance, payment of health benefits, unemployment benefits, compensation for accidents at work, and financial assistance for survivors in the event of the death of the worker.

23 After signing the collective agreement for the building sector, employers, including those who post workers to Sweden, are, in principle, bound by all the terms of that agreement, although some of those rules are applicable on a case-by-case basis according to, in essence, the nature of the site and the way in which the work is carried out.

Determination of wages

24 It is apparent from the observations of the Swedish Government that, in Sweden, employees' remuneration is decided on by management and labour by way of collective negotiation. Generally, collective agreements do not provide for a minimum wage as such. The lowest level of pay appearing in numerous collective agreements is aimed at employees without qualifications or work experience, which means that, as a general rule, it concerns only a very small number of persons. As regards other employees, their pay is determined by way of negotiations conducted at the place of work, having regard to the qualifications of the particular employee and the tasks performed by the latter.

25 According to the observations submitted in this case by the three defendant trade unions, in the collective agreement for the building sector, performance-related pay follows the usual model of remuneration in the construction sector. The rules on performance-related pay require new pay agreements to be concluded in respect of each construction project. It is open to the employers and the local branch of the trade union, however, to agree on the application of an hourly wage in respect of a specific site. No system of monthly wages is applicable to the type of workers concerned in the main proceedings.

26 According to those trade unions, negotiations on pay are conducted in the context of a social truce which must follow the conclusion of a collective agreement. The agreement on pay is concluded, in principle, at local level between the trade union and the employer. If management and labour fail to reach an agreement at this level, negotiations on pay are centralised, at which point Byggnads acts as the principal party on the side of the employees. If management and labour still do not reach an agreement in such negotiations, the basic wage is then determined according to the 'fall-back clause'. According to those trade unions, the 'fall-back' wage, which in fact represents only a negotiating mechanism of last resort, and does not constitute a minimum wage, amounted to SEK 109 approximately (EUR 12) per hour for the second half of 2004.

The dispute in the main proceedings

27 It is apparent from the order of reference that Laval is a company incorporated under Latvian law, whose registered office is in Riga. Between May and December 2004, it posted around 35 workers to Sweden to work on building sites operated by L&P Baltic Bygg AB ('Baltic'), a company incorporated under Swedish law whose entire share capital was held by Laval until the end of 2003, inter alia, for the purposes of the construction of school premises in Vaxholm.

28 Laval, which had signed, on 14 September and 20 October 2004, in Latvia, collective agreements with the Latvian building sector's trade union, was not bound by any collective agreement entered into with Byggnads, Byggettan or Elektrikerna, none of whose members were employed by Laval. Around 65% of the Latvian workers concerned were members of the building workers' trade union in their State of origin.

29 It is clear from the file that, in June 2004, contacts were established between Byggettan, on the one hand, and Baltic and Laval, on the other, and negotiations were begun with a view to Laval's signing the collective agreement for the building sector. Laval asked for wages and other terms and conditions of employment to be

defined in parallel with the negotiations, so that the level of pay and terms and conditions of employment would already be fixed by the time that agreement was signed. Byggettan agreed to this request, even though, generally, the negotiation of a collective agreement needs to have been completed before discussions on wages and other terms and conditions of employment are entered into in the framework of the mandatory social truce. Byggettan refused to allow the introduction of a system of monthly wages, but did agree to Laval's proposal on the principle of an hourly wage.

30 According to the order for reference, during the negotiations held on 15 September 2004, Byggettan had demanded that Laval, first, sign the collective agreement for the building sector in respect of the Vaxholm site, and secondly, guarantee that the posted workers would receive an hourly wage of SEK 145 (approximately EUR 16). That hourly wage was based on statistics on wages for the Stockholm (Sweden) region for the first quarter of 2004, relating to professionally-qualified builders and carpenters. Byggettan declared that it was prepared to take collective action forthwith in the event that Laval failed to agree to this.

31 According to the documents on the file, during the procedure before the Arbedstomstolen, Laval stated that it would pay its workers a monthly wage of SEK 13 600 (approximately EUR 1 500), which would be supplemented by benefits in kind in respect of meals, accommodation and travel amounting to SEK 6 000 (approximately EUR 660) per month.

32 If the collective agreement for the building sector had been signed, Laval would have been bound, in principle, by all its terms, including those relating to the pecuniary obligations to Byggettan and FORA set out in paragraph 20 of this judgment. A proposal to subscribe to insurance contracts with FORA was made to Laval by way of a declaration form sent to it in December 2004.

33 Since those negotiations were not successful, Byggettan requested Byggnads to take measures to initiate the collective action against Laval announced at the meeting of 15 September 2004. Notice was given in October 2004.

34 Blockading ('blockad') of the Vaxholm building site began on 2 November 2004. The blockading consisted, inter alia, of preventing the delivery of goods onto the site, placing pickets and prohibiting Latvian workers and vehicles from entering the site. Laval asked the police for assistance but they explained that since the collective action was lawful under national law they were not allowed to intervene or to remove physical obstacles blocking access to the site.

35 At the end of November 2004, Laval spoke to the liaison office referred to in paragraph 9 above in order to obtain information on the terms and conditions of employment which it had to apply in Sweden, on whether or not there was a minimum wage and on the nature of any contributions which it had to pay. By letter of 2 December 2004, the liaison office's head of legal affairs informed Laval that it was required to apply the provisions to which the law on the posting of workers refers, that it was for management and labour to agree on wage issues, that the minimum requirements under the collective agreements also applied to foreign posted workers, and that, if a foreign employer was having to pay double contributions, the matter could be brought before the courts. In order to ascertain what provisions under the agreements were applicable, Laval had to speak to management and labour in the sector concerned.

36 At the mediation meeting arranged on 1 December 2005 and at the conciliation hearing held before the Arbetsdomstolen on 20 December 2005, Laval was requested by Byggettan to sign the collective agreement for the building sector before the issue of wages was dealt with. If Laval had accepted that proposal, the collective action would have ceased immediately, and the social truce, which would have allowed negotiations on wages to begin, would have come into effect. Laval, however, refused to sign the agreement, since it was not possible for it to know in advance what conditions would be imposed on it in relation to wages.

37 In December 2004, the collective action directed against Laval intensified. On 3 December 2004, Elektrikerna initiated sympathy action. That measure had the effect of preventing Swedish undertakings belonging to the organisation of electricians' employers from providing services to Laval. At Christmas, the workers posted by Laval went back to Latvia and did not return to the site in question.

38 In January 2005, other trade unions announced sympathy actions, consisting of a boycott of all Laval's sites in Sweden, with the result that the undertaking was no longer able to carry out its activities in that Member State.

In February 2005, the town of Vaxholm requested that the contract between it and Baltic be terminated, and on 24 March 2005 the latter was declared bankrupt.

The questions referred

39 On 7 December 2004, Laval commenced proceedings before the Arbetsdomstolen against Byggnads, Byggettan and Elektrikerna, seeking a declaration that both the blockading and the sympathy action affecting all its worksites were illegal and an order that such action should cease. It also sought an order that the trade unions pay compensation for the damage suffered. By decision of 22 December 2004, the national court dismissed Laval's application for an interim order that the collective action should be brought to an end.

40 Since it wished to ascertain whether Articles 12 EC and 49 EC and Directive 96/71 preclude trade unions from attempting, by means of collective action, to force a foreign undertaking which posts workers to Sweden to apply a Swedish collective agreement, the Arbetsdomstolen decided on 29 April 2005 to make a reference to the Court of Justice for a preliminary ruling. In its order for reference, of 15 September 2005, the national court refers the following questions for a preliminary ruling:

'(1) Is it compatible with rules of the EC Treaty on the freedom to provide services and the prohibition of any discrimination on the grounds of nationality and with the provisions of Directive 96/71/EC ... for trade unions to attempt, by means of collective action in the form of a blockade ('blockad'), to force a foreign provider of services to sign a collective agreement in the host country in respect of terms and conditions of employment, such as that described in the decision of the Arbetsdomstolen [of 29 April 2005 (collective agreement for the building sector)], if the situation in the host country is such that the legislation to implement Directive 96/71 has no express provisions concerning the application of terms and conditions of employment in collective agreements?

(2) The [MBL] prohibits a trade union from taking collective action with the intention of circumventing a collective agreement concluded by other parties. That prohibition applies, however, pursuant to a special provision contained in part of the law known as the "Lex Britannia", only where a trade union takes collective action in relation to conditions of work to which the [MBL] is directly applicable, which means in practice that the prohibition is not applicable to collective action against a foreign undertaking which is temporarily active in Sweden and which brings its own workforce. Do the rules of the EC Treaty on the freedom to provide services and the prohibition of discrimination on grounds of nationality and the provisions of Directive 96/71 preclude application of the latter rule – which, together with other parts of the Lex Britannia, mean in practice that Swedish collective agreements become applicable and take precedence over foreign collective agreements already concluded – to collective action in the form of a blockade taken by Swedish trade unions against a foreign temporary provider of services in Sweden?'

41 By order of the President of the Court of Justice of 15 November 2005, the application for a ruling to be given in this case under the accelerated procedure provided for in the first paragraph of Article 104a of the Rules of Procedure was dismissed.

Admissibility

42 Byggnads, Byggettan and Elektrikerna challenge the admissibility of the reference for a preliminary ruling.

43 First of all, they claim that there is no link between the questions referred and the facts of the case in the main proceedings. The national court asks the Court of Justice to interpret provisions relating to freedom to provide services and Directive 96/71, although Laval is established in Sweden, in accordance with Article 43 EC, through its subsidiary, Baltic, in which it held 100% of the share capital until the end of 2003. Since the share capital of Laval and of Baltic were held by the same persons, and those companies had the same representatives and used the same trademark, they should be regarded as one and the same economic entity from the point of view of Community law, even though they constitute two separate legal persons. Therefore, Laval was under an obligation to pursue its activity in Sweden under the conditions laid down for its own nationals by the legislation of that Member State, for the purposes of the second paragraph of Article 43 EC.

44 Secondly, they submit that the purpose of the dispute in the main proceedings is to enable Laval to circumvent Swedish law and, for that reason, the dispute, at least in part, is artificial. Laval, whose activity consists of placing, on a temporary basis, staff of Latvian origin with companies which carry on their activities on the

Swedish market, is seeking to escape all the obligations under Swedish legislation and rules relating to collective agreements and, by relying on the provisions of the Treaty on services and on Directive 96/71, is making an improper attempt to take advantage of the possibilities offered by Community law.

45 In this regard, it must be recalled that, in proceedings under Article 234 EC, which are based on a clear separation of functions between the national courts and the Court of Justice, any assessment of the facts in the case is a matter for the national court. Similarly, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of Community law, the Court is in principle bound to give a ruling (see, *inter alia*, Case C-326/00 *IKA* [2003] ECR I-1703, paragraph 27; Case C-145/03 *Keller* [2005] ECR I-2529, paragraph 33, and Case C-419/04 *Conseil général de la Vienne* [2006] ECR I-5645, paragraph 19).

46 Nevertheless, the Court has also held that, in exceptional circumstances, it can examine the conditions in which the case was referred to it by the national court, in order to confirm its own jurisdiction (see, to that effect, Case 244/80 *Foglia* [1981] ECR 3045, paragraph 21). The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, *inter alia*, Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 39; Case C-390/99 *Canal Satélite Digital* [2002] ECR I-607, paragraph 19, and *Conseil général de la Vienne*, paragraph 20).

47 Furthermore, it must be borne in mind that the Court must take account, under the division of jurisdiction between the Community judicature and the national courts, of the factual and legislative context, as described in the order for reference, in which the questions put to it are set (see, *inter alia*, Case C-475/99 *Ambulanz Glöckner* [2001] ECR I-8089, paragraph 10, and Case C-136/03 *Dörr and Ünal* [2005] ECR I-4759, paragraph 46, *Conseil général de la Vienne*, paragraph 24).

48 In this case, as the Advocate General pointed out in paragraph 97 of his Opinion, the national court seeks an interpretation of Articles 12 EC and 49 EC, and of the provisions of Directive 96/71 concerning the posting of workers in the framework of the provision of services. It is apparent from the order for reference that those questions have been submitted in the context of the dispute between Laval and Byggnads, Byggettan and Elektrikerna concerning collective action taken by the latter following Laval's refusal to sign the collective agreement for the building sector, that the dispute concerns the terms and conditions of employment applicable to Latvian workers posted by Laval to a building site in Sweden, the work being carried out by an undertaking belonging to the Laval group, and that, following collective action and suspension of the work, the posted workers returned to Latvia.

49 Accordingly, it is clear that the questions referred do have a bearing on the subject-matter of the case in the main proceedings, as described by the national court, and that the factual context in which the questions put to it are set does not support the view that the dispute in question is artificial.

50 It follows that the reference for a preliminary ruling is admissible.

The first question

51 By its first question, the national court is asking whether it is compatible with rules of the EC Treaty on the freedom to provide services and the prohibition of any discrimination on the grounds of nationality and with the provisions of Directive 96/71/EC, for trade unions to attempt, by means of collective action in the form of a blockade, to force a foreign provider of services to sign a collective agreement in the host country in respect of terms and conditions of employment, such as the collective agreement for the building sector, if the situation in the host country is characterised by the fact that the legislation to implement that directive has no express provision concerning the application of terms and conditions of employment in collective agreements.

52 It is clear from the order of reference that the collective action initiated by Byggnads and Byggettan was motivated by Laval's refusal to guarantee its workers posted in Sweden the hourly wage demanded by those trade

unions, even though that Member State does not provide for minimum rates of pay, and Laval's refusal to sign the collective agreement for the building sector, some terms of which lay down, in relation to certain matters referred to in Article 3(1), first subparagraph, (a) to (g) of Directive 96/71, more favourable conditions than those resulting from the relevant legislative provisions, while other terms relate to matters not referred to in that article.

53 Accordingly, the national court's first question must be understood as asking, in essence, whether Articles 12 EC and 49 EC, and Directive 96/71, are to be interpreted as precluding a trade union, in a Member State in which the terms and conditions of employment concerning the matters referred to in Article 3(1), first subparagraph, (a) to (g) of that directive, save for minimum rates of pay, are contained in legislative provisions, from attempting, by means of collective action in the form of blockading sites such as that at issue in the main proceedings, to force a provider of services established in another Member State to enter into negotiations with it on the rates of pay for posted workers, and to sign a collective agreement, the terms of which lay down, as regards some of those matters, more favourable conditions than those resulting from the relevant legislative provisions, while other terms relate to matters not referred to in Article 3 of the directive.

The relevant provisions of Community law

54 In order to ascertain the provisions of Community law applicable to a case such as that in the main proceedings, it must be noted that, according to the settled case-law of the Court, Article 12 EC, which lays down the general principle of the prohibition of discrimination on grounds of nationality, applies independently only to situations governed by Community law for which the Treaty lays down no specific prohibition of discrimination (see Case C-100/01 *Oteiza Olazabal* [2002] ECR I-10981, paragraph 25, and Case C-387/01 *Weigel* [2004] ECR I-4981, paragraph 57).

55 So far as the freedom to provide services is concerned, that principle was given specific expression and effect by Article 49 EC (Case C-22/98 *Becu and Others* [1999] ECR I-5665, paragraph 32, and Case C-55/98 *Vestergaard* [1999] ECR I-7641, paragraph 17). It is for that reason unnecessary to rule on Article 12 EC.

56 As regards the temporary posting of workers to another Member State so that they can carry out construction work or public works in the context of services provided by their employer, it is clear from the settled case-law of the Court that Articles 49 EC and 50 EC preclude a Member State from prohibiting a person providing services established in another Member State from moving freely on its territory with all his staff and also preclude that Member State from making the movement of staff in question subject to more restrictive conditions. To impose such conditions on the person providing services established in another Member State discriminates against that person in relation to his competitors established in the host country who are able to use their own staff without restrictions, and moreover affects his ability to provide the service (Case C-113/89 *Rush Portuguesa* [1990] ECR I-1417, paragraph 12).

57 Conversely, Community law does not preclude Member States from applying their legislation, or collective labour agreements entered into by management and labour relating to minimum wages, to any person who is employed, even temporarily, within their territory, no matter in which country the employer is established (see, in particular, Joined Cases 62/81 and 63/81 *Seco and Desquenne & Giral* [1982] ECR 223, paragraph 14, and Case C-164/99 *Portugaia Construções* [2002] ECR I-787, paragraph 21). The application of such rules must, however, be appropriate for securing the attainment of the objective which they pursue, that is, the protection of posted workers, and must not go beyond what is necessary in order to attain that objective (see, to that effect, *inter alia*, Joined Cases C-369/96 and C-376/96 *Arblade and Others* [1999] ECR I-8453, paragraph 35 and Case C-341/02 *Commission v Germany* [2005] ECR I-2733, paragraph 24).

58 In that context, the Community legislature adopted Directive 96/71, with a view, as is clear from recital 6 in the preamble to that directive, to laying down, in the interests of the employers and their personnel, the terms and conditions governing the employment relationship where an undertaking established in one Member State posts workers on a temporary basis to the territory of another Member State for the purposes of providing a service.

59 It follows from recital 13 to Directive 96/71 that the laws of the Member States must be coordinated in order to lay down a nucleus of mandatory rules for minimum protection to be observed in the host country by employers who post workers there.

60 Nevertheless, Directive 96/71 did not harmonise the material content of those mandatory rules for minimum protection. That content may accordingly be freely defined by the Member States, in compliance with the Treaty and the general principles of Community law (Case C-490/04 *Commission v Germany* [2007] ECR I-0000, paragraph 19).

61 Consequently, since the facts at issue in the main proceedings, as described in the order of reference, occurred in 2004, that is to say, on a date subsequent to the expiry of the period allowed to the Member States for transposing Directive 96/71, that date being fixed for 16 December 1999, and since those facts fall within the scope of that directive, the first question must be examined with regard to the provisions of that directive interpreted in the light of Article 49 EC (Case C-60/03 *Wolff & Müller* [2004] ECR I-9553, paragraphs 25 to 27 and 45), and, where appropriate, with regard to the latter provision itself.

The possibilities available to the Member States for determining the terms and conditions of employment applicable to posted workers, including minimum rates of pay

62 In the context of the procedure established by Article 234 EC providing for cooperation between national courts and the Court of Justice, and in order to provide the national court with an answer which will be of use to it and enable it to determine the case before it (C-334/95 *Krüger* [1997] ECR I-4517, paragraph 22; C-88/99 *Roquette Frères* [2000] ECR I-10465, paragraph 18, and Joined Cases C-393/04 and C-41/05 *Air Liquide Industries Belgium* [2006] ECR I-5293, paragraph 23), it is appropriate to examine the possibilities available to the Member States for determining the terms and conditions of employment covering the matters referred to in Article 3(1), first subparagraph, (a) to (g), including minimum rates of pay, which undertakings are to guarantee workers they post in the framework of the transnational provision of services.

63 It is clear from both the order for reference and the observations submitted in the course of the present proceedings that underlying the dispute is, first, as regards the determination of the terms and conditions of the employment of posted workers relating to those matters, the fact that minimum rates of pay constitute the only term of employment which, in Sweden, is not laid down in accordance with one of the means provided for in Directive 96/71 and, second, the requirement imposed on Laval to negotiate with trade unions in order to ascertain the wages to be paid to its workers and to sign the collective agreement for the building sector.

64 According to the first and second indents of the first subparagraph of Article 3(1) of Directive 96/71, the terms and conditions of employment covering the matters referred to in (a) to (g) thereof are established, in relation to the transnational provision of services in the construction sector, either by law, regulation or administrative provision, or by collective agreements or arbitration awards which have been declared universally applicable. Collective agreements and arbitration awards for the purposes of that provision are those which must be observed by all undertakings in the geographical area and in the profession or industry concerned.

65 The second subparagraph of Article 3(8) of Directive 96/71 also gives Member States the possibility, in the absence of a system for declaring collective agreements or arbitration awards to be of universal application, to base themselves on those which are generally applicable to all similar undertakings in the industry concerned or those which have been concluded by the most representative employers' and labour organisations at national level and which are applied throughout the national territory.

66 It is clear from the wording of that provision that recourse to the latter possibility requires, first, that the Member State must so decide, and second, that the application of collective agreements to undertakings which post workers should guarantee equality of treatment in the matters listed in Article 3(1), first subparagraph, (a) to (g) of Directive 96/71 between the latter undertakings and national undertakings in the profession or industry concerned which are in a similar position. Equality of treatment, within the meaning of Article 3(8) of the directive, is deemed to exist where national undertakings are subject to the same obligations, as regards those matters, as posting undertakings, and where each are required to fulfil such obligations with the same effects.

67 It is common ground that, in Sweden, the terms and conditions of employment covering the matters listed in Article 3(1), first subparagraph, (a) to (g) of Directive 96/71, save for minimum rates of pay, have been laid down by law. It is also not disputed that the collective agreements have not been declared universally applicable, and that that Member State has not made use of the possibility provided for in the second subparagraph of Article 3(8) of that directive.

68 It must be noted, in this respect, that since the purpose of Directive 96/71 is not to harmonise systems for establishing terms and conditions of employment in the Member States, the latter are free to choose a system at the national level which is not expressly mentioned among those provided for in that directive, provided that it does not hinder the provision of services between the Member States.

69 It is clear from the file that the national authorities in Sweden have entrusted management and labour with the task of setting, by way of collective negotiations, the wage rates which national undertakings are to pay their workers and that, as regards undertakings in the construction sector, such a system requires negotiation on a case-by-case basis, at the place of work, having regard to the qualifications and tasks of the employees concerned.

70 As regards the requirements as to pay which can be imposed on foreign service providers, it should be recalled that the first subparagraph of Article 3(1) of Directive 96/71 relates only to minimum rates of pay. Therefore, that provision cannot be relied on to justify an obligation on such service providers to comply with rates of pay such as those which the trade unions seek in this case to impose in the framework of the Swedish system, which do not constitute minimum wages and are not, moreover, laid down in accordance with the means set out in that regard in Article 3(1) and (8) of the directive.

71 It must therefore be concluded at this stage that a Member State in which the minimum rates of pay are not determined in accordance with one of the means provided for in Article 3(1) and (8) of Directive 96/71 is not entitled, pursuant to that directive, to impose on undertakings established in other Member States, in the framework of the transnational provision of services, negotiation at the place of work, on a case-by-case basis, having regard to the qualifications and tasks of the employees, so that the undertakings concerned may ascertain the wages which they are to pay their posted workers.

72 It is necessary to assess further, the obligations on undertakings established in another Member State which stem from such a system for determining wages with regard to Article 49 EC.

Matters which may be covered by the terms and conditions of work applicable to posted workers

73 In order to ensure that the nucleus of mandatory rules for minimum protection are observed, the first subparagraph of Article 3(1) of Directive 96/71 provides that Member States are to ensure that, whatever the law applicable to the employment relationship, in the framework of the transnational provision of services, undertakings guarantee workers posted to their territory the terms and conditions of employment covering the matters listed in that provision, namely: maximum work periods and minimum rest periods; minimum paid annual holidays; the minimum rates of pay, including overtime rates; the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings; health, safety and hygiene at work; protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people; and equality of treatment between men and women and other provisions on non-discrimination.

74 That provision seeks, first, to ensure a climate of fair competition between national undertakings and undertakings which provide services transnationally, in so far as it requires the latter to afford their workers, as regards a limited list of matters, the terms and conditions of employment laid down in the host Member State by law, regulation or administrative provision or by collective agreements or arbitration awards within the meaning of Article 3(8) of Directive 96/71, which constitute mandatory rules for minimum protection.

75 That provision thus prevents a situation arising in which, by applying to their workers the terms and conditions of employment in force in the Member State of origin as regards those matters, undertakings established in other Member States would compete unfairly against undertakings of the host Member State in the framework of the transnational provision of services, if the level of social protection in the host Member State is higher.

76 Secondly, that provision seeks to ensure that posted workers will have the rules of the Member States for minimum protection as regards the terms and conditions of employment relating to those matters applied to them while they work on a temporary basis in the territory of that Member State.

77 The consequence of affording such minimum protection – if the level of protection resulting from the terms and conditions of employment granted to posted workers in the Member State of origin, as regards the matters referred to in Article 3(1), first subparagraph, (a) to (g) of Directive 96/71, is lower than the level of minimum

protection afforded in the host Member State – is to enable those workers to enjoy better terms and conditions of employment in the host Member State.

78 However, in the case in the main proceedings, it is apparent from paragraph 19 of this judgment that, in respect of some of the matters referred to in Article 3(1), first subparagraph, (a) to (g) of Directive 96/71, in particular as regards working time and annual leave, certain terms of the collective agreement for the building sector depart from the provisions of Swedish law which lay down the terms and conditions of employment applicable to posted workers, by establishing more favourable terms.

79 It is true that Article 3(7) of Directive 96/71 provides that paragraphs 1 to 6 are not to prevent application of terms and conditions of employment which are more favourable to workers. In addition, according to recital 17, the mandatory rules for minimum protection in force in the host country must not prevent the application of such terms and conditions.

80 Nevertheless, Article 3(7) of Directive 96/71 cannot be interpreted as allowing the host Member State to make the provision of services in its territory conditional on the observance of terms and conditions of employment which go beyond the mandatory rules for minimum protection. As regards the matters referred to in Article 3(1), first subparagraph, (a) to (g), Directive 96/71 expressly lays down the degree of protection for workers of undertakings established in other Member States who are posted to the territory of the host Member State which the latter State is entitled to require those undertakings to observe. Moreover, such an interpretation would amount to depriving the directive of its effectiveness.

81 Therefore – without prejudice to the right of undertakings established in other Member States to sign of their own accord a collective labour agreement in the host Member State, in particular in the context of a commitment made to their own posted staff, the terms of which might be more favourable – the level of protection which must be guaranteed to workers posted to the territory of the host Member State is limited, in principle, to that provided for in Article 3(1), first subparagraph, (a) to (g) of Directive 96/71, unless, pursuant to the law or collective agreements in the Member State of origin, those workers already enjoy more favourable terms and conditions of employment as regards the matters referred to in that provision.

82 Moreover, it must be pointed out that, pursuant to the first indent of Article 3(10) of Directive 96/71, Member States may apply terms and conditions of employment on matters other than those specifically referred to in Article 3(1), first subparagraph, (a) to (g), in compliance with the Treaty and, in the case of public policy provisions, on a basis of equality of treatment, to national undertakings and to the undertakings of other Member States.

83 In the main proceedings, certain terms of the collective agreement for the building sector relate to matters which are not specifically referred to in Article 3(1), first subparagraph, (a) to (g) of Directive 96/71. In that regard, it follows from paragraph 20 of this judgment that signing that collective agreement entails undertakings accepting pecuniary obligations such as those requiring them to pay to Byggettan a sum equal to 1.5% of total gross wages for the purposes of the pay review which that section trade union carries out, and to the insurance company, FORA, first, 0.8% of total gross wages for the purposes of a charge called the ‘special building supplement’, and, second, a further 5.9% for the purposes of a number of insurance premiums.

84 It is common ground, however, that those obligations were imposed without the national authorities’ having had recourse to Article 3(10) of Directive 96/71. The terms of the collective agreement for the building sector in question were in fact established through negotiation between management and labour; not being bodies governed by public law, they cannot avail themselves of that provision by citing grounds of public policy in order to maintain that collective action such as that at issue in the main proceedings complies with Community law.

85 It is also necessary to assess from the point of view of Article 49 EC the collective action taken by the trade unions in the case in the main proceedings, both in so far as it seeks to force a service provider established in another Member State to enter into negotiations on the wages to be paid to posted workers and in so far as it seeks to force that service provider to sign a collective agreement the terms of which lay down, as regards some of the matters referred to in Article 3(1), first subparagraph, (a) to (g) of Directive 96/71, more favourable conditions than those stemming from the relevant legislative provisions, while other terms cover matters not referred to in that provision.

Assessment of the collective action at issue in the case in the main proceedings from the point of view of Article 49 EC

86 As regards use of the means available to the trade unions to bring pressure to bear on the relevant parties to sign a collective agreement and to enter into negotiations on pay, the defendants in the main proceedings and the Danish and Swedish Governments submit that the right to take collective action in the context of negotiations with an employer falls outside the scope of Article 49 EC, since, pursuant to Article 137(5) EC, as amended by the Treaty of Nice, the Community has no power to regulate that right.

87 In this regard, it suffices to point out that, even though, in the areas in which the Community does not have competence, the Member States remain, in principle, free to lay down the conditions for the existence and exercise of the rights at issue, they must nevertheless exercise that competence consistently with Community law (see, by analogy, as regards social security, Case C-120/95 *Decker* [1998] ECR I-1831, paragraphs 22 and 23, and Case C-158/96 *Kohll* [1998] ECR I-1931, paragraphs 18 and 19; as regards direct taxation, Case C-334/02 *Commission v France* [2004] ECR I-2229, paragraph 21, and Case C-446/03 *Marks & Spencer* [2005] ECR I-10837, paragraph 29).

88 Therefore, the fact that Article 137 EC does not apply to the right to strike or to the right to impose lock-outs is not such as to exclude collective action such as that at issue in the main proceedings from the domain of freedom to provide services.

89 According to the observations of the Danish and Swedish Governments, the right to take collective action constitutes a fundamental right which, as such, falls outside the scope of Article 49 EC and Directive 96/71.

90 In that regard, it must be recalled that the right to take collective action is recognised both by various international instruments which the Member States have signed or cooperated in, such as the European Social Charter, signed at Turin on 18 October 1961 – to which, moreover, express reference is made in Article 136 EC – and Convention No 87 of the International Labour Organisation concerning Freedom of Association and Protection of the Right to Organise of 9 July 1948 – and by instruments developed by those Member States at Community level or in the context of the European Union, such as the Community Charter of the Fundamental Social Rights of Workers adopted at the meeting of the European Council held in Strasbourg on 9 December 1989, which is also referred to in Article 136 EC, and the Charter of Fundamental Rights of the European Union proclaimed in Nice on 7 December 2000 (OJ 2000 C 364, p. 1).

91 Although the right to take collective action must therefore be recognised as a fundamental right which forms an integral part of the general principles of Community law the observance of which the Court ensures, the exercise of that right may none the less be subject to certain restrictions. As is reaffirmed by Article 28 of the Charter of Fundamental Rights of the European Union, it is to be protected in accordance with Community law and national law and practices.

92 Although it is true, as the Swedish Government points out, that the right to take collective action enjoys constitutional protection in Sweden, as in other Member States, nevertheless as is clear from paragraph 10 of this judgment, under the Swedish constitution, that right – which, in that Member State, covers the blockading of worksites – may be exercised unless otherwise provided by law or agreement.

93 In that regard, the Court has already held that the protection of fundamental rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty, such as the free movement of goods (see Case C-112/00 *Schmidberger* [2003] ECR I-5659, paragraph 74) or freedom to provide services (see Case C-36/02 *Omega* [2004] ECR I-9609, paragraph 35).

94 As the Court held, in *Schmidberger* and *Omega*, the exercise of the fundamental rights at issue, that is, freedom of expression and freedom of assembly and respect for human dignity, respectively, does not fall outside the scope of the provisions of the Treaty. Such exercise must be reconciled with the requirements relating to rights protected under the Treaty and in accordance with the principle of proportionality (see, to that effect, *Schmidberger*, paragraph 77, and *Omega*, paragraph 36).

95 It follows from the foregoing that the fundamental nature of the right to take collective action is not such as to render Community law inapplicable to such action, taken against an undertaking established in another Member State which posts workers in the framework of the transnational provision of services.

96 It must therefore be examined whether the fact that a Member State's trade unions may take collective action in the circumstances described above constitutes a restriction on the freedom to provide services, and, if so, whether it can be justified.

97 It should be noted that, in so far as it seeks to abolish restrictions on the freedom to provide services stemming from the fact that the service provider is established in a Member State other than that in which the service is to be provided, Article 49 EC became directly applicable in the legal orders of the Member States on expiry of the transitional period and confers on individuals rights which are enforceable by them and which the national courts must protect (see, inter alia, Case 33/74 *Van Binsbergen* [1974] ECR 1299, paragraph 26; Case 13/76 *Donà* [1976] ECR 1333, paragraph 20; Case 206/84 *Commission v Ireland* [1986] ECR 3817, paragraph 16; and Case C-208/05 *ITC* [2007] ECR I-181, paragraph 67).

98 Furthermore, compliance with Article 49 EC is also required in the case of rules which are not public in nature but which are designed to regulate, collectively, the provision of services. The abolition, as between Member States, of obstacles to the freedom to provide services would be compromised if the abolition of State barriers could be neutralised by obstacles resulting from the exercise of their legal autonomy by associations or organisations not governed by public law (see Case 36/74 *Walrave and Koch* [1974] ECR 1405, paragraphs 17 and 18; Case C-415/93 *Bosman* [1995] ECR I-4921, paragraphs 83 and 84, and Case C-309/99 *Wouters and Others* [2002] ECR I-1577, paragraph 120).

99 In the case in the main proceedings, it must be pointed out that the right of trade unions of a Member State to take collective action by which undertakings established in other Member States may be forced to sign the collective agreement for the building sector – certain terms of which depart from the legislative provisions and establish more favourable terms and conditions of employment as regards the matters referred to in Article 3(1), first subparagraph, (a) to (g) of Directive 96/71 and others relate to matters not referred to in that provision – is liable to make it less attractive, or more difficult, for such undertakings to carry out construction work in Sweden, and therefore constitutes a restriction on the freedom to provide services within the meaning of Article 49 EC.

100 The same is all the more true of the fact that, in order to ascertain the minimum wage rates to be paid to their posted workers, those undertakings may be forced, by way of collective action, into negotiations with the trade unions of unspecified duration at the place at which the services in question are to be provided.

101 It is clear from the case-law of the Court that, since the freedom to provide services is one of the fundamental principles of the Community (see, inter alia, Case 220/83 *Commission v France* [1986] ECR 3663, paragraph 17, and Case 252/83 *Commission v Denmark* [1986] ECR 3713, paragraph 17), a restriction on that freedom is warranted only if it pursues a legitimate objective compatible with the Treaty and is justified by overriding reasons of public interest; if that is the case, it must be suitable for securing the attainment of the objective which it pursues and not go beyond what is necessary in order to attain it (Case C-398/95 *SETTG* [1997] ECR I-3091, paragraph 21; Case C-451/03 *Servizi Ausiliari Dottori Commercialisti* [2006] ECR I-2941, paragraph 37, and Case C-94/04 *Cipolla* [2006] ECR I-11421, paragraph 61).

102 The Swedish Government and the defendant trade unions in the main proceedings submit that the restrictions in question are justified, since they are necessary to ensure the protection of a fundamental right recognised by Community law and have as their objective the protection of workers, which constitutes an overriding reason of public interest.

103 In that regard, it must be pointed out that the right to take collective action for the protection of the workers of the host State against possible social dumping may constitute an overriding reason of public interest within the meaning of the case-law of the Court which, in principle, justifies a restriction of one of the fundamental freedoms guaranteed by the Treaty (see, to that effect, Joined Cases C-369/96 and C-376/96 *Arblade and Others* [1999] ECR I-8453, paragraph 36; Case C-165/98 *Mazzoleni and ISA* [2001] ECR I-2189, paragraph 27; Joined Cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98 *Finalarte and Others* [2001] ECR I-7831, paragraph 33, and Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union* [2007] ECR I-0000, paragraph 77).

104 It should be added that, according to Article 3(1)(c) and (j) EC, the activities of the Community are to include not only an 'internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital', but also 'a policy in the social sphere'. Article 2 EC states that the Community is to have as its task, inter alia, the promotion of 'a harmonious, balanced and sustainable development of economic activities' and 'a high level of employment and of social protection'.

105 Since the Community has thus not only an economic but also a social purpose, the rights under the provisions of the EC Treaty on the free movement of goods, persons, services and capital must be balanced against the objectives pursued by social policy, which include, as is clear from the first paragraph of Article 136 EC, inter alia, improved living and working conditions, so as to make possible their harmonisation while improvement is being maintained, proper social protection and dialogue between management and labour.

106 In the case in the main proceedings, Byggnads and Byggettan contend that the objective of the blockade carried out against Laval was the protection of workers.

107 In that regard, it must be observed that, in principle, blockading action by a trade union of the host Member State which is aimed at ensuring that workers posted in the framework of a transnational provision of services have their terms and conditions of employment fixed at a certain level, falls within the objective of protecting workers.

108 However, as regards the specific obligations, linked to signature of the collective agreement for the building sector, which the trade unions seek to impose on undertakings established in other Member States by way of collective action such as that at issue in the case in the main proceedings, the obstacle which that collective action forms cannot be justified with regard to such an objective. In addition to what is set out in paragraphs 81 and 83 of the present judgment, with regard to workers posted in the framework of a transnational provision of services, their employer is required, as a result of the coordination achieved by Directive 96/71, to observe a nucleus of mandatory rules for minimum protection in the host Member State.

109 Finally, as regards the negotiations on pay which the trade unions seek to impose, by way of collective action such as that at issue in the main proceedings, on undertakings, established in another Member State which post workers temporarily to their territory, it must be emphasised that Community law certainly does not prohibit Member States from requiring such undertakings to comply with their rules on minimum pay by appropriate means (see *Seco and Desquenne & Giral*, paragraph 14; *Rush Portuguesa*, paragraph 18, and *Arblade and Others*, paragraph 41).

110 However, collective action such as that at issue in the main proceedings cannot be justified in the light of the public interest objective referred to in paragraph 102 of the present judgment, where the negotiations on pay, which that action seeks to require an undertaking established in another Member State to enter into, form part of a national context characterised by a lack of provisions, of any kind, which are sufficiently precise and accessible that they do not render it impossible or excessively difficult in practice for such an undertaking to determine the obligations with which it is required to comply as regards minimum pay (see, to that effect, *Arblade and Others*, paragraph 43).

111 In the light of the foregoing, the answer to the first question must be that Article 49 EC and Directive 96/71 are to be interpreted as precluding a trade union, in a Member State in which the terms and conditions of employment covering the matters referred to in Article 3(1), first subparagraph, (a) to (g) of that directive are contained in legislative provisions, save for minimum rates of pay, from attempting, by means of collective action in the form of a blockade ('blockad') of sites such as that at issue in the main proceedings, to force a provider of services established in another Member State to enter into negotiations with it on the rates of pay for posted workers and to sign a collective agreement the terms of which lay down, as regards some of those matters, more favourable conditions than those resulting from the relevant legislative provisions, while other terms relate to matters not referred to in Article 3 of the directive.

The second question

112 By the second question, the national court is asking, in essence, whether, where there is a prohibition in a Member State against trade unions undertaking collective action with the aim of having a collective agreement between other parties set aside or amended, Articles 49 EC and 50 EC preclude that prohibition from being subject

to the condition that such action must relate to terms and conditions of employment to which the national law applies directly, thereby making it impossible for an undertaking which posts workers to that Member State in the framework of the provision of services and which is bound by a collective agreement subject to the law of another Member State to enforce such a prohibition vis-à-vis those trade unions.

113 That question concerns the application of the provisions of the MBL which introduced a system to combat social dumping, pursuant to which a service provider is not entitled, in the Member State in which it provides its services, to expect any account to be taken of the obligations under collective agreements to which it is already subject in the Member State in which it is established. It follows from such a system that collective action is authorised against undertakings bound by a collective agreement subject to the law of another Member State in the same way as such action is authorised against undertakings which are not bound by any collective agreement.

114 It is clear from settled case-law that the freedom to provide services implies, in particular, the abolition of any discrimination against a service provider on account of its nationality or the fact that it is established in a Member State other than the one in which the service is provided (see, inter alia, Case C-154/89 *Commission v France* [1991] ECR I-659, paragraph 12; Case C-180/89 *Commission v Italy* ECR I-709, paragraph 15; Case C-198/89 *Commission v Greece* ECR I-727, paragraph 16, and *Commission v Germany* [2007] paragraph 83).

115 It is also settled case-law that discrimination can arise only through the application of different rules to comparable situations or the application of the same rule to different situations (See, inter alia, Case C-279/93 *Schumacker* [1995] ECR I-225, paragraph 30; Case C-383/05 *Talotta* [2007] ECR I-0000, paragraph 18, and Case C-182/06 *Lakebrink and Peters-Lakebrink* [2007] ECR I-0000, paragraph 27).

116 In that regard, it must be pointed out that national rules, such as those at issue in the case in the main proceedings, which fail to take into account, irrespective of their content, collective agreements to which undertakings that post workers to Sweden are already bound in the Member State in which they are established, give rise to discrimination against such undertakings, in so far as under those national rules they are treated in the same way as national undertakings which have not concluded a collective agreement.

117 It follows from Article 46 EC, which must be interpreted strictly, that discriminatory rules may be justified only on grounds of public policy, public security or public health (see *Commission v Germany* [2007] paragraph 86).

118 It is clear from the order for reference that the application of those rules to foreign undertakings which are bound by collective agreements to which Swedish law does not directly apply is intended, first, to allow trade unions to take action to ensure that all employers active on the Swedish labour market pay wages and apply other terms and conditions of employment in line with those usual in Sweden, and secondly, to create a climate of fair competition, on an equal basis, between Swedish employers and entrepreneurs from other Member States.

119 Since none of the considerations referred to in the previous paragraph constitute grounds of public policy, public security or public health within the meaning of Article 46 EC, applied in conjunction with Article 55 EC, it must be held that discrimination such as that in the case in the main proceedings cannot be justified.

120 In the light of the foregoing, the answer to the second question must be that, where there is a prohibition in a Member State against trade unions undertaking collective action with the aim of having a collective agreement between other parties set aside or amended, Articles 49 EC and 50 EC preclude that prohibition from being subject to the condition that such action must relate to terms and conditions of employment to which the national law applies directly.

Costs

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

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

1. **Article 49 EC and Article 3 of Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services are to be interpreted as precluding a trade union, in a Member State in which the terms and conditions of employment covering the matters referred to in Article 3(1), first subparagraph, (a) to (g) of that directive are contained in legislative provisions, save for minimum rates of pay, from attempting, by means of collective action in the form of a blockade ('blockad') of sites such as that at issue in the main proceedings, to force a provider of services established in another Member State to enter into negotiations with it on the rates of pay for posted workers and to sign a collective agreement the terms of which lay down, as regards some of those matters, more favourable conditions than those resulting from the relevant legislative provisions, while other terms relate to matters not referred to in Article 3 of the directive.**

2. **Where there is a prohibition in a Member State against trade unions undertaking collective action with the aim of having a collective agreement between other parties set aside or amended, Articles 49 EC and 50 EC preclude that prohibition from being subject to the condition that such action must relate to terms and conditions of employment to which the national law applies directly.**

Case C-333/13, *Elisabeta Dano and Florin Dano v Jobcenter Leipzig*

In Case C-333/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Sozialgericht Leipzig (Germany), made by decision of 3 June 2013, received at the Court on 19 June 2013, in the proceedings

Elisabeta Dano,

Florin Dano

v

Jobcenter Leipzig,

THE COURT (Grand Chamber),

[...]

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 18 TFEU, of point (a) of the first subparagraph, and the second subparagraph, of Article 20(2) TFEU, of Articles 1, 20 and 51 of the Charter of Fundamental Rights of the European Union ('the Charter'), of Articles 4 and 70 of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1, and corrigendum at OJ 2004 L 200, p. 1), as amended by Commission Regulation (EU) No 1244/2010 of 9 December 2010 (OJ 2010 L 338, p. 35) ('Regulation No 883/2004'), and of Article 24(2) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77).

2 The request has been made in proceedings brought by Ms Dano and her son Florin against Jobcenter Leipzig concerning the latter's refusal to grant them benefits by way of basic provision ('Grundsicherung') that are envisaged by German legislation, namely, for Ms Dano, subsistence benefit ('existenzsichernde Regelleistung') and, for her son, social allowance ('Sozialgeld'), as well as a contribution to accommodation and heating costs.

Legal context

EU law

Regulation No 1247/92

3 The first to eighth recitals in the preamble to Council Regulation (EEC) No 1247/92 of 30 April 1992 amending Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community (OJ 1992 L 136, p. 1) state as follows:

'... it is necessary to amend Regulation (EEC) No 1408/71 ..., as updated by Regulation (EEC) No 2001/83 ..., as last amended by Regulation (EEC) No 2195/91 ...;

... it is necessary to extend the definition of "member of the family" in Regulation (EEC) No 1408/71 to conform with the case-law of the Court of Justice concerning the interpretation of that expression;

... it is also necessary to take account of the case-law of the Court of Justice stating that certain benefits provided under national laws may fall simultaneously within the categories of both social security and social assistance because of the class of persons to whom such laws apply, their objectives and their manner of application;

... the Court of Justice has stated that, in some of its features, legislation under which such benefits are granted is akin to social assistance in that need is an essential criterion in its implementation and the conditions of entitlement are not based upon the aggregation of periods of employment or contributions, whilst in other features it is close to social security to the extent that there is an absence of discretion in the manner in which such benefits as are provided thereunder are awarded and in that it confers a legally defined position upon beneficiaries;

... Regulation (EEC) No 1408/71 excludes from its scope, by virtue of Article 4(4) thereof, social assistance schemes;

... the conditions referred to and their methods of application are such that a system of coordination which differs from that currently provided for in Regulation (EEC) No 1408/71 and which takes account of the special characteristics of the benefits concerned should be included in that Regulation in order to protect the interests of migrant workers in accordance with the provisions of Article 51 of the Treaty;

... such benefits should be granted, in respect of persons falling within the scope of Regulation (EEC) No 1408/71, solely in accordance with the legislation of the country of residence of the person concerned or of the members of his or her family, with such aggregation of periods of residence completed in any other Member State as is necessary and without discrimination on grounds of nationality;

... it is necessary nevertheless to ensure that the existing system of coordination in Regulation (EEC) No 1408/71 continues to apply to benefits which either do not fall within the special category of benefits referred to or are not expressly included in an Annex to that Regulation; ... a new Annex is needed for this purpose’.

Regulation (EC) No 883/2004

4 Regulation No 883/2004 replaced Regulation No 1408/71 from 1 May 2010.

5 Recitals 1, 16 and 37 in the preamble to Regulation No 883/2004 state:

‘(1) The rules for coordination of national social security systems fall within the framework of free movement of persons and should contribute towards improving their standard of living and conditions of employment.

...

(16) Within the Community there is in principle no justification for making social security rights dependent on the place of residence of the person concerned; nevertheless, in specific cases, in particular as regards special benefits linked to the economic and social context of the person involved, the place of residence could be taken into account.

...

(37) As the Court of Justice has repeatedly stated, provisions which derogate from the principle of the exportability of social security benefits must be interpreted strictly. This means that they can apply only to benefits which satisfy the specified conditions. It follows that Chapter 9 of Title III of this Regulation can apply only to benefits which are both special and non-contributory and listed in Annex X to this Regulation.’

6 Article 1 of Regulation No 883/2004, headed ‘Definitions’, provides:

‘For the purposes of this Regulation:

...

(l) “legislation” means, in respect of each Member State, laws, regulations and other statutory provisions and all other implementing measures relating to the social security branches covered by Article 3(1);

...’

7 Article 2(1) of Regulation No 883/2004, relating to the persons covered by the regulation, provides:

‘This Regulation shall apply to nationals of a Member State, stateless persons and refugees residing in a Member State who are or have been subject to the legislation of one or more Member States, as well as to the members of their families and to their survivors.’

8 Article 3 of Regulation No 883/2004, headed ‘Matters covered’, states:

‘1. This Regulation shall apply to all legislation concerning the following branches of social security:

...

(b) maternity and equivalent paternity benefits;

...

(h) unemployment benefits;

...

2. Unless otherwise provided for in Annex XI, this Regulation shall apply to general and special social security schemes, whether contributory or non-contributory, and to schemes relating to the obligations of an employer or shipowner.

3. This Regulation shall also apply to the special non-contributory cash benefits covered by Article 70.

...

5. This Regulation shall not apply to:

(a) social and medical assistance ...’

9 Article 4 of Regulation No 883/2004, headed ‘Equality of treatment’, provides:

‘Unless otherwise provided for by this Regulation, persons to whom this Regulation applies shall enjoy the same benefits and be subject to the same obligations under the legislation of any Member State as the nationals thereof.’

10 Chapter 9 of Title III of Regulation No 883/2004, relating to ‘Special non-contributory cash benefits’, contains Article 70, which is headed ‘General provision’ and provides:

‘1. This Article shall apply to special non-contributory cash benefits which are provided under legislation which, because of its personal scope, objectives and/or conditions for entitlement, has characteristics both of the social security legislation referred to in Article 3(1) and of social assistance.

2. For the purposes of this Chapter, “special non-contributory cash benefits” means those which:

(a) are intended to provide either:

(i) supplementary, substitute or ancillary cover against the risks covered by the branches of social security referred to in Article 3(1), and which guarantee the persons concerned a minimum subsistence income having regard to the economic and social situation in the Member State concerned;

or

(ii) solely specific protection for the disabled, closely linked to the said person's social environment in the Member State concerned,

and

(b) where the financing exclusively derives from compulsory taxation intended to cover general public expenditure and the conditions for providing and for calculating the benefits are not dependent on any contribution in respect of the beneficiary. However, benefits provided to supplement a contributory benefit shall not be considered to be contributory benefits for this reason alone,

and

(c) are listed in Annex X.

3. Article 7 and the other chapters of this Title shall not apply to the benefits referred to in paragraph 2 of this Article.

4. The benefits referred to in paragraph 2 shall be provided exclusively in the Member State in which the persons concerned reside, in accordance with its legislation. Such benefits shall be provided by and at the expense of the institution of the place of residence.'

11 Annex X to Regulation No 883/2004, which is entitled 'Special non-contributory cash benefits', specifies the following benefits as regards the Federal Republic of Germany:

'...

(b) Benefits to cover subsistence costs under the basic provision for jobseekers unless, with respect to these benefits, the eligibility requirements for a temporary supplement following receipt of unemployment benefit ([Paragraph] 24(1) of Book II of the Social Code) are fulfilled.'

Directive 2004/38

12 Recitals 10, 16 and 21 in the preamble to Directive 2004/38 state:

'(10) Persons exercising their right of residence should not, however, become an unreasonable burden on the social assistance system of the host Member State during an initial period of residence. Therefore, the right of residence for Union citizens and their family members for periods in excess of three months should be subject to conditions.

...

(16) As long as the beneficiaries of the right of residence do not become an unreasonable burden on the social assistance system of the host Member State they should not be expelled. Therefore, an expulsion measure should not be the automatic consequence of recourse to the social assistance system. The host Member State should examine whether it is a case of temporary difficulties and take into account the duration of residence, the personal circumstances and the amount of aid granted in order to consider whether the beneficiary has become an unreasonable burden on its social assistance system and to proceed to his expulsion. In no case should an expulsion measure be adopted against workers, self-employed persons or jobseekers as defined by the Court of Justice save on grounds of public policy or public security.

...

(21) However, it should be left to the host Member State to decide whether it will grant social assistance during the first three months of residence, or for a longer period in the case of jobseekers, to Union citizens other than those who are workers or self-employed persons or who retain that status or their family members, or maintenance assistance for studies, including vocational training, prior to acquisition of the right of permanent residence, to these same persons.'

13 Article 6 of Directive 2004/38, headed 'Right of residence for up to three months', provides in paragraph 1:

'Union citizens shall have the right of residence on the territory of another Member State for a period of up to three months without any conditions or any formalities other than the requirement to hold a valid identity card or passport.'

14 Article 7(1) of Directive 2004/38 provides:

'All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:

- (a) are workers or self-employed persons in the host Member State; or
- (b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; ...'

15 Article 8 of Directive 2004/38, headed 'Administrative formalities for Union citizens', provides in paragraph 4:

'Member States may not lay down a fixed amount which they regard as "sufficient resources", but they must take into account the personal situation of the person concerned. In all cases this amount shall not be higher than the threshold below which nationals of the host Member State become eligible for social assistance, or, where this criterion is not applicable, higher than the minimum social security pension paid by the host Member State.'

16 Article 14 of Directive 2004/38, headed 'Retention of the right of residence', provides:

- 1. Union citizens and their family members shall have the right of residence provided for in Article 6, as long as they do not become an unreasonable burden on the social assistance system of the host Member State.
- 2. Union citizens and their family members shall have the right of residence provided for in Articles 7, 12 and 13 as long as they meet the conditions set out therein.

In specific cases where there is a reasonable doubt as to whether a Union citizen or his/her family members satisfies the conditions set out in Articles 7, 12 and 13, Member States may verify if these conditions are fulfilled. This verification shall not be carried out systematically.

- 3. An expulsion measure shall not be the automatic consequence of a Union citizen's or his or her family member's recourse to the social assistance system of the host Member State.
- 4. By way of derogation from paragraphs 1 and 2 and without prejudice to the provisions of Chapter VI, an expulsion measure may in no case be adopted against Union citizens or their family members if:
 - (a) the Union citizens are workers or self-employed persons, or
 - (b) the Union citizens entered the territory of the host Member State in order to seek employment. In this case, the Union citizens and their family members may not be expelled for as long as the Union citizens can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged.'

17 Article 24 of Directive 2004/38, headed 'Equal treatment', provides:

'1. Subject to such specific provisions as are expressly provided for in the Treaty and secondary law, all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty. The benefit of this right shall be extended to family members who are not nationals of a Member State and who have the right of residence or permanent residence.

2. By way of derogation from paragraph 1, the host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate, the longer period provided for in Article 14(4)(b), nor shall it be obliged, prior to acquisition of the right of permanent residence, to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families.'

German law

Social Code

18 Paragraph 19a(1) of Book I of the Social Code (Sozialgesetzbuch Erstes Buch; 'SGB I') sets out the two main types of benefit granted by way of basic provision for jobseekers:

'(1) Under the entitlement to basic provision for jobseekers, the following may be claimed:

1. benefits for integration into the labour market,
2. benefits to cover subsistence costs.'

19 In Book II of the Social Code (Sozialgesetzbuch Zweites Buch; 'SGB II'), Paragraph 1, headed 'Function and objective of basic provision for jobseekers', provides in subparagraphs 1 to 3:

'(1) Basic provision for jobseekers is intended to enable its beneficiaries to lead a life in keeping with human dignity.

...

(3) Basic provision for jobseekers encompasses benefits:

1. intended to bring to an end or reduce need, in particular by integration into the labour market, and
2. intended to cover subsistence costs.'

20 Paragraph 7 of SGB II, headed 'Beneficiaries', provides:

'(1) Benefits under this Book shall be received by persons who:

1. have attained the age of 15 and have not yet reached the age limit referred to in Paragraph 7a,
2. are fit for work,
3. are in need of assistance and
4. whose ordinary place of residence is in the Federal Republic of Germany (beneficiaries fit for work). The following are excluded:

1. foreign nationals who are not workers or self-employed persons in the Federal Republic of Germany and do not enjoy the right of freedom of movement under Paragraph 2(3) of the Law on freedom of movement of Union

citizens [Freizügigkeitsgesetz/EU; “the FreizügG/EU”], and their family members, for the first three months of their residence,

2. foreign nationals whose right of residence arises solely out of the search for employment and their family members,

...

Point 1 of the second sentence shall not apply to foreign nationals residing in the Federal Republic of Germany who have been granted a residence permit under Chapter 2, Section 5, of the Law on residence. Provisions of law governing residence shall be unaffected.

...’

21 Paragraph 8 of SGB II, headed ‘Fitness for work’, states in subparagraph 1:

‘All persons who are not incapable for the foreseeable future, because of an illness or handicap, of working for at least three hours per day under normal labour market conditions are fit for work.

...’

22 Paragraph 9(1) of SGB II provides:

‘All persons who cannot, or cannot sufficiently, cover their subsistence costs on the basis of the income or assets to be taken into consideration and who do not receive the necessary assistance from other persons, in particular from family members or providers of other social security benefits, are in need of assistance.’

23 Paragraph 20 of SGB II sets out additional provisions on basic subsistence needs. Paragraph 21 of SGB II lays down rules on additional needs and Paragraph 22 lays down rules on accommodation and heating needs. Finally, Paragraphs 28 to 30 deal with education and participation benefits.

24 In Book XII of the Social Code (Sozialgesetzbuch Zwölftes Buch; ‘SGB XII’), Paragraph 1, which relates to social assistance, provides:

‘The function of social assistance is to enable the beneficiaries to lead a life in keeping with human dignity. ...’

25 Paragraph 21 of SGB XII provides:

‘Subsistence benefits shall not be paid to persons who are in principle entitled to benefits under Book II because they are fit for work or because of their family ties. ...’

26 Paragraph 23 of SGB XII, headed ‘Social assistance for foreign nationals’, reads as follows:

‘(1) Subsistence assistance, assistance for sick persons, assistance for pregnant women, maternity assistance and care assistance under this Book must be given to foreign nationals who are actually resident in national territory. The provisions of the fourth Chapter shall not be affected. Otherwise, social assistance may be granted in so far as it is justified in a particular case. The restrictions of the first sentence shall not apply to foreign nationals holding a permanent residence permit (“Niederlassungserlaubnis”) or a residence permit of limited duration (“befristeter Aufenthaltstitel”) who anticipate taking up permanent residence in federal territory. Legal provisions under which social assistance other than the benefits referred to in the first sentence must or should be granted shall not be affected.

...

(3) Foreign nationals who have entered national territory in order to obtain social assistance or whose right of residence arises solely out of the search for employment, and their family members, have no right to social

assistance. If they have entered national territory for the purpose of treatment or alleviation of illness, assistance for sick persons may be granted only to remedy a critical, life-threatening condition or for urgent and essential treatment of a serious or contagious disease.

(4) Foreign nationals in receipt of social assistance must be informed of the return and resettlement programmes applicable to them; in appropriate cases recourse to such programmes is to be promoted.'

Law on freedom of movement of Union citizens

27 The scope of the FreizügG/EU is specified in Paragraph 1 of that law:

'This Law shall govern the entry and residence of nationals of other Member States of the European Union (Union citizens) and their family members.'

28 Paragraph 2 of the FreizügG/EU provides, on the right of entry and residence:

'(1) Union citizens who are entitled to freedom of movement and their family members shall have the right to enter and reside in federal territory, subject to the provisions of this Law.

(2) The following are entitled to freedom of movement under Community law:

1. Union citizens who wish to reside in federal territory as workers or for the purpose of seeking employment or pursuing vocational training,

...

5. Union citizens who are not working, subject to the conditions laid down in Paragraph 4,

6. family members, subject to the conditions laid down in Paragraphs 3 and 4,

...

(4) Union citizens shall not require a visa in order to enter federal territory or a residence permit in order to reside there. ...

(5) In order for Union citizens to reside in federal territory for a period of up to three months, it is sufficient that they hold a valid identity card or passport. Family members who are not Union citizens have the same right if they hold an approved or otherwise accepted passport (or document in lieu of a passport) and they are accompanying or joining the Union citizen.

...

(7) The right under subparagraph 1 may be found not to exist if it is established that the person concerned has pretended that a condition for that right is fulfilled by using counterfeit or falsified documents or by misrepresentation of the facts. In the case of a family member who is not a Union citizen, the right under subparagraph 1 may also be found not to exist if it is established that he is not joining the Union citizen in order to establish or preserve family life or is not accompanying the Union citizen for that purpose. In these cases a family member who is not a Union citizen may be refused issue of the residence card or visa or his residence card may be withdrawn. Decisions under sentences 1 to 3 shall be in writing.'

29 Paragraph 3 of the FreizügG/EU, relating to family members, states:

'(1) Family members of the Union citizens specified in Paragraph 2(2), points 1 to 5, shall enjoy the right under Paragraph 2(1) if they are accompanying or joining the Union citizen. For family members of the Union citizens specified in Paragraph 2(2), point 5, this shall apply subject to Paragraph 4.

(2) The following are family members:

1. the spouse, the partner and the descendants of the persons specified in Paragraph 2(2), points 1 to 5 and 7, or of their spouses or partners, who are not yet 21 years old,
2. the relatives in the ascending line and descendants of the persons specified in Paragraph 2(2), points 1 to 5 and 7, or of their spouses or partners, whom those persons or their spouses or partners maintain.

...'

30 Paragraph 4 of the FreizügG/EU provides, in relation to persons who are entitled to freedom of movement and are not working:

'Union citizens who are not working and the family members accompanying or joining them shall enjoy the right provided for in Paragraph 2(1) if they have sufficient sickness insurance cover and sufficient means of subsistence. If the Union citizen is resident in federal territory as a student, this right shall extend only to his spouse, partner and children who are maintained.'

31 Paragraph 5 of the FreizügG/EU, headed 'Residence cards and certificate concerning the right of permanent residence', provides:

'...

(2) The competent aliens office may require that the conditions for the right under Paragraph 2(1) be substantiated within three months following entry into federal territory. Information and evidence necessary for substantiation may be received by the competent registration authority at the time of registration with it. That authority shall forward the information and evidence to the competent aliens office. The registration authority shall not use or process that data for any other purpose.

(3) A check to establish whether the conditions for the right under Paragraph 2(1) are fulfilled or continue to be fulfilled may be carried out where this is justified by a particular reason.

...'

32 Paragraph 5a of the FreizügG/EU states:

'(1) The competent authority may request a Union citizen to produce to it a valid identity card or passport in the circumstances referred to in Paragraph 5(2) and, in the circumstances referred to in

...

3. Paragraph 2(2), point 5, proof of sufficient sickness insurance cover and sufficient means of subsistence.'

33 Paragraph 6 of the FreizügG/EU, relating to loss of the right of entry and residence, states:

'(1) Without prejudice to Paragraph 2(7) and Paragraph 5(4), loss of the right under Paragraph 2(1) may be determined, and the certificate concerning the right of permanent residence, the residence card or the permanent residence card may be withdrawn, only on grounds of public policy, public security or public health (Articles 45(3) and 52(1) of the Treaty on the Functioning of the European Union). Entry may also be refused on the grounds referred to in the first sentence. ...

(2) The existence of a criminal conviction shall not in itself constitute a sufficient ground for the adoption of the decisions or measures referred to in subparagraph 1. Only criminal convictions which have not yet been deleted from the federal central register may be taken into account, and only in so far as the circumstances on which they are based disclose personal conduct that constitutes a present threat to the requirements of public policy. There must be a genuine and sufficiently serious threat affecting a fundamental interest of society.

(3) When a decision under subparagraph 1 is made, account must be taken in particular of how long the person concerned has resided in Germany, his age, his state of health, his family and economic situation, his social and cultural integration in Germany and the extent of his ties to his State of origin.

...

(6) Decisions or measures relating to loss of the right of residence or the right of permanent residence may not be adopted on economic grounds.

...'

34 As regards the obligation to leave the territory, Paragraph 7 of the FreizügG/EU states:

'(1) Union citizens and their family members shall be obliged to leave federal territory if the aliens office has established that there is no right of entry and residence. The decision shall contain a warning of removal from federal territory and set a time-limit for leaving it. Except in urgent cases the period set must be at least a month.

...

Union citizens and their family members who have lost their right to freedom of movement pursuant to Paragraph 6(1) may not re-enter federal territory and reside there. The prohibition under the first sentence shall, upon application, be for a fixed term. That term shall begin to run when federal territory is left. An application to have the prohibition lifted that is made after a reasonable period or after three years shall be determined within six months.'

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

35 Ms Dano, who was born in 1989, and her son Florin, who was born on 2 July 2009 in Saarbrücken (Germany), are both Romanian nationals. According to the findings of the referring court, Ms Dano last entered Germany on 10 November 2010.

36 On 19 July 2011, the city of Leipzig issued Ms Dano with a residence certificate of unlimited duration ('unbefristete Freizügigkeitsbescheinigung') for EU nationals, establishing 27 June 2011 as the date of entry into German territory. On 28 January 2013 it also issued her with a duplicate certificate.

37 Since their arrival in Leipzig, Ms Dano and her son have been living in the apartment of Ms Dano's sister, who provides for them materially.

38 Ms Dano receives child benefit ('Kindergeld') for her son Florin, which is paid by the Leipzig family benefits office on behalf of the Federal Employment Agency and amounts to EUR 184 per month. The Leipzig social assistance service for children and young people also pays an advance on maintenance payments of EUR 133 per month for that child, whose father's identity is not known.

39 Ms Dano attended school for three years in Romania, but did not obtain any leaving certificate. She understands German orally and can express herself simply in German. On the other hand, she cannot write in German and her ability to read texts in that language is only limited. She has not been trained in a profession and, to date, has not worked in Germany or Romania. Although her ability to work is not in dispute, there is nothing to indicate that she has looked for a job.

40 The first application that Ms Dano and her son submitted for the grant of benefits by way of basic provision under SGB II was refused by Jobcenter Leipzig by decision of 28 September 2011, on the basis of point 2 of the second sentence of Paragraph 7(1) of SGB II. Since that decision was not contested, it became final.

41 A fresh application for the same benefits, submitted on 25 January 2012, was also refused, by decision of Jobcenter Leipzig of 23 February 2012. Ms Dano and her son lodged an administrative objection against that refusal, relying on Articles 18 TFEU and 45 TFEU and on the judgment in *Vatsouras and Koupatantze* (C-22/08 and C-23/08, EU:C:2009:344). That objection was dismissed by decision of 1 June 2012.

42 On 1 July 2012, Ms Dano and her son brought an action challenging that decision before the Sozialgericht Leipzig (Social Court, Leipzig), by which they again sought the grant of benefits by way of basic provision for jobseekers under SGB II in respect of the period commencing on 25 January 2012.

43 The Sozialgericht Leipzig considers that, by virtue of point 2 of the second sentence of Paragraph 7(1) of SGB II and Paragraph 23(3) of SGB XII, Ms Dano and her son are not entitled to benefits granted by way of basic provision. However, it expresses doubts as to whether provisions of EU law, in particular Article 4 of Regulation No 883/2004, the general principle of non-discrimination resulting from Article 18 TFEU and the general right of residence resulting from Article 20 TFEU, preclude those provisions of German law.

44 According to the findings of the referring court, the main proceedings concern persons who cannot claim a right of residence in the host State by virtue of Directive 2004/38.

45 In those circumstances, the Sozialgericht Leipzig decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Do persons who do not wish to claim payment of any benefits of social security law or family benefits under Article 3(1) of Regulation No 883/2004 but rather special non-contributory benefits under Article 3(3) and Article 70 of the regulation fall within the scope *ratione personae* of Article 4 of the regulation?’

(2) If Question 1 is answered in the affirmative: are the Member States precluded by Article 4 of Regulation No 883/2004, in order to prevent an unreasonable recourse to non-contributory social security benefits under Article 70 of the regulation which guarantee a level of subsistence, from excluding in full or in part Union citizens in need from accessing those benefits, which are provided to their own nationals who are in the same situation?’

(3) If Question 1 or Question 2 is answered in the negative: are the Member States precluded by (a) Article 18 TFEU and/or (b) [point (a) of the first subparagraph of Article 20(2)] TFEU in conjunction with the [second subparagraph] of Article 20(2) TFEU and Article 24(2) of Directive 2004/38/EC, in order to prevent an unreasonable recourse to non-contributory social security benefits under Article 70 of Regulation No 883/2004 which guarantee a level of subsistence, from excluding in full or in part Union citizens in need from accessing those benefits, which are provided to their own nationals who are in the same situation?’

(4) If, according to the answers to the abovementioned questions, the partial exclusion of benefits which guarantee a level of subsistence complies with EU law: may the provision of non-contributory benefits which guarantee a level of subsistence for Union citizens, outside acute emergencies, be limited to the provision of the necessary funds for return to the home State or do Articles 1, 20 and 51 of the Charter ... require more extensive payments which enable permanent residence?’

Consideration of the questions referred

Question 1

46 By its first question, the referring court asks, in essence, whether Article 4 of Regulation No 883/2004 must be interpreted as meaning that ‘special non-contributory benefits’ for the purposes of Articles 3(3) and 70 of the regulation fall within its scope.

47 A preliminary point to note is that the referring court has classified the benefits at issue in the main proceedings as ‘special non-contributory cash benefits’ within the meaning of Article 70(2) of Regulation No 883/2004.

48 It must be pointed out, first, that Article 3 of Regulation No 883/2004 defines the matters covered by the regulation, expressly stating in Article 3(3) that the regulation ‘shall also apply to the special non-contributory cash benefits covered by Article 70 [of the regulation]’.

49 Accordingly, it is clear from the wording of Article 3 of Regulation No 883/2004 that the regulation applies to special non-contributory cash benefits.

50 Second, Article 70(3) of Regulation No 883/2004 provides that Article 7 of the regulation, which governs the waiving of residence rules, and the other chapters of Title III thereof, which is devoted to the various categories of benefits, are not to apply to special non-contributory cash benefits.

51 Whilst Article 70(3) of Regulation No 883/2004 therefore, by way of exception, renders certain of the regulation's provisions inapplicable to special non-contributory cash benefits, Article 4 is not among those provisions.

52 Finally, the interpretation that Article 4 of Regulation No 883/2004 applies to special non-contributory cash benefits corresponds to the intention of the EU legislature, as is apparent from the third recital in the preamble to Regulation No 1247/92 which amended Regulation No 1408/71, inserting provisions relating to benefits of this type in order to take account of the case-law in that regard.

53 In accordance with the seventh recital, such benefits should be granted solely in accordance with the legislation of the Member State of residence of the person concerned or of the members of his or her family, with such aggregation of periods of residence completed in any other Member State as is necessary and without discrimination on grounds of nationality.

54 The specific provision which the EU legislature thus inserted into Regulation No 1408/71 by means of Regulation No 1247/92 is thus characterised by non-exportability of special non-contributory cash benefits as the counterpart of equal treatment in the State of residence.

55 In the light of all the foregoing considerations, the answer to the first question is that Regulation No 883/2004 must be interpreted as meaning that 'special non-contributory cash benefits' as referred to in Articles 3(3) and 70 of the regulation fall within the scope of Article 4 of the regulation.

Questions 2 and 3

56 By its second and third questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 18 TFEU, Article 20(2) TFEU, Article 24(2) of Directive 2004/38 and Article 4 of Regulation No 883/2004 must be interpreted as precluding legislation of a Member State under which nationals of other Member States who are not economically active are excluded, in full or in part, from entitlement to certain 'special non-contributory cash benefits' within the meaning of Regulation No 883/2004 although those benefits are granted to nationals of the Member State concerned who are in the same situation.

57 It should be observed first of all that Article 20(1) TFEU confers on any person holding the nationality of a Member State the status of citizen of the Union (judgment in *N.*, C-46/12, EU:C:2013:9725, paragraph 25).

58 As the Court has held on numerous occasions, the status of citizen of the Union is destined to be the fundamental status of nationals of the Member States, enabling those among such nationals who find themselves in the same situation to enjoy within the scope *ratione materiae* of the FEU Treaty the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for in that regard (judgments in *Grzelczyk*, C-184/99, EU:C:2001:458, paragraph 31; *D'Hoop*, C-224/98, EU:C:2002:432, paragraph 28; and *N.*, EU:C:2013:9725, paragraph 27).

59 Every Union citizen may therefore rely on the prohibition of discrimination on grounds of nationality laid down in Article 18 TFEU in all situations falling within the scope *ratione materiae* of EU law. These situations include those relating to the exercise of the right to move and reside within the territory of the Member States conferred by point (a) of the first subparagraph of Article 20(2) TFEU and Article 21 TFEU (see judgment in *N.*, EU:C:2013:97, paragraph 28 and the case-law cited).

60 In this connection, it is to be noted that Article 18(1) TFEU prohibits any discrimination on grounds of nationality '[w]ithin the scope of application of the Treaties, and without prejudice to any special provisions contained therein'. The second subparagraph of Article 20(2) TFEU expressly states that the rights conferred on Union citizens by that article are to be exercised 'in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder'. Furthermore, under Article 21(1) TFEU too the right of Union citizens to move and reside freely within the territory of the Member States is subject to compliance with the

'limitations and conditions laid down in the Treaties and by the measures adopted to give them effect' (see judgment in *Brey*, C-140/12, EU:C:2013:565, paragraph 46 and the case-law cited).

61 Thus, the principle of non-discrimination, laid down generally in Article 18 TFEU, is given more specific expression in Article 24 of Directive 2004/38 in relation to Union citizens who, like the applicants in the main proceedings, exercise their right to move and reside within the territory of the Member States. That principle is also given more specific expression in Article 4 of Regulation No 883/2004 in relation to Union citizens, such as the applicants in the main proceedings, who invoke in the host Member State the benefits referred to in Article 70(2) of the regulation.

62 Accordingly, the Court should interpret Article 24 of Directive 2004/38 and Article 4 of Regulation No 883/2004.

63 It must be stated first of all that 'special non-contributory cash benefits' as referred to in Article 70(2) of Regulation No 883/2004 do fall within the concept of 'social assistance' within the meaning of Article 24(2) of Directive 2004/38. That concept refers to all assistance schemes established by the public authorities, whether at national, regional or local level, to which recourse may be had by an individual who does not have resources sufficient to meet his own basic needs and those of his family and who by reason of that fact may, during his period of residence, become a burden on the public finances of the host Member State which could have consequences for the overall level of assistance which may be granted by that State (judgment in *Brey*, EU:C:2013:565, paragraph 61).

64 That having been said, it must be pointed out that, whilst Article 24(1) of Directive 2004/38 and Article 4 of Regulation No 883/2004 reiterate the prohibition of discrimination on grounds of nationality, Article 24(2) of that directive contains a derogation from the principle of non-discrimination.

65 Under Article 24(2) of Directive 2004/38, the host Member State is not obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate, the period of seeking employment, referred to in Article 14(4)(b) of the directive, that extends beyond that first period, nor is it obliged, prior to acquisition of the right of permanent residence, to grant maintenance aid for studies to persons other than workers, self-employed persons, persons who retain such status and members of their families.

66 It is apparent from the documents before the Court that Ms Dano has been residing in Germany for more than three months, that she is not seeking employment and that she did not enter Germany in order to work. She therefore does not fall within the scope *ratione personae* of Article 24(2) of Directive 2004/38.

67 In those circumstances, it must be established whether Article 24(1) of Directive 2004/38 and Article 4 of Regulation No 883/2004 preclude refusal to grant social benefits in a situation such as that at issue in the main proceedings.

68 Article 24(1) of Directive 2004/38 provides that all Union citizens residing on the basis of the directive in the territory of the host Member State are to enjoy equal treatment with the nationals of that Member State within the scope of the Treaty.

69 It follows that, so far as concerns access to social benefits, such as those at issue in the main proceedings, a Union citizen can claim equal treatment with nationals of the host Member State only if his residence in the territory of the host Member State complies with the conditions of Directive 2004/38.

70 First, in the case of periods of residence of up to three months, Article 6 of Directive 2004/38 limits the conditions and formalities for the right of residence to the requirement to hold a valid identity card or passport and, under Article 14(1) of the directive, that right is retained as long as the Union citizen and his family members do not become an unreasonable burden on the social assistance system of the host Member State (judgment in *Ziolkowski and Szeja*, C-424/10 and C-425/10, EU:C:2011:866, paragraph 39). In accordance with Article 24(2) of Directive 2004/38, the host Member State is thus not obliged to confer entitlement to social benefits on a national of another Member State or his family members during that period.

71 Second, for periods of residence longer than three months, the right of residence is subject to the conditions set out in Article 7(1) of Directive 2004/38 and, under Article 14(2), that right is retained only if the Union citizen

and his family members satisfy those conditions. It is apparent from recital 10 in the preamble to the directive in particular that those conditions are intended, inter alia, to prevent such persons from becoming an unreasonable burden on the social assistance system of the host Member State (judgment in *Ziolkowski and Szeja*, EU:C:2011:866, paragraph 40).

72 Third, it is apparent from Article 16(1) of Directive 2004/38 that Union citizens acquire the right of permanent residence after residing legally for a continuous period of five years in the host Member State and that that right is not subject to the conditions referred to in the preceding paragraph. As stated in recital 18 in the preamble to the directive, once obtained, the right of permanent residence is not to be subject to any conditions, with the aim of it being a genuine vehicle for integration into the society of that State (judgment in *Ziolkowski and Szeja*, EU:C:2011:866, paragraph 41).

73 In order to determine whether economically inactive Union citizens, in the situation of the applicants in the main proceedings, whose period of residence in the host Member State has been longer than three months but shorter than five years, can claim equal treatment with nationals of that Member State so far as concerns entitlement to social benefits, it must therefore be examined whether the residence of those citizens complies with the conditions in Article 7(1)(b) of Directive 2004/38. Those conditions include the requirement that the economically inactive Union citizen must have sufficient resources for himself and his family members.

74 To accept that persons who do not have a right of residence under Directive 2004/38 may claim entitlement to social benefits under the same conditions as those applicable to nationals of the host Member State would run counter to an objective of the directive, set out in recital 10 in its preamble, namely preventing Union citizens who are nationals of other Member States from becoming an unreasonable burden on the social assistance system of the host Member State.

75 It should be added that, as regards the condition requiring possession of sufficient resources, Directive 2004/38 distinguishes between (i) persons who are working and (ii) those who are not. Under Article 7(1)(a) of Directive 2004/38, the first group of Union citizens in the host Member State have the right of residence without having to fulfil any other condition. On the other hand, persons who are economically inactive are required by Article 7(1)(b) of the directive to meet the condition that they have sufficient resources of their own.

76 Therefore, Article 7(1)(b) of Directive 2004/38 seeks to prevent economically inactive Union citizens from using the host Member State's welfare system to fund their means of subsistence.

77 As the Advocate General has observed in points 93 and 96 of his Opinion, any unequal treatment between Union citizens who have made use of their freedom of movement and residence and nationals of the host Member State with regard to the grant of social benefits is an inevitable consequence of Directive 2004/38. Such potential unequal treatment is founded on the link established by the Union legislature in Article 7 of the directive between the requirement to have sufficient resources as a condition for residence and the concern not to create a burden on the social assistance systems of the Member States.

78 A Member State must therefore have the possibility, pursuant to Article 7 of Directive 2004/38, of refusing to grant social benefits to economically inactive Union citizens who exercise their right to freedom of movement solely in order to obtain another Member State's social assistance although they do not have sufficient resources to claim a right of residence.

79 To deny the Member State concerned that possibility would, as the Advocate General has stated in point 106 of his Opinion, thus have the consequence that persons who, upon arriving in the territory of another Member State, do not have sufficient resources to provide for themselves would have them automatically, through the grant of a special non-contributory cash benefit which is intended to cover the beneficiary's subsistence costs.

80 Therefore, the financial situation of each person concerned should be examined specifically, without taking account of the social benefits claimed, in order to determine whether he meets the condition of having sufficient resources to qualify for a right of residence under Article 7(1)(b) of Directive 2004/38.

81 In the main proceedings, according to the findings of the referring court the applicants do not have sufficient resources and thus cannot claim a right of residence in the host Member State under Directive 2004/38. Therefore,

as has been stated in paragraph 69 of the present judgment, they cannot invoke the principle of non-discrimination in Article 24(1) of the directive.

82 Accordingly, Article 24(1) of Directive 2004/38, read in conjunction with Article 7(1)(b) thereof, does not preclude national legislation such as that at issue in the main proceedings in so far as it excludes nationals of other Member States who do not have a right of residence under Directive 2004/38 in the host Member State from entitlement to certain ‘special non-contributory cash benefits’ within the meaning of Article 70(2) of Regulation No 883/2004.

83 The same conclusion must be reached in respect of the interpretation of Article 4 of Regulation No 883/2004. The benefits at issue in the main proceedings, which constitute ‘special non-contributory cash benefits’ within the meaning of Article 70(2) of the regulation, are, under Article 70(4), to be provided exclusively in the Member State in which the persons concerned reside, in accordance with its legislation. It follows that there is nothing to prevent the grant of such benefits to Union citizens who are not economically active from being made subject to the requirement that those citizens fulfil the conditions for obtaining a right of residence under Directive 2004/38 in the host Member State (see, to this effect, judgment in *Brey*, EU:C:2013:965, paragraph 44).

84 In the light of the foregoing, the answer to the second and third questions is that Article 24(1) of Directive 2004/38, read in conjunction with Article 7(1)(b) thereof, and Article 4 of Regulation No 883/2004 must be interpreted as not precluding legislation of a Member State under which nationals of other Member States are excluded from entitlement to certain ‘special non-contributory cash benefits’ within the meaning of Article 70(2) of Regulation No 883/2004, although those benefits are granted to nationals of the host Member State who are in the same situation, in so far as those nationals of other Member States do not have a right of residence under Directive 2004/38 in the host Member State.

Question 4

85 By its fourth question, the referring court asks, in essence, whether Articles 1, 20 and 51 of the Charter must be interpreted as requiring the Member States to grant Union citizens non-contributory cash benefits by way of basic provision such as to enable permanent residence or whether those States may limit their grant to the provision of funds necessary for return to the home State.

86 It should be recalled that, in the context of a reference for a preliminary ruling under Article 267 TFEU, the Court is called upon to interpret EU law only within the limits of the powers conferred on the European Union (see, inter alia, judgment in *Betriu Montull*, C-5/12, EU:C:2013:571, paragraph 68 and the case-law cited).

87 Article 51(1) of the Charter states that the provisions of the Charter are addressed ‘to the Member States only when they are implementing Union law’.

88 According to Article 6(1) TEU, the provisions of the Charter are not to extend in any way the competences of the European Union as defined in the Treaties. Likewise, the Charter, pursuant to Article 51(2) thereof, does not extend the field of application of EU law beyond the powers of the European Union or establish any new power or task for the European Union, or modify powers and tasks as defined in the Treaties (see judgment in *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraphs 17 and 23, and order in *Nagy and Others*, C-488/12 to C-491/12 and C-526/12, EU:C:2013:703, paragraph 15).

89 In paragraph 41 of the judgment in *Brey* (EU:C:2013:565), the Court confirmed that Article 70 of Regulation No 883/2004, which defines the term ‘special non-contributory cash benefits’, is not intended to lay down the conditions creating the right to those benefits. It is thus for the legislature of each Member State to lay down those conditions.

90 Accordingly, since those conditions result neither from Regulation No 883/2004 nor from Directive 2004/38 or other secondary EU legislation, and the Member States thus have competence to determine the conditions for the grant of such benefits, they also have competence, as the Advocate General has observed in point 146 of his Opinion, to define the extent of the social cover provided by that type of benefit.

91 Consequently, when the Member States lay down the conditions for the grant of special non-contributory cash benefits and the extent of such benefits, they are not implementing EU law.

92 It follows that the Court does not have jurisdiction to answer the fourth question.

Costs

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

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

1. **Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, as amended by Commission Regulation (EU) No 1244/2010 of 9 December 2010, must be interpreted as meaning that ‘special non-contributory cash benefits’ as referred to in Articles 3(3) and 70 of the regulation fall within the scope of Article 4 of the regulation.**
2. **Article 24(1) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, read in conjunction with Article 7(1)(b) thereof, and Article 4 of Regulation No 883/2004, as amended by Regulation No 1244/2010, must be interpreted as not precluding legislation of a Member State under which nationals of other Member States are excluded from entitlement to certain ‘special non-contributory cash benefits’ within the meaning of Article 70(2) of Regulation No 883/2004, although those benefits are granted to nationals of the host Member State who are in the same situation, in so far as those nationals of other Member States do not have a right of residence under Directive 2004/38 in the host Member State.**
3. **The Court of Justice of the European Union does not have jurisdiction to answer the fourth question.**

LECTURE 4: DATA PROTECTION

In an attempt to develop a more perfect internal market, the European Union has taken up the challenge to promote and develop the emergence of a digital single market, in which cross-border online transactions are facilitated. The establishment of such a market has to a significant extent increased the possibility for individuals' personal data to be assembled and transferred throughout the European Union and beyond. The risk of those data being transferred has given rise to increased debates on the need for and extent of EU regulation governing and structuring such transfers. Building on a regulatory framework in place since 1995, the EU legislator took up this challenge in the wake of controversial judgments by the Court of Justice in the *Google Spain* and *Schrems* cases.

The purpose of this lecture is to demonstrate how the European Union regulates the internal market by means of ever more detailed regulation, responding to needs and worries of EU citizens. Although delving in a subject of great technicality, the subject matter also allows to analyse how far the EU is willing and able to go in perfecting the internal market. To make that point more clear, an excursion into the genesis and fate of EU data retention rules complementing the data protection framework will be made.

Materials to read:

- Court of Justice, Case C-131/12, *Google Spain*, EU:C:2014:317.
- Court of Justice, Case C-362/14, *Schrems*, EU:C:2015:650.
- Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

Lecture 4 outline:

1. From privacy to data protection: an inherent part of the digital single market
 - i. The establishment of a digital market
 - ii. Data as inherent part of the digital market
 - iii. Data protection – a species of the right to privacy
2. First steps at EU level
 - i. The 1995 Directive
 - ii. Recognition of data protection as a fundamental right in the Charter
 - iii. Problems and gaps unforeseen in 1995
3. The *Google Spain* and *Schrems* judgments and the need for an updated regulatory framework
 - i. *Google Spain*: the right to be forgotten
 - ii. *Schrems*: the right not to have one's data transferred outside the Union
4. The new framework in place
 - i. Regulation 2016/679
 - ii. The right to be forgotten
 - iii. Guarantees against unwarranted transfers inside and outside the Union
5. Excursion: data retention as complementary regulatory instrument

- i. A complementary legal tool in the service of law enforcement
 - ii. EU legislative attempts and judicial scrutiny
6. Data protection: the role of law in the future
 - i. Obligations imposed on businesses
 - ii. Obligations imposed on Member States
 - iii. New legal problems to be foreseen?

Questions for discussion:

- To what extent does the right to protect personal data, enshrined in the Charter of Fundamental Rights, give individuals the right to object against the free movement of personal data relating to him/her?
- Is the extraterritorial application of the EU data protection legislation package the most appropriate way to regulate the transfer and use of data that were deemed problematic in the *Schrems* judgment?

Case C-131/12, *Google Spain*

JUDGMENT OF THE COURT (Grand Chamber)

In Case C-131/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Audiencia Nacional (Spain), made by decision of 27 February 2012, received at the Court on 9 March 2012, in the proceedings

Google Spain SL,

Google Inc.

v

Agencia Española de Protección de Datos (AEPD),

Mario Costeja González,

THE COURT (Grand Chamber),

[...]

1 This request for a preliminary ruling concerns the interpretation of Article 2(b) and (d), Article 4(1)(a) and (c), Article 12(b) and subparagraph (a) of the first paragraph of Article 14 of 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) and of Article 8 of the Charter of Fundamental Rights of the European Union ('the Charter').

2 The request has been made in proceedings between, on the one hand, Google Spain SL ('Google Spain') and Google Inc. and, on the other, the Agencia Española de Protección de Datos (Spanish Data Protection Agency; 'the AEPD') and Mr Costeja González concerning a decision by the AEPD upholding the complaint lodged by Mr Costeja González against those two companies and ordering Google Inc. to adopt the measures necessary to withdraw personal data relating to Mr Costeja González from its index and to prevent access to the data in the future.

Legal context

European Union law

3 Directive 95/46 which, according to Article 1, has the object of protecting the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data, and of removing obstacles to the free flow of such data, states in recitals 2, 10, 18 to 20 and 25 in its preamble:

'(2) ... data-processing systems are designed to serve man; ... they must, whatever the nationality or residence of natural persons, respect their fundamental rights and freedoms, notably the right to privacy, and contribute to ... the well-being of individuals;

...

(10) ... the object of the national laws on the processing of personal data is to protect fundamental rights and freedoms, notably the right to privacy, which is recognised both in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms [, signed in Rome on 4 November 1950,] and in the general principles of Community law; ... for that reason, the approximation of those laws must not result in any lessening of the protection they afford but must, on the contrary, seek to ensure a high level of protection in the Community;

...

(18) ... in order to ensure that individuals are not deprived of the protection to which they are entitled under this Directive, any processing of personal data in the Community must be carried out in accordance with the law of one of the Member States; ... in this connection, processing carried out under the responsibility of a controller who is established in a Member State should be governed by the law of that State;

(19) ... establishment on the territory of a Member State implies the effective and real exercise of activity through stable arrangements; ... the legal form of such an establishment, whether simply [a] branch or a subsidiary with a legal personality, is not the determining factor in this respect; ... when a single controller is established on the territory of several Member States, particularly by means of subsidiaries, he must ensure, in order to avoid any circumvention of national rules, that each of the establishments fulfils the obligations imposed by the national law applicable to its activities;

(20) ... the fact that the processing of data is carried out by a person established in a third country must not stand in the way of the protection of individuals provided for in this Directive; ... in these cases, the processing should be governed by the law of the Member State in which the means used are located, and there should be guarantees to ensure that the rights and obligations provided for in this Directive are respected in practice;

...

(25) ... the principles of protection must be reflected, on the one hand, in the obligations imposed on persons ... responsible for processing, in particular regarding data quality, technical security, notification to the supervisory authority, and the circumstances under which processing can be carried out, and, on the other hand, in the right conferred on individuals, the data on whom are the subject of processing, to be informed that processing is taking place, to consult the data, to request corrections and even to object to processing in certain circumstances’.

4 Article 2 of Directive 95/46 states that ‘[f]or the purposes of this Directive:

(a) “personal data” shall mean any information relating to an identified or identifiable natural person (“data subject”); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity;

(b) “processing of personal data” (“processing”) shall mean any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organisation, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction;

...

(d) “controller” shall mean the natural or legal person, public authority, agency or any other body which alone or jointly with others determines the purposes and means of the processing of personal data; where the purposes and means of processing are determined by national or Community laws or regulations, the controller or the specific criteria for his nomination may be designated by national or Community law;

...’

5 Article 3 of Directive 95/46, entitled ‘Scope’, states in paragraph 1:

‘This Directive shall apply to the processing of personal data wholly or partly by automatic means, and to the processing otherwise than by automatic means of personal data which form part of a filing system or are intended to form part of a filing system.’

6 Article 4 of Directive 95/46, entitled ‘National law applicable’, provides:

‘1. Each Member State shall apply the national provisions it adopts pursuant to this Directive to the processing of personal data where:

(a) the processing is carried out in the context of the activities of an establishment of the controller on the territory of the Member State; when the same controller is established on the territory of several Member States, he must take the necessary measures to ensure that each of these establishments complies with the obligations laid down by the national law applicable;

(b) the controller is not established on the Member State’s territory, but in a place where its national law applies by virtue of international public law;

(c) the controller is not established on Community territory and, for purposes of processing personal data makes use of equipment, automated or otherwise, situated on the territory of the said Member State, unless such equipment is used only for purposes of transit through the territory of the Community.

2. In the circumstances referred to in paragraph 1(c), the controller must designate a representative established in the territory of that Member State, without prejudice to legal actions which could be initiated against the controller himself.’

7 In Section I (entitled ‘Principles relating to data quality’) of Chapter II of Directive 95/46, Article 6 is worded as follows:

‘1. Member States shall provide that personal data must be:

(a) processed fairly and lawfully;

(b) collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes. Further processing of data for historical, statistical or scientific purposes shall not be considered as incompatible provided that Member States provide appropriate safeguards;

(c) adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed;

(d) accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that data which are inaccurate or incomplete, having regard to the purposes for which they were collected or for which they are further processed, are erased or rectified;

(e) kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed. Member States shall lay down appropriate safeguards for personal data stored for longer periods for historical, statistical or scientific use.

2. It shall be for the controller to ensure that paragraph 1 is complied with.’

8 In Section II (entitled ‘Criteria for making data processing legitimate’) of Chapter II of Directive 95/46, Article 7 provides:

‘Member States shall provide that personal data may be processed only if:

...

(f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed, except where such interests are overridden by the interests [or] fundamental rights and freedoms of the data subject which require protection under Article 1(1).’

9 Article 9 of Directive 95/46, entitled ‘Processing of personal data and freedom of expression’, provides:

‘Member States shall provide for exemptions or derogations from the provisions of this Chapter, Chapter IV and Chapter VI for the processing of personal data carried out solely for journalistic purposes or the purpose of artistic or literary expression only if they are necessary to reconcile the right to privacy with the rules governing freedom of expression.’

10 Article 12 of Directive 95/46, entitled ‘Rights of access’, provides:

‘Member States shall guarantee every data subject the right to obtain from the controller:

...

(b) as appropriate the rectification, erasure or blocking of data the processing of which does not comply with the provisions of this Directive, in particular because of the incomplete or inaccurate nature of the data;

...’

11 Article 14 of Directive 95/46, entitled ‘The data subject’s right to object’, provides:

‘Member States shall grant the data subject the right:

(a) at least in the cases referred to in Article 7(e) and (f), to object at any time on compelling legitimate grounds relating to his particular situation to the processing of data relating to him, save where otherwise provided by national legislation. Where there is a justified objection, the processing instigated by the controller may no longer involve those data;

...’

12 Article 28 of Directive 95/46, entitled ‘Supervisory authority’, is worded as follows:

‘1. Each Member State shall provide that one or more public authorities are responsible for monitoring the application within its territory of the provisions adopted by the Member States pursuant to this Directive.

...

3. Each authority shall in particular be endowed with:

– investigative powers, such as powers of access to data forming the subject-matter of processing operations and powers to collect all the information necessary for the performance of its supervisory duties,

– effective powers of intervention, such as, for example, that ... of ordering the blocking, erasure or destruction of data, of imposing a temporary or definitive ban on processing ...

– ...

Decisions by the supervisory authority which give rise to complaints may be appealed against through the courts.

4. Each supervisory authority shall hear claims lodged by any person, or by an association representing that person, concerning the protection of his rights and freedoms in regard to the processing of personal data. The person concerned shall be informed of the outcome of the claim.

...

6. Each supervisory authority is competent, whatever the national law applicable to the processing in question, to exercise, on the territory of its own Member State, the powers conferred on it in accordance with paragraph 3. Each authority may be requested to exercise its powers by an authority of another Member State.

The supervisory authorities shall cooperate with one another to the extent necessary for the performance of their duties, in particular by exchanging all useful information.

...?

Spanish law

13 Directive 95/46 was transposed into Spanish Law by Organic Law No 15/1999 of 13 December 1999 on the protection of personal data (BOE No 298 of 14 December 1999, p. 43088).

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

14 On 5 March 2010, Mr Costeja González, a Spanish national resident in Spain, lodged with the AEPD a complaint against La Vanguardia Ediciones SL, which publishes a daily newspaper with a large circulation, in particular in Catalonia (Spain) ('La Vanguardia'), and against Google Spain and Google Inc. The complaint was based on the fact that, when an internet user entered Mr Costeja González's name in the search engine of the Google group ('Google Search'), he would obtain links to two pages of La Vanguardia's newspaper, of 19 January and 9 March 1998 respectively, on which an announcement mentioning Mr Costeja González's name appeared for a real-estate auction connected with attachment proceedings for the recovery of social security debts.

15 By that complaint, Mr Costeja González requested, first, that La Vanguardia be required either to remove or alter those pages so that the personal data relating to him no longer appeared or to use certain tools made available by search engines in order to protect the data. Second, he requested that Google Spain or Google Inc. be required to remove or conceal the personal data relating to him so that they ceased to be included in the search results and no longer appeared in the links to La Vanguardia. Mr Costeja González stated in this context that the attachment proceedings concerning him had been fully resolved for a number of years and that reference to them was now entirely irrelevant.

16 By decision of 30 July 2010, the AEPD rejected the complaint in so far as it related to La Vanguardia, taking the view that the publication by it of the information in question was legally justified as it took place upon order of the Ministry of Labour and Social Affairs and was intended to give maximum publicity to the auction in order to secure as many bidders as possible.

17 On the other hand, the complaint was upheld in so far as it was directed against Google Spain and Google Inc. The AEPD considered in this regard that operators of search engines are subject to data protection legislation given that they carry out data processing for which they are responsible and act as intermediaries in the information society. The AEPD took the view that it has the power to require the withdrawal of data and the prohibition of access to certain data by the operators of search engines when it considers that the locating and dissemination of the data are liable to compromise the fundamental right to data protection and the dignity of persons in the broad sense, and this would also encompass the mere wish of the person concerned that such data not be known to third parties. The AEPD considered that that obligation may be owed directly by operators of search engines, without it being necessary to erase the data or information from the website where they appear, including when retention of the information on that site is justified by a statutory provision.

18 Google Spain and Google Inc. brought separate actions against that decision before the Audiencia Nacional (National High Court). The Audiencia Nacional joined the actions.

19 That court states in the order for reference that the actions raise the question of what obligations are owed by operators of search engines to protect personal data of persons concerned who do not wish that certain information, which is published on third parties' websites and contains personal data relating to them that enable that information to be linked to them, be located, indexed and made available to internet users indefinitely. The answer to that question depends on the way in which Directive 95/46 must be interpreted in the context of these technologies, which appeared after the directive's publication.

20 In those circumstances, the Audiencia Nacional decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘1. With regard to the territorial application of Directive [95/46] and, consequently, of the Spanish data protection legislation:

(a) must it be considered that an “establishment”, within the meaning of Article 4(1)(a) of Directive 95/46, exists when any one or more of the following circumstances arise:

– when the undertaking providing the search engine sets up in a Member State an office or subsidiary for the purpose of promoting and selling advertising space on the search engine, which orientates its activity towards the inhabitants of that State,

or

– when the parent company designates a subsidiary located in that Member State as its representative and controller for two specific filing systems which relate to the data of customers who have contracted for advertising with that undertaking,

or

– when the office or subsidiary established in a Member State forwards to the parent company, located outside the European Union, requests and requirements addressed to it both by data subjects and by the authorities with responsibility for ensuring observation of the right to data protection, even where such collaboration is engaged in voluntarily?

(b) Must Article 4(1)(c) of Directive 95/46 be interpreted as meaning that there is “use of equipment ... situated on the territory of the said Member State”:

– when a search engine uses crawlers or robots to locate and index information contained in web pages located on servers in that Member State,

or

– when it uses a domain name pertaining to a Member State and arranges for searches and the results thereof to be based on the language of that Member State?

(c) Is it possible to regard as a use of equipment, in the terms of Article 4(1)(c) of Directive 95/46, the temporary storage of the information indexed by internet search engines? If the answer to that question is affirmative, can it be considered that that connecting factor is present when the undertaking refuses to disclose the place where it stores those indexes, invoking reasons of competition?

(d) Regardless of the answers to the foregoing questions and particularly in the event that the Court ... considers that the connecting factors referred to in Article 4 of [Directive 95/46] are not present:

must Directive 95/46 ... be applied, in the light of Article 8 of the [Charter], in the Member State where the centre of gravity of the conflict is located and more effective protection of the rights of ... Union citizens is possible?

2. As regards the activity of search engines as providers of content in relation to Directive 95/46 ...:

(a) in relation to the activity of [Google Search], as a provider of content, consisting in locating information published or included on the net by third parties, indexing it automatically, storing it temporarily and finally making it available to internet users according to a particular order of preference, when that information contains personal data of third parties: must an activity like the one described be interpreted as falling within the concept of “processing of ... data” used in Article 2(b) of Directive 95/46?

(b) If the answer to the foregoing question is affirmative, and once again in relation to an activity like the one described:

must Article 2(d) of Directive 95/46 be interpreted as meaning that the undertaking managing [Google Search] is to be regarded as the “controller” of the personal data contained in the web pages that it indexes?

(c) In the event that the answer to the foregoing question is affirmative:

may the [AEPD], protecting the rights embodied in [Article] 12(b) and [subparagraph (a) of the first paragraph of Article 14] of Directive 95/46, directly impose on [Google Search] a requirement that it withdraw from its indexes an item of information published by third parties, without addressing itself in advance or simultaneously to the owner of the web page on which that information is located?

(d) In the event that the answer to the foregoing question is affirmative:

would the obligation of search engines to protect those rights be excluded when the information that contains the personal data has been lawfully published by third parties and is kept on the web page from which it originates?

3. Regarding the scope of the right of erasure and/or the right to object, in relation to the “derecho al olvido” (the “right to be forgotten”), the following question is asked:

must it be considered that the rights to erasure and blocking of data, provided for in Article 12(b), and the right to object, provided for by [subparagraph (a) of the first paragraph of Article 14] of Directive 95/46, extend to enabling the data subject to address himself to search engines in order to prevent indexing of the information relating to him personally, published on third parties’ web pages, invoking his wish that such information should not be known to internet users when he considers that it might be prejudicial to him or he wishes it to be consigned to oblivion, even though the information in question has been lawfully published by third parties?’

Consideration of the questions referred

Question 2(a) and (b), concerning the material scope of Directive 95/46

21 By Question 2(a) and (b), which it is appropriate to examine first, the referring court asks, in essence, whether Article 2(b) of Directive 95/46 is to be interpreted as meaning that the activity of a search engine as a provider of content which consists in finding information published or placed on the internet by third parties, indexing it automatically, storing it temporarily and, finally, making it available to internet users according to a particular order of preference must be classified as ‘processing of personal data’ within the meaning of that provision when that information contains personal data. If the answer is in the affirmative, the referring court seeks to ascertain furthermore whether Article 2(d) of Directive 95/46 is to be interpreted as meaning that the operator of a search engine must be regarded as the ‘controller’ in respect of that processing of the personal data, within the meaning of that provision.

22 According to Google Spain and Google Inc., the activity of search engines cannot be regarded as processing of the data which appear on third parties’ web pages displayed in the list of search results, given that search engines process all the information available on the internet without effecting a selection between personal data and other information. Furthermore, even if that activity must be classified as ‘data processing’, the operator of a search engine cannot be regarded as a ‘controller’ in respect of that processing since it has no knowledge of those data and does not exercise control over the data.

23 On the other hand, Mr Costeja González, the Spanish, Italian, Austrian and Polish Governments and the European Commission consider that that activity quite clearly involves ‘data processing’ within the meaning of Directive 95/46, which is distinct from the data processing by the publishers of websites and pursues different objectives from such processing. The operator of a search engine is the ‘controller’ in respect of the data processing carried out by it since it is the operator that determines the purposes and means of that processing.

24 In the Greek Government’s submission, the activity in question constitutes such ‘processing’, but inasmuch as search engines serve merely as intermediaries, the undertakings which operate them cannot be regarded as ‘controllers’, except where they store data in an ‘intermediate memory’ or ‘cache memory’ for a period which exceeds that which is technically necessary.

25 Article 2(b) of Directive 95/46 defines ‘processing of personal data’ as ‘any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organisation, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction’.

26 As regards in particular the internet, the Court has already had occasion to state that the operation of loading personal data on an internet page must be considered to be such ‘processing’ within the meaning of Article 2(b) of Directive 95/46 (see Case C-101/01 *Lindqvist* EU:C:2003:596, paragraph 25).

27 So far as concerns the activity at issue in the main proceedings, it is not contested that the data found, indexed and stored by search engines and made available to their users include information relating to identified or identifiable natural persons and thus ‘personal data’ within the meaning of Article 2(a) of that directive.

28 Therefore, it must be found that, in exploring the internet automatically, constantly and systematically in search of the information which is published there, the operator of a search engine ‘collects’ such data which it subsequently ‘retrieves’, ‘records’ and ‘organises’ within the framework of its indexing programmes, ‘stores’ on its servers and, as the case may be, ‘discloses’ and ‘makes available’ to its users in the form of lists of search results. As those operations are referred to expressly and unconditionally in Article 2(b) of Directive 95/46, they must be classified as ‘processing’ within the meaning of that provision, regardless of the fact that the operator of the search engine also carries out the same operations in respect of other types of information and does not distinguish between the latter and the personal data.

29 Nor is the foregoing finding affected by the fact that those data have already been published on the internet and are not altered by the search engine.

30 The Court has already held that the operations referred to in Article 2(b) of Directive 95/46 must also be classified as such processing where they exclusively concern material that has already been published in unaltered form in the media. It has indeed observed in that regard that a general derogation from the application of Directive 95/46 in such a case would largely deprive the directive of its effect (see, to this effect, Case C-73/07 *Satakunnan Markkinapörssi and Satamedia* EU:C:2008:727, paragraphs 48 and 49).

31 Furthermore, it follows from the definition contained in Article 2(b) of Directive 95/46 that, whilst the alteration of personal data indeed constitutes processing within the meaning of the directive, the other operations which are mentioned there do not, on the other hand, in any way require that the personal data be altered.

32 As to the question whether the operator of a search engine must be regarded as the ‘controller’ in respect of the processing of personal data that is carried out by that engine in the context of an activity such as that at issue in the main proceedings, it should be recalled that Article 2(d) of Directive 95/46 defines ‘controller’ as ‘the natural or legal person, public authority, agency or any other body which alone or jointly with others determines the purposes and means of the processing of personal data’.

33 It is the search engine operator which determines the purposes and means of that activity and thus of the processing of personal data that it itself carries out within the framework of that activity and which must, consequently, be regarded as the ‘controller’ in respect of that processing pursuant to Article 2(d).

34 Furthermore, it would be contrary not only to the clear wording of that provision but also to its objective — which is to ensure, through a broad definition of the concept of ‘controller’, effective and complete protection of data subjects — to exclude the operator of a search engine from that definition on the ground that it does not exercise control over the personal data published on the web pages of third parties.

35 In this connection, it should be pointed out that the processing of personal data carried out in the context of the activity of a search engine can be distinguished from and is additional to that carried out by publishers of websites, consisting in loading those data on an internet page.

36 Moreover, it is undisputed that that activity of search engines plays a decisive role in the overall dissemination of those data in that it renders the latter accessible to any internet user making a search on the basis of the data subject’s name, including to internet users who otherwise would not have found the web page on which those data are published.

37 Also, the organisation and aggregation of information published on the internet that are effected by search engines with the aim of facilitating their users' access to that information may, when users carry out their search on the basis of an individual's name, result in them obtaining through the list of results a structured overview of the information relating to that individual that can be found on the internet enabling them to establish a more or less detailed profile of the data subject.

38 Inasmuch as the activity of a search engine is therefore liable to affect significantly, and additionally compared with that of the publishers of websites, the fundamental rights to privacy and to the protection of personal data, the operator of the search engine as the person determining the purposes and means of that activity must ensure, within the framework of its responsibilities, powers and capabilities, that the activity meets the requirements of Directive 95/46 in order that the guarantees laid down by the directive may have full effect and that effective and complete protection of data subjects, in particular of their right to privacy, may actually be achieved.

39 Finally, the fact that publishers of websites have the option of indicating to operators of search engines, by means in particular of exclusion protocols such as 'robot.txt' or codes such as 'noindex' or 'noarchive', that they wish specific information published on their site to be wholly or partially excluded from the search engines' automatic indexes does not mean that, if publishers of websites do not so indicate, the operator of a search engine is released from its responsibility for the processing of personal data that it carries out in the context of the engine's activity.

40 That fact does not alter the position that the purposes and means of that processing are determined by the operator of the search engine. Furthermore, even if that option for publishers of websites were to mean that they determine the means of that processing jointly with that operator, this finding would not remove any of the latter's responsibility as Article 2(d) of Directive 95/46 expressly provides that that determination may be made 'alone or jointly with others'.

41 It follows from all the foregoing considerations that the answer to Question 2(a) and (b) is that Article 2(b) and (d) of Directive 95/46 are to be interpreted as meaning that, first, the activity of a search engine consisting in finding information published or placed on the internet by third parties, indexing it automatically, storing it temporarily and, finally, making it available to internet users according to a particular order of preference must be classified as 'processing of personal data' within the meaning of Article 2(b) when that information contains personal data and, second, the operator of the search engine must be regarded as the 'controller' in respect of that processing, within the meaning of Article 2(d).

Question 1(a) to (d), concerning the territorial scope of Directive 95/46

42 By Question 1(a) to (d), the referring court seeks to establish whether it is possible to apply the national legislation transposing Directive 95/46 in circumstances such as those at issue in the main proceedings.

43 In this respect, the referring court has established the following facts:

– Google Search is offered worldwide through the website 'www.google.com'. In numerous States, a local version adapted to the national language exists. The version of Google Search in Spanish is offered through the website 'www.google.es', which has been registered since 16 September 2003. Google Search is one of the most used search engines in Spain.

– Google Search is operated by Google Inc., which is the parent company of the Google Group and has its seat in the United States.

– Google Search indexes websites throughout the world, including websites located in Spain. The information indexed by its 'web crawlers' or robots, that is to say, computer programmes used to locate and sweep up the content of web pages methodically and automatically, is stored temporarily on servers whose State of location is unknown, that being kept secret for reasons of competition.

– Google Search does not merely give access to content hosted on the indexed websites, but takes advantage of that activity and includes, in return for payment, advertising associated with the internet users' search terms, for undertakings which wish to use that tool in order to offer their goods or services to the internet users.

– The Google group has recourse to its subsidiary Google Spain for promoting the sale of advertising space generated on the website ‘www.google.com’. Google Spain, which was established on 3 September 2003 and possesses separate legal personality, has its seat in Madrid (Spain). Its activities are targeted essentially at undertakings based in Spain, acting as a commercial agent for the Google group in that Member State. Its objects are to promote, facilitate and effect the sale of on-line advertising products and services to third parties and the marketing of that advertising.

– Google Inc. designated Google Spain as the controller, in Spain, in respect of two filing systems registered by Google Inc. with the AEPD; those filing systems were intended to contain the personal data of the customers who had concluded contracts for advertising services with Google Inc.

44 Specifically, the main issues raised by the referring court concern the notion of ‘establishment’, within the meaning of Article 4(1)(a) of Directive 95/46, and of ‘use of equipment situated on the territory of the said Member State’, within the meaning of Article 4(1)(c).

Question 1(a)

45 By Question 1(a), the referring court asks, in essence, whether Article 4(1)(a) of Directive 95/46 is to be interpreted as meaning that processing of personal data is carried out in the context of the activities of an establishment of the controller on the territory of a Member State, within the meaning of that provision, when one or more of the following three conditions are met:

– the operator of a search engine sets up in a Member State a branch or subsidiary which is intended to promote and sell advertising space offered by that engine and which orientates its activity towards the inhabitants of that Member State, or

– the parent company designates a subsidiary located in that Member State as its representative and controller for two specific filing systems which relate to the data of customers who have contracted for advertising with that undertaking, or

– the branch or subsidiary established in a Member State forwards to the parent company, located outside the European Union, requests and requirements addressed to it both by data subjects and by the authorities with responsibility for ensuring observation of the right to protection of personal data, even where such collaboration is engaged in voluntarily.

46 So far as concerns the first of those three conditions, the referring court states that Google Search is operated and managed by Google Inc. and that it has not been established that Google Spain carries out in Spain an activity directly linked to the indexing or storage of information or data contained on third parties’ websites. Nevertheless, according to the referring court, the promotion and sale of advertising space, which Google Spain attends to in respect of Spain, constitutes the bulk of the Google group’s commercial activity and may be regarded as closely linked to Google Search.

47 Mr Costeja González, the Spanish, Italian, Austrian and Polish Governments and the Commission submit that, in the light of the inextricable link between the activity of the search engine operated by Google Inc. and the activity of Google Spain, the latter must be regarded as an establishment of the former and the processing of personal data is carried out in context of the activities of that establishment. On the other hand, according to Google Spain, Google Inc. and the Greek Government, Article 4(1)(a) of Directive 95/46 is not applicable in the case of the first of the three conditions listed by the referring court.

48 In this regard, it is to be noted first of all that recital 19 in the preamble to Directive 95/46 states that ‘establishment on the territory of a Member State implies the effective and real exercise of activity through stable arrangements’ and that ‘the legal form of such an establishment, whether simply [a] branch or a subsidiary with a legal personality, is not the determining factor’.

49 It is not disputed that Google Spain engages in the effective and real exercise of activity through stable arrangements in Spain. As it moreover has separate legal personality, it constitutes a subsidiary of Google Inc. on Spanish territory and, therefore, an ‘establishment’ within the meaning of Article 4(1)(a) of Directive 95/46.

50 In order to satisfy the criterion laid down in that provision, it is also necessary that the processing of personal data by the controller be ‘carried out in the context of the activities’ of an establishment of the controller on the territory of a Member State.

51 Google Spain and Google Inc. dispute that this is the case since the processing of personal data at issue in the main proceedings is carried out exclusively by Google Inc., which operates Google Search without any intervention on the part of Google Spain; the latter’s activity is limited to providing support to the Google group’s advertising activity which is separate from its search engine service.

52 Nevertheless, as the Spanish Government and the Commission in particular have pointed out, Article 4(1)(a) of Directive 95/46 does not require the processing of personal data in question to be carried out ‘by’ the establishment concerned itself, but only that it be carried out ‘in the context of the activities’ of the establishment.

53 Furthermore, in the light of the objective of Directive 95/46 of ensuring effective and complete protection of the fundamental rights and freedoms of natural persons, and in particular their right to privacy, with respect to the processing of personal data, those words cannot be interpreted restrictively (see, by analogy, Case C-324/09 *L’Oréal and Others* EU:C:2011:474, paragraphs 62 and 63).

54 It is to be noted in this context that it is clear in particular from recitals 18 to 20 in the preamble to Directive 95/46 and Article 4 thereof that the European Union legislature sought to prevent individuals from being deprived of the protection guaranteed by the directive and that protection from being circumvented, by prescribing a particularly broad territorial scope.

55 In the light of that objective of Directive 95/46 and of the wording of Article 4(1)(a), it must be held that the processing of personal data for the purposes of the service of a search engine such as Google Search, which is operated by an undertaking that has its seat in a third State but has an establishment in a Member State, is carried out ‘in the context of the activities’ of that establishment if the latter is intended to promote and sell, in that Member State, advertising space offered by the search engine which serves to make the service offered by that engine profitable.

56 In such circumstances, the activities of the operator of the search engine and those of its establishment situated in the Member State concerned are inextricably linked since the activities relating to the advertising space constitute the means of rendering the search engine at issue economically profitable and that engine is, at the same time, the means enabling those activities to be performed.

57 As has been stated in paragraphs 26 to 28 of the present judgment, the very display of personal data on a search results page constitutes processing of such data. Since that display of results is accompanied, on the same page, by the display of advertising linked to the search terms, it is clear that the processing of personal data in question is carried out in the context of the commercial and advertising activity of the controller’s establishment on the territory of a Member State, in this instance Spanish territory.

58 That being so, it cannot be accepted that the processing of personal data carried out for the purposes of the operation of the search engine should escape the obligations and guarantees laid down by Directive 95/46, which would compromise the directive’s effectiveness and the effective and complete protection of the fundamental rights and freedoms of natural persons which the directive seeks to ensure (see, by analogy, *L’Oréal and Others* EU:C:2011:474, paragraphs 62 and 63), in particular their right to privacy, with respect to the processing of personal data, a right to which the directive accords special importance as is confirmed in particular by Article 1(1) thereof and recitals 2 and 10 in its preamble (see, to this effect, Joined Cases C-465/00, C-138/01 and C-139/01 *Österreichischer Rundfunk and Others* EU:C:2003:294, paragraph 70; Case C-553/07 *Rijkeboer* EU:C:2009:293, paragraph 47; and Case C-473/12 *IPI* EU:C:2013:715, paragraph 28 and the case-law cited).

59 Since the first of the three conditions listed by the referring court suffices by itself for it to be concluded that an establishment such as Google Spain satisfies the criterion laid down in Article 4(1)(a) of Directive 95/46, it is unnecessary to examine the other two conditions.

60 It follows from the foregoing that the answer to Question 1(a) is that Article 4(1)(a) of Directive 95/46 is to be interpreted as meaning that processing of personal data is carried out in the context of the activities of an establishment of the controller on the territory of a Member State, within the meaning of that provision, when the

operator of a search engine sets up in a Member State a branch or subsidiary which is intended to promote and sell advertising space offered by that engine and which orientates its activity towards the inhabitants of that Member State.

Question 1(b) to (d)

61 In view of the answer given to Question 1(a), there is no need to answer Question 1(b) to (d).

Question 2(c) and (d), concerning the extent of the responsibility of the operator of a search engine under Directive 95/46

62 By Question 2(c) and (d), the referring court asks, in essence, whether Article 12(b) and subparagraph (a) of the first paragraph of Article 14 of Directive 95/46 are to be interpreted as meaning that, in order to comply with the rights laid down in those provisions, the operator of a search engine is obliged to remove from the list of results displayed following a search made on the basis of a person's name links to web pages, published by third parties and containing information relating to that person, also in a case where that name or information is not erased beforehand or simultaneously from those web pages, and even, as the case may be, when its publication in itself on those pages is lawful.

63 Google Spain and Google Inc. submit that, by virtue of the principle of proportionality, any request seeking the removal of information must be addressed to the publisher of the website concerned because it is he who takes the responsibility for making the information public, who is in a position to appraise the lawfulness of that publication and who has available to him the most effective and least restrictive means of making the information inaccessible. Furthermore, to require the operator of a search engine to withdraw information published on the internet from its indexes would take insufficient account of the fundamental rights of publishers of websites, of other internet users and of that operator itself.

64 According to the Austrian Government, a national supervisory authority may order such an operator to erase information published by third parties from its filing systems only if the data in question have been found previously to be unlawful or incorrect or if the data subject has made a successful objection to the publisher of the website on which that information was published.

65 Mr Costeja González, the Spanish, Italian and Polish Governments and the Commission submit that the national authority may directly order the operator of a search engine to withdraw from its indexes and intermediate memory information containing personal data that has been published by third parties, without having to approach beforehand or simultaneously the publisher of the web page on which that information appears. Furthermore, according to Mr Costeja González, the Spanish and Italian Governments and the Commission, the fact that the information has been published lawfully and that it still appears on the original web page has no effect on the obligations of that operator under Directive 95/46. On the other hand, according to the Polish Government that fact is such as to release the operator from its obligations.

66 First of all, it should be remembered that, as is apparent from Article 1 and recital 10 in the preamble, Directive 95/46 seeks to ensure a high level of protection of the fundamental rights and freedoms of natural persons, in particular their right to privacy, with respect to the processing of personal data (see, to this effect, *API* EU:C:2013:715, paragraph 28).

67 According to recital 25 in the preamble to Directive 95/46, the principles of protection laid down by the directive are reflected, on the one hand, in the obligations imposed on persons responsible for processing, in particular regarding data quality, technical security, notification to the supervisory authority and the circumstances under which processing can be carried out, and, on the other hand, in the rights conferred on individuals whose data are the subject of processing to be informed that processing is taking place, to consult the data, to request corrections and even to object to processing in certain circumstances.

68 The Court has already held that the provisions of Directive 95/46, in so far as they govern the processing of personal data liable to infringe fundamental freedoms, in particular the right to privacy, must necessarily be interpreted in the light of fundamental rights, which, according to settled case-law, form an integral part of the general principles of law whose observance the Court ensures and which are now set out in the Charter (see, in

particular, Case C-274/99 P *Connolly v Commission* EU:C:2001:127, paragraph 37, and *Österreichischer Rundfunk and Others* EU:C:2003:294, paragraph 68).

69 Article 7 of the Charter guarantees the right to respect for private life, whilst Article 8 of the Charter expressly proclaims the right to the protection of personal data. Article 8(2) and (3) specify that such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law, that everyone has the right of access to data which have been collected concerning him or her and the right to have the data rectified, and that compliance with these rules is to be subject to control by an independent authority. Those requirements are implemented inter alia by Articles 6, 7, 12, 14 and 28 of Directive 95/46.

70 Article 12(b) of Directive 95/46 provides that Member States are to guarantee every data subject the right to obtain from the controller, as appropriate, the rectification, erasure or blocking of data the processing of which does not comply with the provisions of Directive 95/46, in particular because of the incomplete or inaccurate nature of the data. As this final point relating to the case where certain requirements referred to in Article 6(1)(d) of Directive 95/46 are not observed is stated by way of example and is not exhaustive, it follows that non-compliant nature of the processing, which is capable of conferring upon the data subject the right guaranteed in Article 12(b) of the directive, may also arise from non-observance of the other conditions of lawfulness that are imposed by the directive upon the processing of personal data.

71 In this connection, it should be noted that, subject to the exceptions permitted under Article 13 of Directive 95/46, all processing of personal data must comply, first, with the principles relating to data quality set out in Article 6 of the directive and, secondly, with one of the criteria for making data processing legitimate listed in Article 7 of the directive (see *Österreichischer Rundfunk and Others* EU:C:2003:294, paragraph 65; Joined Cases C-468/10 and C-469/10 *ASNEF and FECEMD* EU:C:2011:777, paragraph 26; and Case C-342/12 *Worten* EU:C:2013:355, paragraph 33).

72 Under Article 6 of Directive 95/46 and without prejudice to specific provisions that the Member States may lay down in respect of processing for historical, statistical or scientific purposes, the controller has the task of ensuring that personal data are processed ‘fairly and lawfully’, that they are ‘collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes’, that they are ‘adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed’, that they are ‘accurate and, where necessary, kept up to date’ and, finally, that they are ‘kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed’. In this context, the controller must take every reasonable step to ensure that data which do not meet the requirements of that provision are erased or rectified.

73 As regards legitimation, under Article 7 of Directive 95/46, of processing such as that at issue in the main proceedings carried out by the operator of a search engine, that processing is capable of being covered by the ground in Article 7(f).

74 This provision permits the processing of personal data where it is necessary for the purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject — in particular his right to privacy with respect to the processing of personal data — which require protection under Article 1(1) of the directive. Application of Article 7(f) thus necessitates a balancing of the opposing rights and interests concerned, in the context of which account must be taken of the significance of the data subject’s rights arising from Articles 7 and 8 of the Charter (see *ASNEF and FECEMD*, EU:C:2011:777, paragraphs 38 and 40).

75 Whilst the question whether the processing complies with Articles 6 and 7(f) of Directive 95/46 may be determined in the context of a request as provided for in Article 12(b) of the directive, the data subject may, in addition, rely in certain conditions on the right to object laid down in subparagraph (a) of the first paragraph of Article 14 of the directive.

76 Under subparagraph (a) of the first paragraph of Article 14 of Directive 95/46, Member States are to grant the data subject the right, at least in the cases referred to in Article 7(e) and (f) of the directive, to object at any time on compelling legitimate grounds relating to his particular situation to the processing of data relating to him, save where otherwise provided by national legislation. The balancing to be carried out under subparagraph (a) of

the first paragraph of Article 14 thus enables account to be taken in a more specific manner of all the circumstances surrounding the data subject's particular situation. Where there is a justified objection, the processing instigated by the controller may no longer involve those data.

77 Requests under Article 12(b) and subparagraph (a) of the first paragraph of Article 14 of Directive 95/46 may be addressed by the data subject directly to the controller who must then duly examine their merits and, as the case may be, end processing of the data in question. Where the controller does not grant the request, the data subject may bring the matter before the supervisory authority or the judicial authority so that it carries out the necessary checks and orders the controller to take specific measures accordingly.

78 In this connection, it is to be noted that it is clear from Article 28(3) and (4) of Directive 95/46 that each supervisory authority is to hear claims lodged by any person concerning the protection of his rights and freedoms in regard to the processing of personal data and that it has investigative powers and effective powers of intervention enabling it to order in particular the blocking, erasure or destruction of data or to impose a temporary or definitive ban on such processing.

79 It is in the light of those considerations that it is necessary to interpret and apply the provisions of Directive 95/46 governing the data subject's rights when he lodges with the supervisory authority or judicial authority a request such as that at issue in the main proceedings.

80 It must be pointed out at the outset that, as has been found in paragraphs 36 to 38 of the present judgment, processing of personal data, such as that at issue in the main proceedings, carried out by the operator of a search engine is liable to affect significantly the fundamental rights to privacy and to the protection of personal data when the search by means of that engine is carried out on the basis of an individual's name, since that processing enables any internet user to obtain through the list of results a structured overview of the information relating to that individual that can be found on the internet — information which potentially concerns a vast number of aspects of his private life and which, without the search engine, could not have been interconnected or could have been only with great difficulty — and thereby to establish a more or less detailed profile of him. Furthermore, the effect of the interference with those rights of the data subject is heightened on account of the important role played by the internet and search engines in modern society, which render the information contained in such a list of results ubiquitous (see, to this effect, Joined Cases C-509/09 and C-161/10 *eDate Advertising and Others* EU:C:2011:685, paragraph 45).

81 In the light of the potential seriousness of that interference, it is clear that it cannot be justified by merely the economic interest which the operator of such an engine has in that processing. However, inasmuch as the removal of links from the list of results could, depending on the information at issue, have effects upon the legitimate interest of internet users potentially interested in having access to that information, in situations such as that at issue in the main proceedings a fair balance should be sought in particular between that interest and the data subject's fundamental rights under Articles 7 and 8 of the Charter. Whilst it is true that the data subject's rights protected by those articles also override, as a general rule, that interest of internet users, that balance may however depend, in specific cases, on the nature of the information in question and its sensitivity for the data subject's private life and on the interest of the public in having that information, an interest which may vary, in particular, according to the role played by the data subject in public life.

82 Following the appraisal of the conditions for the application of Article 12(b) and subparagraph (a) of the first paragraph of Article 14 of Directive 95/46 which is to be carried out when a request such as that at issue in the main proceedings is lodged with it, the supervisory authority or judicial authority may order the operator of the search engine to remove from the list of results displayed following a search made on the basis of a person's name links to web pages published by third parties containing information relating to that person, without an order to that effect presupposing the previous or simultaneous removal of that name and information — of the publisher's own accord or following an order of one of those authorities — from the web page on which they were published.

83 As has been established in paragraphs 35 to 38 of the present judgment, inasmuch as the data processing carried out in the context of the activity of a search engine can be distinguished from and is additional to that carried out by publishers of websites and affects the data subject's fundamental rights additionally, the operator of the search engine as the controller in respect of that processing must ensure, within the framework of its responsibilities, powers and capabilities, that that processing meets the requirements of Directive 95/46, in order that the guarantees laid down by the directive may have full effect.

84 Given the ease with which information published on a website can be replicated on other sites and the fact that the persons responsible for its publication are not always subject to European Union legislation, effective and complete protection of data users could not be achieved if the latter had to obtain first or in parallel the erasure of the information relating to them from the publishers of websites.

85 Furthermore, the processing by the publisher of a web page consisting in the publication of information relating to an individual may, in some circumstances, be carried out ‘solely for journalistic purposes’ and thus benefit, by virtue of Article 9 of Directive 95/46, from derogations from the requirements laid down by the directive, whereas that does not appear to be so in the case of the processing carried out by the operator of a search engine. It cannot therefore be ruled out that in certain circumstances the data subject is capable of exercising the rights referred to in Article 12(b) and subparagraph (a) of the first paragraph of Article 14 of Directive 95/46 against that operator but not against the publisher of the web page.

86 Finally, it must be stated that not only does the ground, under Article 7 of Directive 95/46, justifying the publication of a piece of personal data on a website not necessarily coincide with that which is applicable to the activity of search engines, but also, even where that is the case, the outcome of the weighing of the interests at issue to be carried out under Article 7(f) and subparagraph (a) of the first paragraph of Article 14 of the directive may differ according to whether the processing carried out by the operator of a search engine or that carried out by the publisher of the web page is at issue, given that, first, the legitimate interests justifying the processing may be different and, second, the consequences of the processing for the data subject, and in particular for his private life, are not necessarily the same.

87 Indeed, since the inclusion in the list of results, displayed following a search made on the basis of a person’s name, of a web page and of the information contained on it relating to that person makes access to that information appreciably easier for any internet user making a search in respect of the person concerned and may play a decisive role in the dissemination of that information, it is liable to constitute a more significant interference with the data subject’s fundamental right to privacy than the publication on the web page.

88 In the light of all the foregoing considerations, the answer to Question 2(c) and (d) is that Article 12(b) and subparagraph (a) of the first paragraph of Article 14 of Directive 95/46 are to be interpreted as meaning that, in order to comply with the rights laid down in those provisions and in so far as the conditions laid down by those provisions are in fact satisfied, the operator of a search engine is obliged to remove from the list of results displayed following a search made on the basis of a person’s name links to web pages, published by third parties and containing information relating to that person, also in a case where that name or information is not erased beforehand or simultaneously from those web pages, and even, as the case may be, when its publication in itself on those pages is lawful.

Question 3, concerning the scope of the data subject’s rights guaranteed by Directive 95/46

89 By Question 3, the referring court asks, in essence, whether Article 12(b) and subparagraph (a) of the first paragraph of Article 14 of Directive 95/46 are to be interpreted as enabling the data subject to require the operator of a search engine to remove from the list of results displayed following a search made on the basis of his name links to web pages published lawfully by third parties and containing true information relating to him, on the ground that that information may be prejudicial to him or that he wishes it to be ‘forgotten’ after a certain time.

90 Google Spain, Google Inc., the Greek, Austrian and Polish Governments and the Commission consider that this question should be answered in the negative. Google Spain, Google Inc., the Polish Government and the Commission submit in this regard that Article 12(b) and subparagraph (a) of the first paragraph of Article 14 of Directive 95/46 confer rights upon data subjects only if the processing in question is incompatible with the directive or on compelling legitimate grounds relating to their particular situation, and not merely because they consider that that processing may be prejudicial to them or they wish that the data being processed sink into oblivion. The Greek and Austrian Governments submit that the data subject must approach the publisher of the website concerned.

91 According to Mr Costeja González and the Spanish and Italian Governments, the data subject may oppose the indexing by a search engine of personal data relating to him where their dissemination through the search engine is prejudicial to him and his fundamental rights to the protection of those data and to privacy — which

encompass the ‘right to be forgotten’ — override the legitimate interests of the operator of the search engine and the general interest in freedom of information.

92 As regards Article 12(b) of Directive 95/46, the application of which is subject to the condition that the processing of personal data be incompatible with the directive, it should be recalled that, as has been noted in paragraph 72 of the present judgment, such incompatibility may result not only from the fact that such data are inaccurate but, in particular, also from the fact that they are inadequate, irrelevant or excessive in relation to the purposes of the processing, that they are not kept up to date, or that they are kept for longer than is necessary unless they are required to be kept for historical, statistical or scientific purposes.

93 It follows from those requirements, laid down in Article 6(1)(c) to (e) of Directive 95/46, that even initially lawful processing of accurate data may, in the course of time, become incompatible with the directive where those data are no longer necessary in the light of the purposes for which they were collected or processed. That is so in particular where they appear to be inadequate, irrelevant or no longer relevant, or excessive in relation to those purposes and in the light of the time that has elapsed.

94 Therefore, if it is found, following a request by the data subject pursuant to Article 12(b) of Directive 95/46, that the inclusion in the list of results displayed following a search made on the basis of his name of the links to web pages published lawfully by third parties and containing true information relating to him personally is, at this point in time, incompatible with Article 6(1)(c) to (e) of the directive because that information appears, having regard to all the circumstances of the case, to be inadequate, irrelevant or no longer relevant, or excessive in relation to the purposes of the processing at issue carried out by the operator of the search engine, the information and links concerned in the list of results must be erased.

95 So far as concerns requests as provided for by Article 12(b) of Directive 95/46 founded on alleged non-compliance with the conditions laid down in Article 7(f) of the directive and requests under subparagraph (a) of the first paragraph of Article 14 of the directive, it must be pointed out that in each case the processing of personal data must be authorised under Article 7 for the entire period during which it is carried out.

96 In the light of the foregoing, when appraising such requests made in order to oppose processing such as that at issue in the main proceedings, it should in particular be examined whether the data subject has a right that the information relating to him personally should, at this point in time, no longer be linked to his name by a list of results displayed following a search made on the basis of his name. In this connection, it must be pointed out that it is not necessary in order to find such a right that the inclusion of the information in question in the list of results causes prejudice to the data subject.

97 As the data subject may, in the light of his fundamental rights under Articles 7 and 8 of the Charter, request that the information in question no longer be made available to the general public by its inclusion in such a list of results, it should be held, as follows in particular from paragraph 81 of the present judgment, that those rights override, as a rule, not only the economic interest of the operator of the search engine but also the interest of the general public in finding that information upon a search relating to the data subject’s name. However, that would not be the case if it appeared, for particular reasons, such as the role played by the data subject in public life, that the interference with his fundamental rights is justified by the preponderant interest of the general public in having, on account of inclusion in the list of results, access to the information in question.

98 As regards a situation such as that at issue in the main proceedings, which concerns the display, in the list of results that the internet user obtains by making a search by means of Google Search on the basis of the data subject’s name, of links to pages of the on-line archives of a daily newspaper that contain announcements mentioning the data subject’s name and relating to a real-estate auction connected with attachment proceedings for the recovery of social security debts, it should be held that, having regard to the sensitivity for the data subject’s private life of the information contained in those announcements and to the fact that its initial publication had taken place 16 years earlier, the data subject establishes a right that that information should no longer be linked to his name by means of such a list. Accordingly, since in the case in point there do not appear to be particular reasons substantiating a preponderant interest of the public in having, in the context of such a search, access to that information, a matter which is, however, for the referring court to establish, the data subject may, by virtue of Article 12(b) and subparagraph (a) of the first paragraph of Article 14 of Directive 95/46, require those links to be removed from the list of results.

99 It follows from the foregoing considerations that the answer to Question 3 is that Article 12(b) and subparagraph (a) of the first paragraph of Article 14 of Directive 95/46 are to be interpreted as meaning that, when appraising the conditions for the application of those provisions, it should inter alia be examined whether the data subject has a right that the information in question relating to him personally should, at this point in time, no longer be linked to his name by a list of results displayed following a search made on the basis of his name, without it being necessary in order to find such a right that the inclusion of the information in question in that list causes prejudice to the data subject. As the data subject may, in the light of his fundamental rights under Articles 7 and 8 of the Charter, request that the information in question no longer be made available to the general public on account of its inclusion in such a list of results, those rights override, as a rule, not only the economic interest of the operator of the search engine but also the interest of the general public in having access to that information upon a search relating to the data subject's name. However, that would not be the case if it appeared, for particular reasons, such as the role played by the data subject in public life, that the interference with his fundamental rights is justified by the preponderant interest of the general public in having, on account of its inclusion in the list of results, access to the information in question.

Costs

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

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

1. **Article 2(b) and (d) of 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 are to be interpreted as meaning that, first, the activity of a search engine consisting in finding information published or placed on the internet by third parties, indexing it automatically, storing it temporarily and, finally, making it available to internet users according to a particular order of preference must be classified as 'processing of personal data' within the meaning of Article 2(b) when that information contains personal data and, second, the operator of the search engine must be regarded as the 'controller' in respect of that processing, within the meaning of Article 2(d).**
2. **Article 4(1)(a) of Directive 95/46 is to be interpreted as meaning that processing of personal data is carried out in the context of the activities of an establishment of the controller on the territory of a Member State, within the meaning of that provision, when the operator of a search engine sets up in a Member State a branch or subsidiary which is intended to promote and sell advertising space offered by that engine and which orientates its activity towards the inhabitants of that Member State.**
3. **Article 12(b) and subparagraph (a) of the first paragraph of Article 14 of Directive 95/46 are to be interpreted as meaning that, in order to comply with the rights laid down in those provisions and in so far as the conditions laid down by those provisions are in fact satisfied, the operator of a search engine is obliged to remove from the list of results displayed following a search made on the basis of a person's name links to web pages, published by third parties and containing information relating to that person, also in a case where that name or information is not erased beforehand or simultaneously from those web pages, and even, as the case may be, when its publication in itself on those pages is lawful.**
4. **Article 12(b) and subparagraph (a) of the first paragraph of Article 14 of Directive 95/46 are to be interpreted as meaning that, when appraising the conditions for the application of those provisions, it should inter alia be examined whether the data subject has a right that the information in question relating to him personally should, at this point in time, no longer be linked to his name by a list of results displayed following a search made on the basis of his name, without it being necessary in order to find such a right that the inclusion of the information in question in that list causes prejudice to the data subject. As the data subject may, in the light of his fundamental rights under Articles 7 and 8 of the Charter, request that the information in question no longer be made available to the general public on account of its inclusion in such a list of results, those rights override, as a rule, not only the economic interest of the operator of the search engine but also the interest of the general public in having access to that information upon a search relating to the data subject's name. However, that would not be the case if it appeared, for particular reasons, such as the role played by the data subject in public life, that the interference with his fundamental rights is**

justified by the preponderant interest of the general public in having, on account of its inclusion in the list of results, access to the information in question.

Case C-362/14, *Schrems*

In Case C-362/14,

[...]

1 This request for a preliminary ruling relates to the interpretation, in the light of Articles 7, 8 and 47 of the Charter of Fundamental Rights of the European Union ('the Charter'), of Articles 25(6) and 28 of 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), as amended by Regulation (EC) No 1882/2003 of the European Parliament and of the Council of 29 September 2003 (OJ 2003 L 284, p. 1) ('Directive 95/46'), and, in essence, to the validity of Commission Decision 2000/520/EC of 26 July 2000 pursuant to Directive 95/46 on the adequacy of the protection provided by the safe harbour privacy principles and related frequently asked questions issued by the US Department of Commerce (OJ 2000 L 215, p. 7).

2 The request has been made in proceedings between Mr Schrems and the Data Protection Commissioner ('the Commissioner') concerning the latter's refusal to investigate a complaint made by Mr Schrems regarding the fact that Facebook Ireland Ltd ('Facebook Ireland') transfers the personal data of its users to the United States of America and keeps it on servers located in that country.

Legal context

Directive 95/46

3 Recitals 2, 10, 56, 57, 60, 62 and 63 in the preamble to Directive 95/46 are worded as follows:

'(2) ... data-processing systems are designed to serve man; ... they must, whatever the nationality or residence of natural persons, respect their fundamental rights and freedoms, notably the right to privacy, and contribute to ... the well-being of individuals;

...

(10) ... the object of the national laws on the processing of personal data is to protect fundamental rights and freedoms, notably the right to privacy, which is recognised both in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms[, signed in Rome on 4 November 1950,] and in the general principles of Community law; ..., for that reason, the approximation of those laws must not result in any lessening of the protection they afford but must, on the contrary, seek to ensure a high level of protection in the Community;

...

(56) ... cross-border flows of personal data are necessary to the expansion of international trade; ... the protection of individuals guaranteed in the Community by this Directive does not stand in the way of transfers of personal data to third countries which ensure an adequate level of protection; ... the adequacy of the level of protection afforded by a third country must be assessed in the light of all the circumstances surrounding the transfer operation or set of transfer operations;

(57) ... on the other hand, the transfer of personal data to a third country which does not ensure an adequate level of protection must be prohibited;

...

(60) ... in any event, transfers to third countries may be effected only in full compliance with the provisions adopted by the Member States pursuant to this Directive, and in particular Article 8 thereof;

...

(62) ... the establishment in Member States of supervisory authorities, exercising their functions with complete independence, is an essential component of the protection of individuals with regard to the processing of personal data;

(63) ... such authorities must have the necessary means to perform their duties, including powers of investigation and intervention, particularly in cases of complaints from individuals, and powers to engage in legal proceedings; ...'

4 Articles 1, 2, 25, 26, 28 and 31 of Directive 95/46 provide:

Article 1

Object of the Directive

1. In accordance with this Directive, Member States shall protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data.

...

Article 2

Definitions

For the purposes of this Directive:

(a) "personal data" shall mean any information relating to an identified or identifiable natural person ("data subject"); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity;

(b) "processing of personal data" ("processing") shall mean any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organisation, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction;

...

(d) "controller" shall mean the natural or legal person, public authority, agency or any other body which alone or jointly with others determines the purposes and means of the processing of personal data; where the purposes and means of processing are determined by national or Community laws or regulations, the controller or the specific criteria for his nomination may be designated by national or Community law;

...

Article 25

Principles

1. The Member States shall provide that the transfer to a third country of personal data which are undergoing processing or are intended for processing after transfer may take place only if, without prejudice to compliance with the national provisions adopted pursuant to the other provisions of this Directive, the third country in question ensures an adequate level of protection.

2. The adequacy of the level of protection afforded by a third country shall be assessed in the light of all the circumstances surrounding a data transfer operation or set of data transfer operations; particular consideration shall be given to the nature of the data, the purpose and duration of the proposed processing operation or operations, the country of origin and country of final destination, the rules of law, both general and sectoral, in force in the third country in question and the professional rules and security measures which are complied with in that country.

3. The Member States and the Commission shall inform each other of cases where they consider that a third country does not ensure an adequate level of protection within the meaning of paragraph 2.

4. Where the Commission finds, under the procedure provided for in Article 31(2), that a third country does not ensure an adequate level of protection within the meaning of paragraph 2 of this Article, Member States shall take the measures necessary to prevent any transfer of data of the same type to the third country in question.

5. At the appropriate time, the Commission shall enter into negotiations with a view to remedying the situation resulting from the finding made pursuant to paragraph 4.

6. The Commission may find, in accordance with the procedure referred to in Article 31(2), that a third country ensures an adequate level of protection within the meaning of paragraph 2 of this Article, by reason of its domestic law or of the international commitments it has entered into, particularly upon conclusion of the negotiations referred to in paragraph 5, for the protection of the private lives and basic freedoms and rights of individuals.

Member States shall take the measures necessary to comply with the Commission's decision.

Article 26

Derogations

1. By way of derogation from Article 25 and save where otherwise provided by domestic law governing particular cases, Member States shall provide that a transfer or a set of transfers of personal data to a third country which does not ensure an adequate level of protection within the meaning of Article 25(2) may take place on condition that:

- (a) the data subject has given his consent unambiguously to the proposed transfer; or
- (b) the transfer is necessary for the performance of a contract between the data subject and the controller or the implementation of precontractual measures taken in response to the data subject's request; or
- (c) the transfer is necessary for the conclusion or performance of a contract concluded in the interest of the data subject between the controller and a third party; or
- (d) the transfer is necessary or legally required on important public interest grounds, or for the establishment, exercise or defence of legal claims; or
- (e) the transfer is necessary in order to protect the vital interests of the data subject; or
- (f) the transfer is made from a register which according to laws or regulations is intended to provide information to the public and which is open to consultation either by the public in general or by any person who can demonstrate legitimate interest, to the extent that the conditions laid down in law for consultation are fulfilled in the particular case.

2. Without prejudice to paragraph 1, a Member State may authorise a transfer or a set of transfers of personal data to a third country which does not ensure an adequate level of protection within the meaning of Article 25(2), where the controller adduces adequate safeguards with respect to the protection of the privacy and fundamental rights and freedoms of individuals and as regards the exercise of the corresponding rights; such safeguards may in particular result from appropriate contractual clauses.

3. The Member State shall inform the Commission and the other Member States of the authorisations it grants pursuant to paragraph 2.

If a Member State or the Commission objects on justified grounds involving the protection of the privacy and fundamental rights and freedoms of individuals, the Commission shall take appropriate measures in accordance with the procedure laid down in Article 31(2).

Member States shall take the necessary measures to comply with the Commission's decision.

...

Article 28

Supervisory authority

1. Each Member State shall provide that one or more public authorities are responsible for monitoring the application within its territory of the provisions adopted by the Member States pursuant to this Directive.

These authorities shall act with complete independence in exercising the functions entrusted to them.

2. Each Member State shall provide that the supervisory authorities are consulted when drawing up administrative measures or regulations relating to the protection of individuals' rights and freedoms with regard to the processing of personal data.

3. Each authority shall in particular be endowed with:

- investigative powers, such as powers of access to data forming the subject-matter of processing operations and powers to collect all the information necessary for the performance of its supervisory duties,
- effective powers of intervention, such as, for example, that of delivering opinions before processing operations are carried out, in accordance with Article 20, and ensuring appropriate publication of such opinions, of ordering the blocking, erasure or destruction of data, of imposing a temporary or definitive ban on processing, of warning or admonishing the controller, or that of referring the matter to national parliaments or other political institutions,
- the power to engage in legal proceedings where the national provisions adopted pursuant to this Directive have been violated or to bring these violations to the attention of the judicial authorities.

Decisions by the supervisory authority which give rise to complaints may be appealed against through the courts.

4. Each supervisory authority shall hear claims lodged by any person, or by an association representing that person, concerning the protection of his rights and freedoms in regard to the processing of personal data. The person concerned shall be informed of the outcome of the claim.

Each supervisory authority shall, in particular, hear claims for checks on the lawfulness of data processing lodged by any person when the national provisions adopted pursuant to Article 13 of this Directive apply. The person shall at any rate be informed that a check has taken place.

...

6. Each supervisory authority is competent, whatever the national law applicable to the processing in question, to exercise, on the territory of its own Member State, the powers conferred on it in accordance with paragraph 3. Each authority may be requested to exercise its powers by an authority of another Member State.

...

Article 31

...

2. Where reference is made to this Article, Articles 4 and 7 of [Council] Decision 1999/468/EC [of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (OJ 1999 L 184, p. 23)] shall apply, having regard to the provisions of Article 8 thereof.

...’

Decision 2000/520

5 Decision 2000/520 was adopted by the Commission on the basis of Article 25(6) of Directive 95/46.

6 Recitals 2, 5 and 8 in the preamble to that decision are worded as follows:

‘(2) The Commission may find that a third country ensures an adequate level of protection. In that case personal data may be transferred from the Member States without additional guarantees being necessary.

...

(5) The adequate level of protection for the transfer of data from the Community to the United States recognised by this Decision, should be attained if organisations comply with the safe harbour privacy principles for the protection of personal data transferred from a Member State to the United States (hereinafter “the Principles”) and the frequently asked questions (hereinafter “the FAQs”) providing guidance for the implementation of the Principles issued by the Government of the United States on 21 July 2000. Furthermore the organisations should publicly disclose their privacy policies and be subject to the jurisdiction of the Federal Trade Commission (FTC) under Section 5 of the Federal Trade Commission Act which prohibits unfair or deceptive acts or practices in or affecting commerce, or that of another statutory body that will effectively ensure compliance with the Principles implemented in accordance with the FAQs.

...

(8) In the interests of transparency and in order to safeguard the ability of the competent authorities in the Member States to ensure the protection of individuals as regards the processing of their personal data, it is necessary to specify in this Decision the exceptional circumstances in which the suspension of specific data flows should be justified, notwithstanding the finding of adequate protection.’

7 Articles 1 to 4 of Decision 2000/520 provide:

‘Article 1

1. For the purposes of Article 25(2) of Directive 95/46/EC, for all the activities falling within the scope of that Directive, the “Safe Harbour Privacy Principles” (hereinafter “the Principles”), as set out in Annex I to this Decision, implemented in accordance with the guidance provided by the frequently asked questions (hereinafter “the FAQs”) issued by the US Department of Commerce on 21 July 2000 as set out in Annex II to this Decision are considered to ensure an adequate level of protection for personal data transferred from the Community to organisations established in the United States, having regard to the following documents issued by the US Department of Commerce:

- (a) the safe harbour enforcement overview set out in Annex III;
- (b) a memorandum on damages for breaches of privacy and explicit authorisations in US law set out in Annex IV;
- (c) a letter from the Federal Trade Commission set out in Annex V;

- (d) a letter from the US Department of Transportation set out in Annex VI.
2. In relation to each transfer of data the following conditions shall be met:
- (a) the organisation receiving the data has unambiguously and publicly disclosed its commitment to comply with the Principles implemented in accordance with the FAQs; and
- (b) the organisation is subject to the statutory powers of a government body in the United States listed in Annex VII to this Decision which is empowered to investigate complaints and to obtain relief against unfair or deceptive practices as well as redress for individuals, irrespective of their country of residence or nationality, in case of non-compliance with the Principles implemented in accordance with the FAQs.
3. The conditions set out in paragraph 2 are considered to be met for each organisation that self-certifies its adherence to the Principles implemented in accordance with the FAQs from the date on which the organisation notifies to the US Department of Commerce (or its designee) the public disclosure of the commitment referred to in paragraph 2(a) and the identity of the government body referred to in paragraph 2(b).

Article 2

This Decision concerns only the adequacy of protection provided in the United States under the Principles implemented in accordance with the FAQs with a view to meeting the requirements of Article 25(1) of Directive 95/46/EC and does not affect the application of other provisions of that Directive that pertain to the processing of personal data within the Member States, in particular Article 4 thereof.

Article 3

1. Without prejudice to their powers to take action to ensure compliance with national provisions adopted pursuant to provisions other than Article 25 of Directive 95/46/EC, the competent authorities in Member States may exercise their existing powers to suspend data flows to an organisation that has self-certified its adherence to the Principles implemented in accordance with the FAQs in order to protect individuals with regard to the processing of their personal data in cases where:
- (a) the government body in the United States referred to in Annex VII to this Decision or an independent recourse mechanism within the meaning of letter (a) of the Enforcement Principle set out in Annex I to this Decision has determined that the organisation is violating the Principles implemented in accordance with the FAQs; or
- (b) there is a substantial likelihood that the Principles are being violated; there is a reasonable basis for believing that the enforcement mechanism concerned is not taking or will not take adequate and timely steps to settle the case at issue; the continuing transfer would create an imminent risk of grave harm to data subjects; and the competent authorities in the Member State have made reasonable efforts under the circumstances to provide the organisation with notice and an opportunity to respond.

The suspension shall cease as soon as compliance with the Principles implemented in accordance with the FAQs is assured and the competent authorities concerned in the Community are notified thereof.

2. Member States shall inform the Commission without delay when measures are adopted on the basis of paragraph 1.
3. The Member States and the Commission shall also inform each other of cases where the action of bodies responsible for ensuring compliance with the Principles implemented in accordance with the FAQs in the United States fails to secure such compliance.
4. If the information collected under paragraphs 1, 2 and 3 provides evidence that any body responsible for ensuring compliance with the Principles implemented in accordance with the FAQs in the United States is not effectively fulfilling its role, the Commission shall inform the US Department of Commerce and, if necessary,

present draft measures in accordance with the procedure referred to in Article 31 of Directive 95/46/EC with a view to reversing or suspending the present Decision or limiting its scope.

Article 4

1. This Decision may be adapted at any time in the light of experience with its implementation and/or if the level of protection provided by the Principles and the FAQs is overtaken by the requirements of US legislation.

The Commission shall in any case evaluate the implementation of the present Decision on the basis of available information three years after its notification to the Member States and report any pertinent findings to the Committee established under Article 31 of Directive 95/46/EC, including any evidence that could affect the evaluation that the provisions set out in Article 1 of this Decision provide adequate protection within the meaning of Article 25 of Directive 95/46/EC and any evidence that the present Decision is being implemented in a discriminatory way.

2. The Commission shall, if necessary, present draft measures in accordance with the procedure referred to in Article 31 of Directive 95/46/EC.’

8 Annex I to Decision 2000/520 is worded as follows:

‘Safe Harbour Privacy Principles

issued by the US Department of Commerce on 21 July 2000

... the Department of Commerce is issuing this document and Frequently Asked Questions (“the Principles”) under its statutory authority to foster, promote, and develop international commerce. The Principles were developed in consultation with industry and the general public to facilitate trade and commerce between the United States and European Union. They are intended for use solely by US organisations receiving personal data from the European Union for the purpose of qualifying for the safe harbour and the presumption of “adequacy” it creates. Because the Principles were solely designed to serve this specific purpose, their adoption for other purposes may be inappropriate. ...

Decisions by organisations to qualify for the safe harbour are entirely voluntary, and organisations may qualify for the safe harbour in different ways. ...

Adherence to these Principles may be limited: (a) to the extent necessary to meet national security, public interest, or law enforcement requirements; (b) by statute, government regulation, or case-law that create conflicting obligations or explicit authorisations, provided that, in exercising any such authorisation, an organisation can demonstrate that its non-compliance with the Principles is limited to the extent necessary to meet the overriding legitimate interests furthered by such authorisation; or (c) if the effect of the Directive [or] Member State law is to allow exceptions or derogations, provided such exceptions or derogations are applied in comparable contexts. Consistent with the goal of enhancing privacy protection, organisations should strive to implement these Principles fully and transparently, including indicating in their privacy policies where exceptions to the Principles permitted by (b) above will apply on a regular basis. For the same reason, where the option is allowable under the Principles and/or US law, organisations are expected to opt for the higher protection where possible.

...’

9 Annex II to Decision 2000/520 reads as follows:

‘Frequently Asked Questions (FAQs)

...

FAQ 6 — Self-Certification

Q: *How does an organisation self-certify that it adheres to the Safe Harbour Principles?*

A: Safe harbour benefits are assured from the date on which an organisation self-certifies to the Department of Commerce (or its designee) its adherence to the Principles in accordance with the guidance set forth below.

To self-certify for the safe harbour, organisations can provide to the Department of Commerce (or its designee) a letter, signed by a corporate officer on behalf of the organisation that is joining the safe harbour, that contains at least the following information:

1. name of organisation, mailing address, e-mail address, telephone and fax numbers;
2. description of the activities of the organisation with respect to personal information received from the [European Union]; and
3. description of the organisation's privacy policy for such personal information, including: (a) where the privacy policy is available for viewing by the public, (b) its effective date of implementation, (c) a contact office for the handling of complaints, access requests, and any other issues arising under the safe harbour, (d) the specific statutory body that has jurisdiction to hear any claims against the organisation regarding possible unfair or deceptive practices and violations of laws or regulations governing privacy (and that is listed in the annex to the Principles), (e) name of any privacy programmes in which the organisation is a member, (f) method of verification (e.g. in-house, third party) ..., and (g) the independent recourse mechanism that is available to investigate unresolved complaints.

Where the organisation wishes its safe harbour benefits to cover human resources information transferred from the [European Union] for use in the context of the employment relationship, it may do so where there is a statutory body with jurisdiction to hear claims against the organisation arising out of human resources information that is listed in the annex to the Principles. ...

The Department (or its designee) will maintain a list of all organisations that file such letters, thereby assuring the availability of safe harbour benefits, and will update such list on the basis of annual letters and notifications received pursuant to FAQ 11. ...

...

FAQ 11 — Dispute Resolution and Enforcement

Q: How should the dispute resolution requirements of the Enforcement Principle be implemented, and how will an organisation's persistent failure to comply with the Principles be handled?

A: The Enforcement Principle sets out the requirements for safe harbour enforcement. How to meet the requirements of point (b) of the Principle is set out in the FAQ on verification (FAQ 7). This FAQ 11 addresses points (a) and (c), both of which require independent recourse mechanisms. These mechanisms may take different forms, but they must meet the Enforcement Principle's requirements. Organisations may satisfy the requirements through the following: (1) compliance with private sector developed privacy programmes that incorporate the Safe Harbour Principles into their rules and that include effective enforcement mechanisms of the type described in the Enforcement Principle; (2) compliance with legal or regulatory supervisory authorities that provide for handling of individual complaints and dispute resolution; or (3) commitment to cooperate with data protection authorities located in the European Union or their authorised representatives. This list is intended to be illustrative and not limiting. The private sector may design other mechanisms to provide enforcement, so long as they meet the requirements of the Enforcement Principle and the FAQs. Please note that the Enforcement Principle's requirements are additional to the requirements set forth in paragraph 3 of the introduction to the Principles that self-regulatory efforts must be enforceable under Article 5 of the Federal Trade Commission Act or similar statute.

Recourse Mechanisms

Consumers should be encouraged to raise any complaints they may have with the relevant organisation before proceeding to independent recourse mechanisms. ...

...

FTC Action

The FTC has committed to reviewing on a priority basis referrals received from privacy self-regulatory organisations, such as BBBOnline and TRUSTe, and EU Member States alleging non-compliance with the Safe Harbour Principles to determine whether Section 5 of the FTC Act prohibiting unfair or deceptive acts or practices in commerce has been violated. ...

...'

10 Annex IV to Decision 2000/520 states:

'Damages for Breaches of Privacy, Legal Authorisations and Mergers and Takeovers in US Law

This responds to the request by the European Commission for clarification of US law with respect to (a) claims for damages for breaches of privacy, (b) "explicit authorisations" in US law for the use of personal information in a manner inconsistent with the safe harbour principles, and (c) the effect of mergers and takeovers on obligations undertaken pursuant to the safe harbour principles.

...

B. Explicit Legal Authorisations

The safe harbour principles contain an exception where statute, regulation or case-law create "conflicting obligations or explicit authorisations, provided that, in exercising any such authorisation, an organisation can demonstrate that its non-compliance with the principles is limited to the extent necessary to meet the overriding legitimate interests further[ed] by such authorisation". Clearly, where US law imposes a conflicting obligation, US organisations whether in the safe harbour or not must comply with the law. As for explicit authorisations, while the safe harbour principles are intended to bridge the differences between the US and European regimes for privacy protection, we owe deference to the legislative prerogatives of our elected lawmakers. The limited exception from strict adherence to the safe harbour principles seeks to strike a balance to accommodate the legitimate interests on each side.

The exception is limited to cases where there is an explicit authorisation. Therefore, as a threshold matter, the relevant statute, regulation or court decision must affirmatively authorise the particular conduct by safe harbour organisations ... In other words, the exception would not apply where the law is silent. In addition, the exception would apply only if the explicit authorisation conflicts with adherence to the safe harbour principles. Even then, the exception "is limited to the extent necessary to meet the overriding legitimate interests furthered by such authorisation". By way of illustration, where the law simply authorises a company to provide personal information to government authorities, the exception would not apply. Conversely, where the law specifically authorises the company to provide personal information to government agencies without the individual's consent, this would constitute an "explicit authorisation" to act in a manner that conflicts with the safe harbour principles. Alternatively, specific exceptions from affirmative requirements to provide notice and consent would fall within the exception (since it would be the equivalent of a specific authorisation to disclose the information without notice and consent). For example, a statute which authorises doctors to provide their patients' medical records to health officials without the patients' prior consent might permit an exception from the notice and choice principles. This authorisation would not permit a doctor to provide the same medical records to health maintenance organisations or commercial pharmaceutical research laboratories, which would be beyond the scope of the purposes authorised by the law and therefore beyond the scope of the exception ... The legal authority in question can be a "stand alone" authorisation to do specific things with personal information, but, as the examples below illustrate, it is likely to be an exception to a broader law which proscribes the collection, use, or disclosure of personal information.

...'

Communication COM(2013) 846 final

11 On 27 November 2013 the Commission adopted the communication to the European Parliament and the Council entitled 'Rebuilding Trust in EU-US Data Flows' (COM(2013) 846 final) ('Communication

COM(2013) 846 final'). The communication was accompanied by the 'Report on the Findings by the EU Co-chairs of the ad hoc EU-US Working Group on Data Protection', also dated 27 November 2013. That report was drawn up, as stated in point 1 thereof, in cooperation with the United States after the existence in that country of a number of surveillance programmes involving the large-scale collection and processing of personal data had been revealed. The report contained inter alia a detailed analysis of United States law as regards, in particular, the legal bases authorising the existence of surveillance programmes and the collection and processing of personal data by United States authorities.

12 In point 1 of Communication COM(2013) 846 final, the Commission stated that '[c]ommercial exchanges are addressed by Decision [2000/520]', adding that '[t]his Decision provides a legal basis for transfers of personal data from the [European Union] to companies established in the [United States] which have adhered to the Safe Harbour Privacy Principles'. In addition, the Commission underlined in point 1 the increasing relevance of personal data flows, owing in particular to the development of the digital economy which has indeed 'led to exponential growth in the quantity, quality, diversity and nature of data processing activities'.

13 In point 2 of that communication, the Commission observed that 'concerns about the level of protection of personal data of [Union] citizens transferred to the [United States] under the Safe Harbour scheme have grown' and that '[t]he voluntary and declaratory nature of the scheme has sharpened focus on its transparency and enforcement'.

14 It further stated in point 2 that '[t]he personal data of [Union] citizens sent to the [United States] under the Safe Harbour may be accessed and further processed by US authorities in a way incompatible with the grounds on which the data was originally collected in the [European Union] and the purposes for which it was transferred to the [United States]' and that '[a] majority of the US internet companies that appear to be more directly concerned by [the surveillance] programmes are certified under the Safe Harbour scheme'.

15 In point 3.2 of Communication COM(2013) 846 final, the Commission noted a number of weaknesses in the application of Decision 2000/520. It stated, first, that some certified United States companies did not comply with the principles referred to in Article 1(1) of Decision 2000/520 ('the safe harbour principles') and that improvements had to be made to that decision regarding 'structural shortcomings related to transparency and enforcement, the substantive Safe Harbour principles and the operation of the national security exception'. It observed, secondly, that 'Safe Harbour also acts as a conduit for the transfer of the personal data of EU citizens from the [European Union] to the [United States] by companies required to surrender data to US intelligence agencies under the US intelligence collection programmes'.

16 The Commission concluded in point 3.2 that whilst, '[g]iven the weaknesses identified, the current implementation of Safe Harbour cannot be maintained, ... its revocation would[, however,] adversely affect the interests of member companies in the [European Union] and in the [United States]'. Finally, the Commission added in that point that it would 'engage with the US authorities to discuss the shortcomings identified'.

Communication COM(2013) 847 final

17 On the same date, 27 November 2013, the Commission adopted the communication to the European Parliament and the Council on the Functioning of the Safe Harbour from the Perspective of EU Citizens and Companies Established in the [European Union] (COM(2013) 847 final) ('Communication COM(2013) 847 final'). As is clear from point 1 thereof, that communication was based inter alia on information received in the ad hoc EU-US Working Group and followed two Commission assessment reports published in 2002 and 2004 respectively.

18 Point 1 of Communication COM(2013) 847 final explains that the functioning of Decision 2000/520 'relies on commitments and self-certification of adhering companies', adding that '[s]igning up to these arrangements is voluntary, but the rules are binding for those who sign up'.

19 In addition, it is apparent from point 2.2 of Communication COM(2013) 847 final that, as at 26 September 2013, 3 246 companies, falling within many industry and services sectors, were certified. Those companies mainly provided services in the EU internal market, in particular in the internet sector, and some of them were EU companies which had subsidiaries in the United States. Some of those companies processed the data of their employees in Europe which was transferred to the United States for human resource purposes.

20 The Commission stated in point 2.2 that ‘[a]ny gap in transparency or in enforcement on the US side results in responsibility being shifted to European data protection authorities and to the companies which use the scheme’.

21 It is apparent, in particular, from points 3 to 5 and 8 of Communication COM(2013) 847 final that, in practice, a significant number of certified companies did not comply, or did not comply fully, with the safe harbour principles.

22 In addition, the Commission stated in point 7 of Communication COM(2013) 847 final that ‘all companies involved in the PRISM programme [a large-scale intelligence collection programme], and which grant access to US authorities to data stored and processed in the [United States], appear to be Safe Harbour certified’ and that ‘[t]his has made the Safe Harbour scheme one of the conduits through which access is given to US intelligence authorities to collecting personal data initially processed in the [European Union]’. In that regard, the Commission noted in point 7.1 of that communication that ‘a number of legal bases under US law allow large-scale collection and processing of personal data that is stored or otherwise processed [by] companies based in the [United States]’ and that ‘[t]he large-scale nature of these programmes may result in data transferred under Safe Harbour being accessed and further processed by US authorities beyond what is strictly necessary and proportionate to the protection of national security as foreseen under the exception provided in [Decision 2000/520]’.

23 In point 7.2 of Communication COM(2013) 847 final, headed ‘Limitations and redress possibilities’, the Commission noted that ‘safeguards that are provided under US law are mostly available to US citizens or legal residents’ and that, ‘[m]oreover, there are no opportunities for either EU or US data subjects to obtain access, rectification or erasure of data, or administrative or judicial redress with regard to collection and further processing of their personal data taking place under the US surveillance programmes’.

24 According to point 8 of Communication COM(2013) 847 final, the certified companies included ‘[w]eb companies such as Google, Facebook, Microsoft, Apple, Yahoo’, which had ‘hundreds of millions of clients in Europe’ and transferred personal data to the United States for processing.

25 The Commission concluded in point 8 that ‘the large-scale access by intelligence agencies to data transferred to the [United States] by Safe Harbour certified companies raises additional serious questions regarding the continuity of data protection rights of Europeans when their data is transferred to the [United States]’.

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

26 Mr Schrems, an Austrian national residing in Austria, has been a user of the Facebook social network (‘Facebook’) since 2008.

27 Any person residing in the European Union who wishes to use Facebook is required to conclude, at the time of his registration, a contract with Facebook Ireland, a subsidiary of Facebook Inc. which is itself established in the United States. Some or all of the personal data of Facebook Ireland’s users who reside in the European Union is transferred to servers belonging to Facebook Inc. that are located in the United States, where it undergoes processing.

28 On 25 June 2013 Mr Schrems made a complaint to the Commissioner by which he in essence asked the latter to exercise his statutory powers by prohibiting Facebook Ireland from transferring his personal data to the United States. He contended in his complaint that the law and practice in force in that country did not ensure adequate protection of the personal data held in its territory against the surveillance activities that were engaged in there by the public authorities. Mr Schrems referred in this regard to the revelations made by Edward Snowden concerning the activities of the United States intelligence services, in particular those of the National Security Agency (‘the NSA’).

29 Since the Commissioner took the view that he was not required to investigate the matters raised by Mr Schrems in the complaint, he rejected it as unfounded. The Commissioner considered that there was no evidence that Mr Schrems’ personal data had been accessed by the NSA. He added that the allegations raised by Mr Schrems in his complaint could not be profitably put forward since any question of the adequacy of data protection in the United States had to be determined in accordance with Decision 2000/520 and the Commission had found in that decision that the United States ensured an adequate level of protection.

30 Mr Schrems brought an action before the High Court challenging the decision at issue in the main proceedings. After considering the evidence adduced by the parties to the main proceedings, the High Court found that the electronic surveillance and interception of personal data transferred from the European Union to the United States serve necessary and indispensable objectives in the public interest. However, it added that the revelations made by Edward Snowden had demonstrated a ‘significant over-reach’ on the part of the NSA and other federal agencies.

31 According to the High Court, Union citizens have no effective right to be heard. Oversight of the intelligence services’ actions is carried out within the framework of an *ex parte* and secret procedure. Once the personal data has been transferred to the United States, it is capable of being accessed by the NSA and other federal agencies, such as the Federal Bureau of Investigation (FBI), in the course of the indiscriminate surveillance and interception carried out by them on a large scale.

32 The High Court stated that Irish law precludes the transfer of personal data outside national territory save where the third country ensures an adequate level of protection for privacy and fundamental rights and freedoms. The importance of the rights to privacy and to inviolability of the dwelling, which are guaranteed by the Irish Constitution, requires that any interference with those rights be proportionate and in accordance with the law.

33 The High Court held that the mass and undifferentiated accessing of personal data is clearly contrary to the principle of proportionality and the fundamental values protected by the Irish Constitution. In order for interception of electronic communications to be regarded as consistent with the Irish Constitution, it would be necessary to demonstrate that the interception is targeted, that the surveillance of certain persons or groups of persons is objectively justified in the interests of national security or the suppression of crime and that there are appropriate and verifiable safeguards. Thus, according to the High Court, if the main proceedings were to be disposed of on the basis of Irish law alone, it would then have to be found that, given the existence of a serious doubt as to whether the United States ensures an adequate level of protection of personal data, the Commissioner should have proceeded to investigate the matters raised by Mr Schrems in his complaint and that the Commissioner was wrong in rejecting the complaint.

34 However, the High Court considers that this case concerns the implementation of EU law as referred to in Article 51 of the Charter and that the legality of the decision at issue in the main proceedings must therefore be assessed in the light of EU law. According to the High Court, Decision 2000/520 does not satisfy the requirements flowing both from Articles 7 and 8 of the Charter and from the principles set out by the Court of Justice in the judgment in *Digital Rights Ireland and Others* (C-293/12 and C-594/12, EU:C:2014:238). The right to respect for private life, guaranteed by Article 7 of the Charter and by the core values common to the traditions of the Member States, would be rendered meaningless if the State authorities were authorised to access electronic communications on a casual and generalised basis without any objective justification based on considerations of national security or the prevention of crime that are specific to the individual concerned and without those practices being accompanied by appropriate and verifiable safeguards.

35 The High Court further observes that in his action Mr Schrems in reality raises the legality of the safe harbour regime which was established by Decision 2000/520 and gives rise to the decision at issue in the main proceedings. Thus, even though Mr Schrems has not formally contested the validity of either Directive 95/46 or Decision 2000/520, the question is raised, according to the High Court, as to whether, on account of Article 25(6) of Directive 95/46, the Commissioner was bound by the Commission’s finding in Decision 2000/520 that the United States ensures an adequate level of protection or whether Article 8 of the Charter authorised the Commissioner to break free, if appropriate, from such a finding.

36 In those circumstances the High Court decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Whether in the course of determining a complaint which has been made to an independent office holder who has been vested by statute with the functions of administering and enforcing data protection legislation that personal data is being transferred to another third country (in this case, the United States of America) the laws and practices of which, it is claimed, do not contain adequate protections for the data subject, that office holder is absolutely bound by the Community finding to the contrary contained in [Decision 2000/520] having regard to Article 7, Article 8 and Article 47 of [the Charter], the provisions of Article 25(6) of Directive [95/46] notwithstanding?’

(2) Or, alternatively, may and/or must the office holder conduct his or her own investigation of the matter in the light of factual developments in the meantime since that Commission decision was first published?’

Consideration of the questions referred

37 By its questions, which it is appropriate to examine together, the referring court asks, in essence, whether and to what extent Article 25(6) of Directive 95/46, read in the light of Articles 7, 8 and 47 of the Charter, must be interpreted as meaning that a decision adopted pursuant to that provision, such as Decision 2000/520, by which the Commission finds that a third country ensures an adequate level of protection, prevents a supervisory authority of a Member State, within the meaning of Article 28 of that directive, from being able to examine the claim of a person concerning the protection of his rights and freedoms in regard to the processing of personal data relating to him which has been transferred from a Member State to that third country when that person contends that the law and practices in force in the third country do not ensure an adequate level of protection.

The powers of the national supervisory authorities, within the meaning of Article 28 of Directive 95/46, when the Commission has adopted a decision pursuant to Article 25(6) of that directive

38 It should be recalled first of all that the provisions of Directive 95/46, inasmuch as they govern the processing of personal data liable to infringe fundamental freedoms, in particular the right to respect for private life, must necessarily be interpreted in the light of the fundamental rights guaranteed by the Charter (see judgments in *Österreichischer Rundfunk and Others*, C-465/00, C-138/01 and C-139/01, EU:C:2003:294, paragraph 68; *Google Spain and Google*, C-131/12, EU:C:2014:317, paragraph 68; and *Ryneš*, C-212/13, EU:C:2014:2428, paragraph 29).

39 It is apparent from Article 1 of Directive 95/46 and recitals 2 and 10 in its preamble that that directive seeks to ensure not only effective and complete protection of the fundamental rights and freedoms of natural persons, in particular the fundamental right to respect for private life with regard to the processing of personal data, but also a high level of protection of those fundamental rights and freedoms. The importance of both the fundamental right to respect for private life, guaranteed by Article 7 of the Charter, and the fundamental right to the protection of personal data, guaranteed by Article 8 thereof, is, moreover, emphasised in the case-law of the Court (see judgments in *Rijkeboer*, C-553/07, EU:C:2009:293, paragraph 47; *Digital Rights Ireland and Others*, C-293/12 and C-594/12, EU:C:2014:238, paragraph 53; and *Google Spain and Google*, C-131/12, EU:C:2014:317, paragraphs, 53, 66, 74 and the case-law cited).

40 As regards the powers available to the national supervisory authorities in respect of transfers of personal data to third countries, it should be noted that Article 28(1) of Directive 95/46 requires Member States to set up one or more public authorities responsible for monitoring, with complete independence, compliance with EU rules on the protection of individuals with regard to the processing of such data. In addition, that requirement derives from the primary law of the European Union, in particular Article 8(3) of the Charter and Article 16(2) TFEU (see, to this effect, judgments in *Commission v Austria*, C-614/10, EU:C:2012:631, paragraph 36, and *Commission v Hungary*, C-288/12, EU:C:2014:237, paragraph 47).

41 The guarantee of the independence of national supervisory authorities is intended to ensure the effectiveness and reliability of the monitoring of compliance with the provisions concerning protection of individuals with regard to the processing of personal data and must be interpreted in the light of that aim. It was established in order to strengthen the protection of individuals and bodies affected by the decisions of those authorities. The establishment in Member States of independent supervisory authorities is therefore, as stated in recital 62 in the preamble to Directive 95/46, an essential component of the protection of individuals with regard to the processing of personal data (see judgments in *Commission v Germany*, C-518/07, EU:C:2010:125, paragraph 25, and *Commission v Hungary*, C-288/12, EU:C:2014:237, paragraph 48 and the case-law cited).

42 In order to guarantee that protection, the national supervisory authorities must, in particular, ensure a fair balance between, on the one hand, observance of the fundamental right to privacy and, on the other hand, the interests requiring free movement of personal data (see, to this effect, judgments in *Commission v Germany*, C-518/07, EU:C:2010:125, paragraph 24, and *Commission v Hungary*, C-288/12, EU:C:2014:237, paragraph 51).

43 The national supervisory authorities have a wide range of powers for that purpose. Those powers, listed on a non-exhaustive basis in Article 28(3) of Directive 95/46, constitute necessary means to perform their duties, as

stated in recital 63 in the preamble to the directive. Thus, those authorities possess, in particular, investigative powers, such as the power to collect all the information necessary for the performance of their supervisory duties, effective powers of intervention, such as that of imposing a temporary or definitive ban on processing of data, and the power to engage in legal proceedings.

44 It is, admittedly, apparent from Article 28(1) and (6) of Directive 95/46 that the powers of the national supervisory authorities concern processing of personal data carried out on the territory of their own Member State, so that they do not have powers on the basis of Article 28 in respect of processing of such data carried out in a third country.

45 However, the operation consisting in having personal data transferred from a Member State to a third country constitutes, in itself, processing of personal data within the meaning of Article 2(b) of Directive 95/46 (see, to this effect, judgment in *Parliament v Council and Commission*, C-317/04 and C-318/04, EU:C:2006:346, paragraph 56) carried out in a Member State. That provision defines ‘processing of personal data’ as ‘any operation or set of operations which is performed upon personal data, whether or not by automatic means’ and mentions, by way of example, ‘disclosure by transmission, dissemination or otherwise making available’.

46 Recital 60 in the preamble to Directive 95/46 states that transfers of personal data to third countries may be effected only in full compliance with the provisions adopted by the Member States pursuant to the directive. In that regard, Chapter IV of the directive, in which Articles 25 and 26 appear, has set up a regime intended to ensure that the Member States oversee transfers of personal data to third countries. That regime is complementary to the general regime set up by Chapter II of the directive laying down the general rules on the lawfulness of the processing of personal data (see, to this effect, judgment in *Lindqvist*, C-101/01, EU:C:2003:596, paragraph 63).

47 As, in accordance with Article 8(3) of the Charter and Article 28 of Directive 95/46, the national supervisory authorities are responsible for monitoring compliance with the EU rules concerning the protection of individuals with regard to the processing of personal data, each of them is therefore vested with the power to check whether a transfer of personal data from its own Member State to a third country complies with the requirements laid down by Directive 95/46.

48 Whilst acknowledging, in recital 56 in its preamble, that transfers of personal data from the Member States to third countries are necessary for the expansion of international trade, Directive 95/46 lays down as a principle, in Article 25(1), that such transfers may take place only if the third country ensures an adequate level of protection.

49 Furthermore, recital 57 states that transfers of personal data to third countries not ensuring an adequate level of protection must be prohibited.

50 In order to control transfers of personal data to third countries according to the level of protection accorded to it in each of those countries, Article 25 of Directive 95/46 imposes a series of obligations on the Member States and the Commission. It is apparent, in particular, from that article that the finding that a third country does or does not ensure an adequate level of protection may, as the Advocate General has observed in point 86 of his Opinion, be made either by the Member States or by the Commission.

51 The Commission may adopt, on the basis of Article 25(6) of Directive 95/46, a decision finding that a third country ensures an adequate level of protection. In accordance with the second subparagraph of that provision, such a decision is addressed to the Member States, who must take the measures necessary to comply with it. Pursuant to the fourth paragraph of Article 288 TFEU, it is binding on all the Member States to which it is addressed and is therefore binding on all their organs (see, to this effect, judgments in *Albako Margarinefabrik*, 249/85, EU:C:1987:245, paragraph 17, and *Mediaset*, C-69/13, EU:C:2014:71, paragraph 23) in so far as it has the effect of authorising transfers of personal data from the Member States to the third country covered by it.

52 Thus, until such time as the Commission decision is declared invalid by the Court, the Member States and their organs, which include their independent supervisory authorities, admittedly cannot adopt measures contrary to that decision, such as acts intended to determine with binding effect that the third country covered by it does not ensure an adequate level of protection. Measures of the EU institutions are in principle presumed to be lawful and accordingly produce legal effects until such time as they are withdrawn, annulled in an action for annulment or declared invalid following a reference for a preliminary ruling or a plea of illegality (judgment in *Commission v Greece*, C-475/01, EU:C:2004:585, paragraph 18 and the case-law cited).

53 However, a Commission decision adopted pursuant to Article 25(6) of Directive 95/46, such as Decision 2000/520, cannot prevent persons whose personal data has been or could be transferred to a third country from lodging with the national supervisory authorities a claim, within the meaning of Article 28(4) of that directive, concerning the protection of their rights and freedoms in regard to the processing of that data. Likewise, as the Advocate General has observed in particular in points 61, 93 and 116 of his Opinion, a decision of that nature cannot eliminate or reduce the powers expressly accorded to the national supervisory authorities by Article 8(3) of the Charter and Article 28 of the directive.

54 Neither Article 8(3) of the Charter nor Article 28 of Directive 95/46 excludes from the national supervisory authorities' sphere of competence the oversight of transfers of personal data to third countries which have been the subject of a Commission decision pursuant to Article 25(6) of Directive 95/46.

55 In particular, the first subparagraph of Article 28(4) of Directive 95/46, under which the national supervisory authorities are to hear 'claims lodged by any person ... concerning the protection of his rights and freedoms in regard to the processing of personal data', does not provide for any exception in this regard where the Commission has adopted a decision pursuant to Article 25(6) of that directive.

56 Furthermore, it would be contrary to the system set up by Directive 95/46 and to the objective of Articles 25 and 28 thereof for a Commission decision adopted pursuant to Article 25(6) to have the effect of preventing a national supervisory authority from examining a person's claim concerning the protection of his rights and freedoms in regard to the processing of his personal data which has been or could be transferred from a Member State to the third country covered by that decision.

57 On the contrary, Article 28 of Directive 95/46 applies, by its very nature, to any processing of personal data. Thus, even if the Commission has adopted a decision pursuant to Article 25(6) of that directive, the national supervisory authorities, when hearing a claim lodged by a person concerning the protection of his rights and freedoms in regard to the processing of personal data relating to him, must be able to examine, with complete independence, whether the transfer of that data complies with the requirements laid down by the directive.

58 If that were not so, persons whose personal data has been or could be transferred to the third country concerned would be denied the right, guaranteed by Article 8(1) and (3) of the Charter, to lodge with the national supervisory authorities a claim for the purpose of protecting their fundamental rights (see, by analogy, judgment in *Digital Rights Ireland and Others*, C-293/12 and C-594/12, EU:C:2014:238, paragraph 68).

59 A claim, within the meaning of Article 28(4) of Directive 95/46, by which a person whose personal data has been or could be transferred to a third country contends, as in the main proceedings, that, notwithstanding what the Commission has found in a decision adopted pursuant to Article 25(6) of that directive, the law and practices of that country do not ensure an adequate level of protection must be understood as concerning, in essence, whether that decision is compatible with the protection of the privacy and of the fundamental rights and freedoms of individuals.

60 In this connection, the Court's settled case-law should be recalled according to which the European Union is a union based on the rule of law in which all acts of its institutions are subject to review of their compatibility with, in particular, the Treaties, general principles of law and fundamental rights (see, to this effect, judgments in *Commission and Others v Kadi*, C-584/10 P, C-593/10 P and C-595/10 P, EU:C:2013:518, paragraph 66; *Inuit Tapiriit Kanatami and Others v Parliament and Council*, C-583/11 P, EU:C:2013:625, paragraph 91; and *Telefónica v Commission*, C-274/12 P, EU:C:2013:852, paragraph 56). Commission decisions adopted pursuant to Article 25(6) of Directive 95/46 cannot therefore escape such review.

61 That said, the Court alone has jurisdiction to declare that an EU act, such as a Commission decision adopted pursuant to Article 25(6) of Directive 95/46, is invalid, the exclusivity of that jurisdiction having the purpose of guaranteeing legal certainty by ensuring that EU law is applied uniformly (see judgments in *Melki and Abdeli*, C-188/10 and C-189/10, EU:C:2010:363, paragraph 54, and *CIVAD*, C-533/10, EU:C:2012:347, paragraph 40).

62 Whilst the national courts are admittedly entitled to consider the validity of an EU act, such as a Commission decision adopted pursuant to Article 25(6) of Directive 95/46, they are not, however, endowed with the power to declare such an act invalid themselves (see, to this effect, judgments in *Foto-Frost*, 314/85, EU:C:1987:452, paragraphs 15 to 20, and *IATA and ELFAA*, C-344/04, EU:C:2006:10, paragraph 27). A fortiori, when the national

supervisory authorities examine a claim, within the meaning of Article 28(4) of that directive, concerning the compatibility of a Commission decision adopted pursuant to Article 25(6) of the directive with the protection of the privacy and of the fundamental rights and freedoms of individuals, they are not entitled to declare that decision invalid themselves.

63 Having regard to those considerations, where a person whose personal data has been or could be transferred to a third country which has been the subject of a Commission decision pursuant to Article 25(6) of Directive 95/46 lodges with a national supervisory authority a claim concerning the protection of his rights and freedoms in regard to the processing of that data and contests, in bringing the claim, as in the main proceedings, the compatibility of that decision with the protection of the privacy and of the fundamental rights and freedoms of individuals, it is incumbent upon the national supervisory authority to examine the claim with all due diligence.

64 In a situation where the national supervisory authority comes to the conclusion that the arguments put forward in support of such a claim are unfounded and therefore rejects it, the person who lodged the claim must, as is apparent from the second subparagraph of Article 28(3) of Directive 95/46, read in the light of Article 47 of the Charter, have access to judicial remedies enabling him to challenge such a decision adversely affecting him before the national courts. Having regard to the case-law cited in paragraphs 61 and 62 of the present judgment, those courts must stay proceedings and make a reference to the Court for a preliminary ruling on validity where they consider that one or more grounds for invalidity put forward by the parties or, as the case may be, raised by them of their own motion are well founded (see, to this effect, judgment in *T & L Sugars and Sidul Açúcares v Commission*, C-456/13 P, EU:C:2015:284, paragraph 48 and the case-law cited).

65 In the converse situation, where the national supervisory authority considers that the objections advanced by the person who has lodged with it a claim concerning the protection of his rights and freedoms in regard to the processing of his personal data are well founded, that authority must, in accordance with the third indent of the first subparagraph of Article 28(3) of Directive 95/46, read in the light in particular of Article 8(3) of the Charter, be able to engage in legal proceedings. It is incumbent upon the national legislature to provide for legal remedies enabling the national supervisory authority concerned to put forward the objections which it considers well founded before the national courts in order for them, if they share its doubts as to the validity of the Commission decision, to make a reference for a preliminary ruling for the purpose of examination of the decision's validity.

66 Having regard to the foregoing considerations, the answer to the questions referred is that Article 25(6) of Directive 95/46, read in the light of Articles 7, 8 and 47 of the Charter, must be interpreted as meaning that a decision adopted pursuant to that provision, such as Decision 2000/520, by which the Commission finds that a third country ensures an adequate level of protection, does not prevent a supervisory authority of a Member State, within the meaning of Article 28 of that directive, from examining the claim of a person concerning the protection of his rights and freedoms in regard to the processing of personal data relating to him which has been transferred from a Member State to that third country when that person contends that the law and practices in force in the third country do not ensure an adequate level of protection.

The validity of Decision 2000/520

67 As is apparent from the referring court's explanations relating to the questions submitted, Mr Schrems contends in the main proceedings that United States law and practice do not ensure an adequate level of protection within the meaning of Article 25 of Directive 95/46. As the Advocate General has observed in points 123 and 124 of his Opinion, Mr Schrems expresses doubts, which the referring court indeed seems essentially to share, concerning the validity of Decision 2000/520. In such circumstances, having regard to what has been held in paragraphs 60 to 63 of the present judgment and in order to give the referring court a full answer, it should be examined whether that decision complies with the requirements stemming from Directive 95/46 read in the light of the Charter.

The requirements stemming from Article 25(6) of Directive 95/46

68 As has already been pointed out in paragraphs 48 and 49 of the present judgment, Article 25(1) of Directive 95/46 prohibits transfers of personal data to a third country not ensuring an adequate level of protection.

69 However, for the purpose of overseeing such transfers, the first subparagraph of Article 25(6) of Directive 95/46 provides that the Commission 'may find ... that a third country ensures an adequate level of protection

within the meaning of paragraph 2 of this Article, by reason of its domestic law or of the international commitments it has entered into ..., for the protection of the private lives and basic freedoms and rights of individuals’.

70 It is true that neither Article 25(2) of Directive 95/46 nor any other provision of the directive contains a definition of the concept of an adequate level of protection. In particular, Article 25(2) does no more than state that the adequacy of the level of protection afforded by a third country ‘shall be assessed in the light of all the circumstances surrounding a data transfer operation or set of data transfer operations’ and lists, on a non-exhaustive basis, the circumstances to which consideration must be given when carrying out such an assessment.

71 However, first, as is apparent from the very wording of Article 25(6) of Directive 95/46, that provision requires that a third country ‘ensures’ an adequate level of protection by reason of its domestic law or its international commitments. Secondly, according to the same provision, the adequacy of the protection ensured by the third country is assessed ‘for the protection of the private lives and basic freedoms and rights of individuals’.

72 Thus, Article 25(6) of Directive 95/46 implements the express obligation laid down in Article 8(1) of the Charter to protect personal data and, as the Advocate General has observed in point 139 of his Opinion, is intended to ensure that the high level of that protection continues where personal data is transferred to a third country.

73 The word ‘adequate’ in Article 25(6) of Directive 95/46 admittedly signifies that a third country cannot be required to ensure a level of protection identical to that guaranteed in the EU legal order. However, as the Advocate General has observed in point 141 of his Opinion, the term ‘adequate level of protection’ must be understood as requiring the third country in fact to ensure, by reason of its domestic law or its international commitments, a level of protection of fundamental rights and freedoms that is essentially equivalent to that guaranteed within the European Union by virtue of Directive 95/46 read in the light of the Charter. If there were no such requirement, the objective referred to in the previous paragraph of the present judgment would be disregarded. Furthermore, the high level of protection guaranteed by Directive 95/46 read in the light of the Charter could easily be circumvented by transfers of personal data from the European Union to third countries for the purpose of being processed in those countries.

74 It is clear from the express wording of Article 25(6) of Directive 95/46 that it is the legal order of the third country covered by the Commission decision that must ensure an adequate level of protection. Even though the means to which that third country has recourse, in this connection, for the purpose of ensuring such a level of protection may differ from those employed within the European Union in order to ensure that the requirements stemming from Directive 95/46 read in the light of the Charter are complied with, those means must nevertheless prove, in practice, effective in order to ensure protection essentially equivalent to that guaranteed within the European Union.

75 Accordingly, when examining the level of protection afforded by a third country, the Commission is obliged to assess the content of the applicable rules in that country resulting from its domestic law or international commitments and the practice designed to ensure compliance with those rules, since it must, under Article 25(2) of Directive 95/46, take account of all the circumstances surrounding a transfer of personal data to a third country.

76 Also, in the light of the fact that the level of protection ensured by a third country is liable to change, it is incumbent upon the Commission, after it has adopted a decision pursuant to Article 25(6) of Directive 95/46, to check periodically whether the finding relating to the adequacy of the level of protection ensured by the third country in question is still factually and legally justified. Such a check is required, in any event, when evidence gives rise to a doubt in that regard.

77 Moreover, as the Advocate General has stated in points 134 and 135 of his Opinion, when the validity of a Commission decision adopted pursuant to Article 25(6) of Directive 95/46 is examined, account must also be taken of the circumstances that have arisen after that decision’s adoption.

78 In this regard, it must be stated that, in view of, first, the important role played by the protection of personal data in the light of the fundamental right to respect for private life and, secondly, the large number of persons whose fundamental rights are liable to be infringed where personal data is transferred to a third country not ensuring an adequate level of protection, the Commission’s discretion as to the adequacy of the level of protection ensured by a third country is reduced, with the result that review of the requirements stemming from Article 25

of Directive 95/46, read in the light of the Charter, should be strict (see, by analogy, judgment in *Digital Rights Ireland and Others*, C-293/12 and C-594/12, EU:C:2014:238, paragraphs 47 and 48).

Article 1 of Decision 2000/520

79 The Commission found in Article 1(1) of Decision 2000/520 that the principles set out in Annex I thereto, implemented in accordance with the guidance provided by the FAQs set out in Annex II, ensure an adequate level of protection for personal data transferred from the European Union to organisations established in the United States. It is apparent from that provision that both those principles and the FAQs were issued by the United States Department of Commerce.

80 An organisation adheres to the safe harbour principles on the basis of a system of self-certification, as is apparent from Article 1(2) and (3) of Decision 2000/520, read in conjunction with FAQ 6 set out in Annex II thereto.

81 Whilst recourse by a third country to a system of self-certification is not in itself contrary to the requirement laid down in Article 25(6) of Directive 95/46 that the third country concerned must ensure an adequate level of protection ‘by reason of its domestic law or ... international commitments’, the reliability of such a system, in the light of that requirement, is founded essentially on the establishment of effective detection and supervision mechanisms enabling any infringements of the rules ensuring the protection of fundamental rights, in particular the right to respect for private life and the right to protection of personal data, to be identified and punished in practice.

82 In the present instance, by virtue of the second paragraph of Annex I to Decision 2000/520, the safe harbour principles are ‘intended for use solely by US organisations receiving personal data from the European Union for the purpose of qualifying for the safe harbour and the presumption of “adequacy” it creates’. Those principles are therefore applicable solely to self-certified United States organisations receiving personal data from the European Union, and United States public authorities are not required to comply with them.

83 Moreover, Decision 2000/520, pursuant to Article 2 thereof, ‘concerns only the adequacy of protection provided in the United States under the [safe harbour principles] implemented in accordance with the FAQs with a view to meeting the requirements of Article 25(1) of Directive [95/46]’, without, however, containing sufficient findings regarding the measures by which the United States ensures an adequate level of protection, within the meaning of Article 25(6) of that directive, by reason of its domestic law or its international commitments.

84 In addition, under the fourth paragraph of Annex I to Decision 2000/520, the applicability of the safe harbour principles may be limited, in particular, ‘to the extent necessary to meet national security, public interest, or law enforcement requirements’ and ‘by statute, government regulation, or case-law that create conflicting obligations or explicit authorisations, provided that, in exercising any such authorisation, an organisation can demonstrate that its non-compliance with the Principles is limited to the extent necessary to meet the overriding legitimate interests furthered by such authorisation’.

85 In this connection, Decision 2000/520 states in Part B of Annex IV, with regard to the limits to which the safe harbour principles’ applicability is subject, that, ‘[c]learly, where US law imposes a conflicting obligation, US organisations whether in the safe harbour or not must comply with the law’.

86 Thus, Decision 2000/520 lays down that ‘national security, public interest, or law enforcement requirements’ have primacy over the safe harbour principles, primacy pursuant to which self-certified United States organisations receiving personal data from the European Union are bound to disregard those principles without limitation where they conflict with those requirements and therefore prove incompatible with them.

87 In the light of the general nature of the derogation set out in the fourth paragraph of Annex I to Decision 2000/520, that decision thus enables interference, founded on national security and public interest requirements or on domestic legislation of the United States, with the fundamental rights of the persons whose personal data is or could be transferred from the European Union to the United States. To establish the existence of an interference with the fundamental right to respect for private life, it does not matter whether the information in question relating to private life is sensitive or whether the persons concerned have suffered any adverse consequences on account

of that interference (judgment in *Digital Rights Ireland and Others*, C-293/12 and C-594/12, EU:C:2014:238, paragraph 33 and the case-law cited).

88 In addition, Decision 2000/520 does not contain any finding regarding the existence, in the United States, of rules adopted by the State intended to limit any interference with the fundamental rights of the persons whose data is transferred from the European Union to the United States, interference which the State entities of that country would be authorised to engage in when they pursue legitimate objectives, such as national security.

89 Nor does Decision 2000/520 refer to the existence of effective legal protection against interference of that kind. As the Advocate General has observed in points 204 to 206 of his Opinion, procedures before the Federal Trade Commission — the powers of which, described in particular in FAQ 11 set out in Annex II to that decision, are limited to commercial disputes — and the private dispute resolution mechanisms concern compliance by the United States undertakings with the safe harbour principles and cannot be applied in disputes relating to the legality of interference with fundamental rights that results from measures originating from the State.

90 Moreover, the foregoing analysis of Decision 2000/520 is borne out by the Commission's own assessment of the situation resulting from the implementation of that decision. Particularly in points 2 and 3.2 of Communication COM(2013) 846 final and in points 7.1, 7.2 and 8 of Communication COM(2013) 847 final, the content of which is set out in paragraphs 13 to 16 and paragraphs 22, 23 and 25 of the present judgment respectively, the Commission found that the United States authorities were able to access the personal data transferred from the Member States to the United States and process it in a way incompatible, in particular, with the purposes for which it was transferred, beyond what was strictly necessary and proportionate to the protection of national security. Also, the Commission noted that the data subjects had no administrative or judicial means of redress enabling, in particular, the data relating to them to be accessed and, as the case may be, rectified or erased.

91 As regards the level of protection of fundamental rights and freedoms that is guaranteed within the European Union, EU legislation involving interference with the fundamental rights guaranteed by Articles 7 and 8 of the Charter must, according to the Court's settled case-law, lay down clear and precise rules governing the scope and application of a measure and imposing minimum safeguards, so that the persons whose personal data is concerned have sufficient guarantees enabling their data to be effectively protected against the risk of abuse and against any unlawful access and use of that data. The need for such safeguards is all the greater where personal data is subjected to automatic processing and where there is a significant risk of unlawful access to that data (judgment in *Digital Rights Ireland and Others*, C-293/12 and C-594/12, EU:C:2014:238, paragraphs 54 and 55 and the case-law cited).

92 Furthermore and above all, protection of the fundamental right to respect for private life at EU level requires derogations and limitations in relation to the protection of personal data to apply only in so far as is strictly necessary (judgment in *Digital Rights Ireland and Others*, C-293/12 and C-594/12, EU:C:2014:238, paragraph 52 and the case-law cited).

93 Legislation is not limited to what is strictly necessary where it authorises, on a generalised basis, storage of all the personal data of all the persons whose data has been transferred from the European Union to the United States without any differentiation, limitation or exception being made in the light of the objective pursued and without an objective criterion being laid down by which to determine the limits of the access of the public authorities to the data, and of its subsequent use, for purposes which are specific, strictly restricted and capable of justifying the interference which both access to that data and its use entail (see, to this effect, concerning Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC (OJ 2006 L 105, p. 54), judgment in *Digital Rights Ireland and Others*, C-293/12 and C-594/12, EU:C:2014:238, paragraphs 57 to 61).

94 In particular, legislation permitting the public authorities to have access on a generalised basis to the content of electronic communications must be regarded as compromising the essence of the fundamental right to respect for private life, as guaranteed by Article 7 of the Charter (see, to this effect, judgment in *Digital Rights Ireland and Others*, C-293/12 and C-594/12, EU:C:2014:238, paragraph 39).

95 Likewise, legislation not providing for any possibility for an individual to pursue legal remedies in order to have access to personal data relating to him, or to obtain the rectification or erasure of such data, does not respect

the essence of the fundamental right to effective judicial protection, as enshrined in Article 47 of the Charter. The first paragraph of Article 47 of the Charter requires everyone whose rights and freedoms guaranteed by the law of the European Union are violated to have the right to an effective remedy before a tribunal in compliance with the conditions laid down in that article. The very existence of effective judicial review designed to ensure compliance with provisions of EU law is inherent in the existence of the rule of law (see, to this effect, judgments in *Les Verts v Parliament*, 294/83, EU:C:1986:166, paragraph 23; *Johnston*, 222/84, EU:C:1986:206, paragraphs 18 and 19; *Heylens and Others*, 222/86, EU:C:1987:442, paragraph 14; and *UGT-Rioja and Others*, C-428/06 to C-434/06, EU:C:2008:488, paragraph 80).

96 As has been found in particular in paragraphs 71, 73 and 74 of the present judgment, in order for the Commission to adopt a decision pursuant to Article 25(6) of Directive 95/46, it must find, duly stating reasons, that the third country concerned in fact ensures, by reason of its domestic law or its international commitments, a level of protection of fundamental rights essentially equivalent to that guaranteed in the EU legal order, a level that is apparent in particular from the preceding paragraphs of the present judgment.

97 However, the Commission did not state, in Decision 2000/520, that the United States in fact ‘ensures’ an adequate level of protection by reason of its domestic law or its international commitments.

98 Consequently, without there being any need to examine the content of the safe harbour principles, it is to be concluded that Article 1 of Decision 2000/520 fails to comply with the requirements laid down in Article 25(6) of Directive 95/46, read in the light of the Charter, and that it is accordingly invalid.

Article 3 of Decision 2000/520

99 It is apparent from the considerations set out in paragraphs 53, 57 and 63 of the present judgment that, under Article 28 of Directive 95/46, read in the light in particular of Article 8 of the Charter, the national supervisory authorities must be able to examine, with complete independence, any claim concerning the protection of a person’s rights and freedoms in regard to the processing of personal data relating to him. That is in particular the case where, in bringing such a claim, that person raises questions regarding the compatibility of a Commission decision adopted pursuant to Article 25(6) of that directive with the protection of the privacy and of the fundamental rights and freedoms of individuals.

100 However, the first subparagraph of Article 3(1) of Decision 2000/520 lays down specific rules regarding the powers available to the national supervisory authorities in the light of a Commission finding relating to an adequate level of protection, within the meaning of Article 25 of Directive 95/46.

101 Under that provision, the national supervisory authorities may, ‘[w]ithout prejudice to their powers to take action to ensure compliance with national provisions adopted pursuant to provisions other than Article 25 of Directive [95/46], ... suspend data flows to an organisation that has self-certified its adherence to the [principles of Decision 2000/520]’, under restrictive conditions establishing a high threshold for intervention. Whilst that provision is without prejudice to the powers of those authorities to take action to ensure compliance with national provisions adopted pursuant to Directive 95/46, it excludes, on the other hand, the possibility of them taking action to ensure compliance with Article 25 of that directive.

102 The first subparagraph of Article 3(1) of Decision 2000/520 must therefore be understood as denying the national supervisory authorities the powers which they derive from Article 28 of Directive 95/46, where a person, in bringing a claim under that provision, puts forward matters that may call into question whether a Commission decision that has found, on the basis of Article 25(6) of the directive, that a third country ensures an adequate level of protection is compatible with the protection of the privacy and of the fundamental rights and freedoms of individuals.

103 The implementing power granted by the EU legislature to the Commission in Article 25(6) of Directive 95/46 does not confer upon it competence to restrict the national supervisory authorities’ powers referred to in the previous paragraph of the present judgment.

104 That being so, it must be held that, in adopting Article 3 of Decision 2000/520, the Commission exceeded the power which is conferred upon it in Article 25(6) of Directive 95/46, read in the light of the Charter, and that Article 3 of the decision is therefore invalid.

105 As Articles 1 and 3 of Decision 2000/520 are inseparable from Articles 2 and 4 of that decision and the annexes thereto, their invalidity affects the validity of the decision in its entirety.

106 Having regard to all the foregoing considerations, it is to be concluded that Decision 2000/520 is invalid.

Costs

[...]

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

1. **Article 25(6) of 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 as amended by Regulation (EC) No 1882/2003 of the European Parliament and of the Council of 29 September 2003, read in the light of Articles 7, 8 and 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that a decision adopted pursuant to that provision, such as Commission Decision 2000/520/EC of 26 July 2000 pursuant to Directive 95/46 on the adequacy of the protection provided by the safe harbour privacy principles and related frequently asked questions issued by the US Department of Commerce, by which the European Commission finds that a third country ensures an adequate level of protection, does not prevent a supervisory authority of a Member State, within the meaning of Article 28 of that directive as amended, from examining the claim of a person concerning the protection of his rights and freedoms in regard to the processing of personal data relating to him which has been transferred from a Member State to that third country when that person contends that the law and practices in force in the third country do not ensure an adequate level of protection.**
2. **Decision 2000/520 is invalid.**

Regulation 2016/679, General Data Protection Regulation

[...]

CHAPTER I

General provisions

Article 1

Subject-matter and objectives

1. This Regulation lays down rules relating to the protection of natural persons with regard to the processing of personal data and rules relating to the free movement of personal data.
2. This Regulation protects fundamental rights and freedoms of natural persons and in particular their right to the protection of personal data.
3. The free movement of personal data within the Union shall be neither restricted nor prohibited for reasons connected with the protection of natural persons with regard to the processing of personal data.

Article 2

Material scope

1. This Regulation applies to the processing of personal data wholly or partly by automated means and to the processing other than by automated means of personal data which form part of a filing system or are intended to form part of a filing system.
2. This Regulation does not apply to the processing of personal data:
 - (a) in the course of an activity which falls outside the scope of Union law;
 - (b) by the Member States when carrying out activities which fall within the scope of Chapter 2 of Title V of the TEU;
 - (c) by a natural person in the course of a purely personal or household activity;
 - (d) by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security.
3. For the processing of personal data by the Union institutions, bodies, offices and agencies, Regulation (EC) No 45/2001 applies. Regulation (EC) No 45/2001 and other Union legal acts applicable to such processing of personal data shall be adapted to the principles and rules of this Regulation in accordance with Article 98.
4. This Regulation shall be without prejudice to the application of Directive 2000/31/EC, in particular of the liability rules of intermediary service providers in Articles 12 to 15 of that Directive.

Article 3

Territorial scope

1. This Regulation applies to the processing of personal data in the context of the activities of an establishment of a controller or a processor in the Union, regardless of whether the processing takes place in the Union or not.
2. This Regulation applies to the processing of personal data of data subjects who are in the Union by a controller or processor not established in the Union, where the processing activities are related to:

- (a) the offering of goods or services, irrespective of whether a payment of the data subject is required, to such data subjects in the Union; or
- (b) the monitoring of their behaviour as far as their behaviour takes place within the Union.

3. This Regulation applies to the processing of personal data by a controller not established in the Union, but in a place where Member State law applies by virtue of public international law.

Article 4

Definitions

For the purposes of this Regulation:

- (1) ‘personal data’ means any information relating to an identified or identifiable natural person (‘data subject’); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person;
- (2) ‘processing’ means any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction;
- (3) ‘restriction of processing’ means the marking of stored personal data with the aim of limiting their processing in the future;
- (4) ‘profiling’ means any form of automated processing of personal data consisting of the use of personal data to evaluate certain personal aspects relating to a natural person, in particular to analyse or predict aspects concerning that natural person's performance at work, economic situation, health, personal preferences, interests, reliability, behaviour, location or movements;
- (5) ‘pseudonymisation’ means the processing of personal data in such a manner that the personal data can no longer be attributed to a specific data subject without the use of additional information, provided that such additional information is kept separately and is subject to technical and organisational measures to ensure that the personal data are not attributed to an identified or identifiable natural person;
- (6) ‘filing system’ means any structured set of personal data which are accessible according to specific criteria, whether centralised, decentralised or dispersed on a functional or geographical basis;
- (7) ‘controller’ means the natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data; where the purposes and means of such processing are determined by Union or Member State law, the controller or the specific criteria for its nomination may be provided for by Union or Member State law;
- (8) ‘processor’ means a natural or legal person, public authority, agency or other body which processes personal data on behalf of the controller;
- (9) ‘recipient’ means a natural or legal person, public authority, agency or another body, to which the personal data are disclosed, whether a third party or not. However, public authorities which may receive personal data in the framework of a particular inquiry in accordance with Union or Member State law shall not be regarded as recipients; the processing of those data by those public authorities shall be in compliance with the applicable data protection rules according to the purposes of the processing;
- (10) ‘third party’ means a natural or legal person, public authority, agency or body other than the data subject, controller, processor and persons who, under the direct authority of the controller or processor, are authorised to process personal data;
- (11) ‘consent’ of the data subject means any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her;
- (12) ‘personal data breach’ means a breach of security leading to the accidental or unlawful destruction, loss, alteration, unauthorised disclosure of, or access to, personal data transmitted, stored or otherwise processed;
- (13) ‘genetic data’ means personal data relating to the inherited or acquired genetic characteristics of a natural person which give unique information about the physiology or the health of that natural person and which result, in particular, from an analysis of a biological sample from the natural person in question;
- (14) ‘biometric data’ means personal data resulting from specific technical processing relating to the physical, physiological or behavioural characteristics of a natural person, which allow or confirm the unique identification of that natural person, such as facial images or dactyloscopic data;

- (15) 'data concerning health' means personal data related to the physical or mental health of a natural person, including the provision of health care services, which reveal information about his or her health status;
- (16) 'main establishment' means:
- (a) as regards a controller with establishments in more than one Member State, the place of its central administration in the Union, unless the decisions on the purposes and means of the processing of personal data are taken in another establishment of the controller in the Union and the latter establishment has the power to have such decisions implemented, in which case the establishment having taken such decisions is to be considered to be the main establishment;
 - (b) as regards a processor with establishments in more than one Member State, the place of its central administration in the Union, or, if the processor has no central administration in the Union, the establishment of the processor in the Union where the main processing activities in the context of the activities of an establishment of the processor take place to the extent that the processor is subject to specific obligations under this Regulation;
- (17) 'representative' means a natural or legal person established in the Union who, designated by the controller or processor in writing pursuant to Article 27, represents the controller or processor with regard to their respective obligations under this Regulation;
- (18) 'enterprise' means a natural or legal person engaged in an economic activity, irrespective of its legal form, including partnerships or associations regularly engaged in an economic activity;
- (19) 'group of undertakings' means a controlling undertaking and its controlled undertakings;
- (20) 'binding corporate rules' means personal data protection policies which are adhered to by a controller or processor established on the territory of a Member State for transfers or a set of transfers of personal data to a controller or processor in one or more third countries within a group of undertakings, or group of enterprises engaged in a joint economic activity;
- (21) 'supervisory authority' means an independent public authority which is established by a Member State pursuant to Article 51;
- (22) 'supervisory authority concerned' means a supervisory authority which is concerned by the processing of personal data because:
- (a) the controller or processor is established on the territory of the Member State of that supervisory authority;
 - (b) data subjects residing in the Member State of that supervisory authority are substantially affected or likely to be substantially affected by the processing; or
 - (c) a complaint has been lodged with that supervisory authority;
- (23) 'cross-border processing' means either:
- (a) processing of personal data which takes place in the context of the activities of establishments in more than one Member State of a controller or processor in the Union where the controller or processor is established in more than one Member State; or
 - (b) processing of personal data which takes place in the context of the activities of a single establishment of a controller or processor in the Union but which substantially affects or is likely to substantially affect data subjects in more than one Member State.
- (24) 'relevant and reasoned objection' means an objection to a draft decision as to whether there is an infringement of this Regulation, or whether envisaged action in relation to the controller or processor complies with this Regulation, which clearly demonstrates the significance of the risks posed by the draft decision as regards the fundamental rights and freedoms of data subjects and, where applicable, the free flow of personal data within the Union;
- (25) 'information society service' means a service as defined in point (b) of Article 1(1) of Directive (EU) 2015/1535 of the European Parliament and of the Council [\(19\)](#);
- (26) 'international organisation' means an organisation and its subordinate bodies governed by public international law, or any other body which is set up by, or on the basis of, an agreement between two or more countries.

CHAPTER II

Principles

Article 5

Principles relating to processing of personal data

1. Personal data shall be:

- (a) processed lawfully, fairly and in a transparent manner in relation to the data subject ('lawfulness, fairness and transparency');
- (b) collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes; further processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes shall, in accordance with Article 89(1), not be considered to be incompatible with the initial purposes ('purpose limitation');
- (c) adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed ('data minimisation');
- (d) accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that personal data that are inaccurate, having regard to the purposes for which they are processed, are erased or rectified without delay ('accuracy');
- (e) kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the personal data are processed; personal data may be stored for longer periods insofar as the personal data will be processed solely for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes in accordance with Article 89(1) subject to implementation of the appropriate technical and organisational measures required by this Regulation in order to safeguard the rights and freedoms of the data subject ('storage limitation');
- (f) processed in a manner that ensures appropriate security of the personal data, including protection against unauthorised or unlawful processing and against accidental loss, destruction or damage, using appropriate technical or organisational measures ('integrity and confidentiality').

2. The controller shall be responsible for, and be able to demonstrate compliance with, paragraph 1 ('accountability').

Article 6

Lawfulness of processing

1. Processing shall be lawful only if and to the extent that at least one of the following applies:

- (a) the data subject has given consent to the processing of his or her personal data for one or more specific purposes;
- (b) processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract;
- (c) processing is necessary for compliance with a legal obligation to which the controller is subject;
- (d) processing is necessary in order to protect the vital interests of the data subject or of another natural person;
- (e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller;
- (f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child.

Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks.

2. Member States may maintain or introduce more specific provisions to adapt the application of the rules of this Regulation with regard to processing for compliance with points (c) and (e) of paragraph 1 by determining more precisely specific requirements for the processing and other measures to ensure lawful and fair processing including for other specific processing situations as provided for in Chapter IX.

3. The basis for the processing referred to in point (c) and (e) of paragraph 1 shall be laid down by:

- (a) Union law; or
- (b) Member State law to which the controller is subject.

The purpose of the processing shall be determined in that legal basis or, as regards the processing referred to in point (e) of paragraph 1, shall be necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller. That legal basis may contain specific provisions to adapt the application of rules of this Regulation, inter alia: the general conditions governing the lawfulness of processing by the controller; the types of data which are subject to the processing; the data subjects concerned; the entities to, and the purposes for which, the personal data may be disclosed; the purpose limitation; storage periods; and processing operations and processing procedures, including measures to ensure lawful and fair processing such as those for other specific processing situations as provided for in Chapter IX. The Union or the Member State law shall meet an objective of public interest and be proportionate to the legitimate aim pursued.

4. Where the processing for a purpose other than that for which the personal data have been collected is not based on the data subject's consent or on a Union or Member State law which constitutes a necessary and proportionate measure in a democratic society to safeguard the objectives referred to in Article 23(1), the controller shall, in order to ascertain whether processing for another purpose is compatible with the purpose for which the personal data are initially collected, take into account, inter alia:

- (a) any link between the purposes for which the personal data have been collected and the purposes of the intended further processing;
- (b) the context in which the personal data have been collected, in particular regarding the relationship between data subjects and the controller;
- (c) the nature of the personal data, in particular whether special categories of personal data are processed, pursuant to Article 9, or whether personal data related to criminal convictions and offences are processed, pursuant to Article 10;
- (d) the possible consequences of the intended further processing for data subjects;
- (e) the existence of appropriate safeguards, which may include encryption or pseudonymisation.

Article 7

Conditions for consent

1. Where processing is based on consent, the controller shall be able to demonstrate that the data subject has consented to processing of his or her personal data.
2. If the data subject's consent is given in the context of a written declaration which also concerns other matters, the request for consent shall be presented in a manner which is clearly distinguishable from the other matters, in an intelligible and easily accessible form, using clear and plain language. Any part of such a declaration which constitutes an infringement of this Regulation shall not be binding.
3. The data subject shall have the right to withdraw his or her consent at any time. The withdrawal of consent shall not affect the lawfulness of processing based on consent before its withdrawal. Prior to giving consent, the data subject shall be informed thereof. It shall be as easy to withdraw as to give consent.
4. When assessing whether consent is freely given, utmost account shall be taken of whether, inter alia, the performance of a contract, including the provision of a service, is conditional on consent to the processing of personal data that is not necessary for the performance of that contract.

Article 8

Conditions applicable to child's consent in relation to information society services

1. Where point (a) of Article 6(1) applies, in relation to the offer of information society services directly to a child, the processing of the personal data of a child shall be lawful where the child is at least 16 years old. Where the child is below the age of 16 years, such processing shall be lawful only if and to the extent that consent is given or authorised by the holder of parental responsibility over the child.

Member States may provide by law for a lower age for those purposes provided that such lower age is not below 13 years.

2. The controller shall make reasonable efforts to verify in such cases that consent is given or authorised by the holder of parental responsibility over the child, taking into consideration available technology.

3. Paragraph 1 shall not affect the general contract law of Member States such as the rules on the validity, formation or effect of a contract in relation to a child.

Article 9

Processing of special categories of personal data

1. Processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation shall be prohibited.

2. Paragraph 1 shall not apply if one of the following applies:

- (a) the data subject has given explicit consent to the processing of those personal data for one or more specified purposes, except where Union or Member State law provide that the prohibition referred to in paragraph 1 may not be lifted by the data subject;
- (b) processing is necessary for the purposes of carrying out the obligations and exercising specific rights of the controller or of the data subject in the field of employment and social security and social protection law in so far as it is authorised by Union or Member State law or a collective agreement pursuant to Member State law providing for appropriate safeguards for the fundamental rights and the interests of the data subject;
- (c) processing is necessary to protect the vital interests of the data subject or of another natural person where the data subject is physically or legally incapable of giving consent;
- (d) processing is carried out in the course of its legitimate activities with appropriate safeguards by a foundation, association or any other not-for-profit body with a political, philosophical, religious or trade union aim and on condition that the processing relates solely to the members or to former members of the body or to persons who have regular contact with it in connection with its purposes and that the personal data are not disclosed outside that body without the consent of the data subjects;
- (e) processing relates to personal data which are manifestly made public by the data subject;
- (f) processing is necessary for the establishment, exercise or defence of legal claims or whenever courts are acting in their judicial capacity;
- (g) processing is necessary for reasons of substantial public interest, on the basis of Union or Member State law which shall be proportionate to the aim pursued, respect the essence of the right to data protection and provide for suitable and specific measures to safeguard the fundamental rights and the interests of the data subject;
- (h) processing is necessary for the purposes of preventive or occupational medicine, for the assessment of the working capacity of the employee, medical diagnosis, the provision of health or social care or treatment or the management of health or social care systems and services on the basis of Union or Member State law or pursuant to contract with a health professional and subject to the conditions and safeguards referred to in paragraph 3;
- (i) processing is necessary for reasons of public interest in the area of public health, such as protecting against serious cross-border threats to health or ensuring high standards of quality and safety of health care and of medicinal products or medical devices, on the basis of Union or Member State law which provides for suitable and specific measures to safeguard the rights and freedoms of the data subject, in particular professional secrecy;
- (j) processing is necessary for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes in accordance with Article 89(1) based on Union or Member State law which shall be proportionate to the aim pursued, respect the essence of the right to data protection and provide for suitable and specific measures to safeguard the fundamental rights and the interests of the data subject.

3. Personal data referred to in paragraph 1 may be processed for the purposes referred to in point (h) of paragraph 2 when those data are processed by or under the responsibility of a professional subject to the obligation of professional secrecy under Union or Member State law or rules established by national competent bodies or by another person also subject to an obligation of secrecy under Union or Member State law or rules established by national competent bodies.

4. Member States may maintain or introduce further conditions, including limitations, with regard to the processing of genetic data, biometric data or data concerning health.

Article 10

Processing of personal data relating to criminal convictions and offences

Processing of personal data relating to criminal convictions and offences or related security measures based on Article 6(1) shall be carried out only under the control of official authority or when the processing is authorised by Union or Member State law providing for appropriate safeguards for the rights and freedoms of data subjects. Any comprehensive register of criminal convictions shall be kept only under the control of official authority.

Article 11

Processing which does not require identification

1. If the purposes for which a controller processes personal data do not or do no longer require the identification of a data subject by the controller, the controller shall not be obliged to maintain, acquire or process additional information in order to identify the data subject for the sole purpose of complying with this Regulation.
2. Where, in cases referred to in paragraph 1 of this Article, the controller is able to demonstrate that it is not in a position to identify the data subject, the controller shall inform the data subject accordingly, if possible. In such cases, Articles 15 to 20 shall not apply except where the data subject, for the purpose of exercising his or her rights under those articles, provides additional information enabling his or her identification.

CHAPTER III

Rights of the data subject

Section 1

Transparency and modalities

Article 12

Transparent information, communication and modalities for the exercise of the rights of the data subject

1. The controller shall take appropriate measures to provide any information referred to in Articles 13 and 14 and any communication under Articles 15 to 22 and 34 relating to processing to the data subject in a concise, transparent, intelligible and easily accessible form, using clear and plain language, in particular for any information addressed specifically to a child. The information shall be provided in writing, or by other means, including, where appropriate, by electronic means. When requested by the data subject, the information may be provided orally, provided that the identity of the data subject is proven by other means.
2. The controller shall facilitate the exercise of data subject rights under Articles 15 to 22. In the cases referred to in Article 11(2), the controller shall not refuse to act on the request of the data subject for exercising his or her rights under Articles 15 to 22, unless the controller demonstrates that it is not in a position to identify the data subject.
3. The controller shall provide information on action taken on a request under Articles 15 to 22 to the data subject without undue delay and in any event within one month of receipt of the request. That period may be extended by two further months where necessary, taking into account the complexity and number of the requests. The controller shall inform the data subject of any such extension within one month of receipt of the request, together with the reasons for the delay. Where the data subject makes the request by electronic form means, the information shall be provided by electronic means where possible, unless otherwise requested by the data subject.

4. If the controller does not take action on the request of the data subject, the controller shall inform the data subject without delay and at the latest within one month of receipt of the request of the reasons for not taking action and on the possibility of lodging a complaint with a supervisory authority and seeking a judicial remedy.

5. Information provided under Articles 13 and 14 and any communication and any actions taken under Articles 15 to 22 and 34 shall be provided free of charge. Where requests from a data subject are manifestly unfounded or excessive, in particular because of their repetitive character, the controller may either:

- (a) charge a reasonable fee taking into account the administrative costs of providing the information or communication or taking the action requested; or
- (b) refuse to act on the request.

The controller shall bear the burden of demonstrating the manifestly unfounded or excessive character of the request.

6. Without prejudice to Article 11, where the controller has reasonable doubts concerning the identity of the natural person making the request referred to in Articles 15 to 21, the controller may request the provision of additional information necessary to confirm the identity of the data subject.

7. The information to be provided to data subjects pursuant to Articles 13 and 14 may be provided in combination with standardised icons in order to give in an easily visible, intelligible and clearly legible manner a meaningful overview of the intended processing. Where the icons are presented electronically they shall be machine-readable.

8. The Commission shall be empowered to adopt delegated acts in accordance with Article 92 for the purpose of determining the information to be presented by the icons and the procedures for providing standardised icons.

Section 2

Information and access to personal data

Article 13

Information to be provided where personal data are collected from the data subject

1. Where personal data relating to a data subject are collected from the data subject, the controller shall, at the time when personal data are obtained, provide the data subject with all of the following information:

- (a) the identity and the contact details of the controller and, where applicable, of the controller's representative;
- (b) the contact details of the data protection officer, where applicable;
- (c) the purposes of the processing for which the personal data are intended as well as the legal basis for the processing;
- (d) where the processing is based on point (f) of Article 6(1), the legitimate interests pursued by the controller or by a third party;
- (e) the recipients or categories of recipients of the personal data, if any;
- (f) where applicable, the fact that the controller intends to transfer personal data to a third country or international organisation and the existence or absence of an adequacy decision by the Commission, or in the case of transfers referred to in Article 46 or 47, or the second subparagraph of Article 49(1), reference to the appropriate or suitable safeguards and the means by which to obtain a copy of them or where they have been made available.

2. In addition to the information referred to in paragraph 1, the controller shall, at the time when personal data are obtained, provide the data subject with the following further information necessary to ensure fair and transparent processing:

- (a) the period for which the personal data will be stored, or if that is not possible, the criteria used to determine that period;

- (b) the existence of the right to request from the controller access to and rectification or erasure of personal data or restriction of processing concerning the data subject or to object to processing as well as the right to data portability;
- (c) where the processing is based on point (a) of Article 6(1) or point (a) of Article 9(2), the existence of the right to withdraw consent at any time, without affecting the lawfulness of processing based on consent before its withdrawal;
- (d) the right to lodge a complaint with a supervisory authority;
- (e) whether the provision of personal data is a statutory or contractual requirement, or a requirement necessary to enter into a contract, as well as whether the data subject is obliged to provide the personal data and of the possible consequences of failure to provide such data;
- (f) the existence of automated decision-making, including profiling, referred to in Article 22(1) and (4) and, at least in those cases, meaningful information about the logic involved, as well as the significance and the envisaged consequences of such processing for the data subject.

3. Where the controller intends to further process the personal data for a purpose other than that for which the personal data were collected, the controller shall provide the data subject prior to that further processing with information on that other purpose and with any relevant further information as referred to in paragraph 2.

4. Paragraphs 1, 2 and 3 shall not apply where and insofar as the data subject already has the information.

Article 14

Information to be provided where personal data have not been obtained from the data subject

1. Where personal data have not been obtained from the data subject, the controller shall provide the data subject with the following information:

- (a) the identity and the contact details of the controller and, where applicable, of the controller's representative;
- (b) the contact details of the data protection officer, where applicable;
- (c) the purposes of the processing for which the personal data are intended as well as the legal basis for the processing;
- (d) the categories of personal data concerned;
- (e) the recipients or categories of recipients of the personal data, if any;
- (f) where applicable, that the controller intends to transfer personal data to a recipient in a third country or international organisation and the existence or absence of an adequacy decision by the Commission, or in the case of transfers referred to in Article 46 or 47, or the second subparagraph of Article 49(1), reference to the appropriate or suitable safeguards and the means to obtain a copy of them or where they have been made available.

2. In addition to the information referred to in paragraph 1, the controller shall provide the data subject with the following information necessary to ensure fair and transparent processing in respect of the data subject:

- (a) the period for which the personal data will be stored, or if that is not possible, the criteria used to determine that period;
- (b) where the processing is based on point (f) of Article 6(1), the legitimate interests pursued by the controller or by a third party;
- (c) the existence of the right to request from the controller access to and rectification or erasure of personal data or restriction of processing concerning the data subject and to object to processing as well as the right to data portability;
- (d) where processing is based on point (a) of Article 6(1) or point (a) of Article 9(2), the existence of the right to withdraw consent at any time, without affecting the lawfulness of processing based on consent before its withdrawal;
- (e) the right to lodge a complaint with a supervisory authority;
- (f) from which source the personal data originate, and if applicable, whether it came from publicly accessible sources;
- (g) the existence of automated decision-making, including profiling, referred to in Article 22(1) and (4) and, at least in those cases, meaningful information about the logic involved, as well as the significance and the envisaged consequences of such processing for the data subject.

3. The controller shall provide the information referred to in paragraphs 1 and 2:
 - (a) within a reasonable period after obtaining the personal data, but at the latest within one month, having regard to the specific circumstances in which the personal data are processed;
 - (b) if the personal data are to be used for communication with the data subject, at the latest at the time of the first communication to that data subject; or
 - (c) if a disclosure to another recipient is envisaged, at the latest when the personal data are first disclosed.
4. Where the controller intends to further process the personal data for a purpose other than that for which the personal data were obtained, the controller shall provide the data subject prior to that further processing with information on that other purpose and with any relevant further information as referred to in paragraph 2.
5. Paragraphs 1 to 4 shall not apply where and insofar as:
 - (a) the data subject already has the information;
 - (b) the provision of such information proves impossible or would involve a disproportionate effort, in particular for processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes, subject to the conditions and safeguards referred to in Article 89(1) or in so far as the obligation referred to in paragraph 1 of this Article is likely to render impossible or seriously impair the achievement of the objectives of that processing. In such cases the controller shall take appropriate measures to protect the data subject's rights and freedoms and legitimate interests, including making the information publicly available;
 - (c) obtaining or disclosure is expressly laid down by Union or Member State law to which the controller is subject and which provides appropriate measures to protect the data subject's legitimate interests; or
 - (d) where the personal data must remain confidential subject to an obligation of professional secrecy regulated by Union or Member State law, including a statutory obligation of secrecy.

Article 15

Right of access by the data subject

1. The data subject shall have the right to obtain from the controller confirmation as to whether or not personal data concerning him or her are being processed, and, where that is the case, access to the personal data and the following information:
 - (a) the purposes of the processing;
 - (b) the categories of personal data concerned;
 - (c) the recipients or categories of recipient to whom the personal data have been or will be disclosed, in particular recipients in third countries or international organisations;
 - (d) where possible, the envisaged period for which the personal data will be stored, or, if not possible, the criteria used to determine that period;
 - (e) the existence of the right to request from the controller rectification or erasure of personal data or restriction of processing of personal data concerning the data subject or to object to such processing;
 - (f) the right to lodge a complaint with a supervisory authority;
 - (g) where the personal data are not collected from the data subject, any available information as to their source;
 - (h) the existence of automated decision-making, including profiling, referred to in Article 22(1) and (4) and, at least in those cases, meaningful information about the logic involved, as well as the significance and the envisaged consequences of such processing for the data subject.
2. Where personal data are transferred to a third country or to an international organisation, the data subject shall have the right to be informed of the appropriate safeguards pursuant to Article 46 relating to the transfer.
3. The controller shall provide a copy of the personal data undergoing processing. For any further copies requested by the data subject, the controller may charge a reasonable fee based on administrative costs. Where the data subject makes the request by electronic means, and unless otherwise requested by the data subject, the information shall be provided in a commonly used electronic form.

4. The right to obtain a copy referred to in paragraph 3 shall not adversely affect the rights and freedoms of others.

Section 3

Rectification and erasure

Article 16

Right to rectification

The data subject shall have the right to obtain from the controller without undue delay the rectification of inaccurate personal data concerning him or her. Taking into account the purposes of the processing, the data subject shall have the right to have incomplete personal data completed, including by means of providing a supplementary statement.

Article 17

Right to erasure ('right to be forgotten')

1. The data subject shall have the right to obtain from the controller the erasure of personal data concerning him or her without undue delay and the controller shall have the obligation to erase personal data without undue delay where one of the following grounds applies:

- (a) the personal data are no longer necessary in relation to the purposes for which they were collected or otherwise processed;
- (b) the data subject withdraws consent on which the processing is based according to point (a) of Article 6(1), or point (a) of Article 9(2), and where there is no other legal ground for the processing;
- (c) the data subject objects to the processing pursuant to Article 21(1) and there are no overriding legitimate grounds for the processing, or the data subject objects to the processing pursuant to Article 21(2);
- (d) the personal data have been unlawfully processed;
- (e) the personal data have to be erased for compliance with a legal obligation in Union or Member State law to which the controller is subject;
- (f) the personal data have been collected in relation to the offer of information society services referred to in Article 8(1).

2. Where the controller has made the personal data public and is obliged pursuant to paragraph 1 to erase the personal data, the controller, taking account of available technology and the cost of implementation, shall take reasonable steps, including technical measures, to inform controllers which are processing the personal data that the data subject has requested the erasure by such controllers of any links to, or copy or replication of, those personal data.

3. Paragraphs 1 and 2 shall not apply to the extent that processing is necessary:

- (a) for exercising the right of freedom of expression and information;
- (b) for compliance with a legal obligation which requires processing by Union or Member State law to which the controller is subject or for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller;
- (c) for reasons of public interest in the area of public health in accordance with points (h) and (i) of Article 9(2) as well as Article 9(3);
- (d) for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes in accordance with Article 89(1) in so far as the right referred to in paragraph 1 is likely to render impossible or seriously impair the achievement of the objectives of that processing; or
- (e) for the establishment, exercise or defence of legal claims.

Article 18

Right to restriction of processing

1. The data subject shall have the right to obtain from the controller restriction of processing where one of the following applies:

- (a) the accuracy of the personal data is contested by the data subject, for a period enabling the controller to verify the accuracy of the personal data;
- (b) the processing is unlawful and the data subject opposes the erasure of the personal data and requests the restriction of their use instead;
- (c) the controller no longer needs the personal data for the purposes of the processing, but they are required by the data subject for the establishment, exercise or defence of legal claims;
- (d) the data subject has objected to processing pursuant to Article 21(1) pending the verification whether the legitimate grounds of the controller override those of the data subject.

2. Where processing has been restricted under paragraph 1, such personal data shall, with the exception of storage, only be processed with the data subject's consent or for the establishment, exercise or defence of legal claims or for the protection of the rights of another natural or legal person or for reasons of important public interest of the Union or of a Member State.

3. A data subject who has obtained restriction of processing pursuant to paragraph 1 shall be informed by the controller before the restriction of processing is lifted.

Article 19

Notification obligation regarding rectification or erasure of personal data or restriction of processing

The controller shall communicate any rectification or erasure of personal data or restriction of processing carried out in accordance with Article 16, Article 17(1) and Article 18 to each recipient to whom the personal data have been disclosed, unless this proves impossible or involves disproportionate effort. The controller shall inform the data subject about those recipients if the data subject requests it.

Article 20

Right to data portability

1. The data subject shall have the right to receive the personal data concerning him or her, which he or she has provided to a controller, in a structured, commonly used and machine-readable format and have the right to transmit those data to another controller without hindrance from the controller to which the personal data have been provided, where:

- (a) the processing is based on consent pursuant to point (a) of Article 6(1) or point (a) of Article 9(2) or on a contract pursuant to point (b) of Article 6(1); and
- (b) the processing is carried out by automated means.

2. In exercising his or her right to data portability pursuant to paragraph 1, the data subject shall have the right to have the personal data transmitted directly from one controller to another, where technically feasible.

3. The exercise of the right referred to in paragraph 1 of this Article shall be without prejudice to Article 17. That right shall not apply to processing necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller.

4. The right referred to in paragraph 1 shall not adversely affect the rights and freedoms of others.

Section 4

Right to object and automated individual decision-making

Article 21

Right to object

1. The data subject shall have the right to object, on grounds relating to his or her particular situation, at any time to processing of personal data concerning him or her which is based on point (e) or (f) of Article 6(1), including profiling based on those provisions. The controller shall no longer process the personal data unless the controller demonstrates compelling legitimate grounds for the processing which override the interests, rights and freedoms of the data subject or for the establishment, exercise or defence of legal claims.
2. Where personal data are processed for direct marketing purposes, the data subject shall have the right to object at any time to processing of personal data concerning him or her for such marketing, which includes profiling to the extent that it is related to such direct marketing.
3. Where the data subject objects to processing for direct marketing purposes, the personal data shall no longer be processed for such purposes.
4. At the latest at the time of the first communication with the data subject, the right referred to in paragraphs 1 and 2 shall be explicitly brought to the attention of the data subject and shall be presented clearly and separately from any other information.
5. In the context of the use of information society services, and notwithstanding Directive 2002/58/EC, the data subject may exercise his or her right to object by automated means using technical specifications.
6. Where personal data are processed for scientific or historical research purposes or statistical purposes pursuant to Article 89(1), the data subject, on grounds relating to his or her particular situation, shall have the right to object to processing of personal data concerning him or her, unless the processing is necessary for the performance of a task carried out for reasons of public interest.

Article 22

Automated individual decision-making, including profiling

1. The data subject shall have the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her.
2. Paragraph 1 shall not apply if the decision:
 - (a) is necessary for entering into, or performance of, a contract between the data subject and a data controller;
 - (b) is authorised by Union or Member State law to which the controller is subject and which also lays down suitable measures to safeguard the data subject's rights and freedoms and legitimate interests; or
 - (c) is based on the data subject's explicit consent.
3. In the cases referred to in points (a) and (c) of paragraph 2, the data controller shall implement suitable measures to safeguard the data subject's rights and freedoms and legitimate interests, at least the right to obtain human intervention on the part of the controller, to express his or her point of view and to contest the decision.
4. Decisions referred to in paragraph 2 shall not be based on special categories of personal data referred to in Article 9(1), unless point (a) or (g) of Article 9(2) applies and suitable measures to safeguard the data subject's rights and freedoms and legitimate interests are in place.

Section 5

Restrictions

Article 23

Restrictions

1. Union or Member State law to which the data controller or processor is subject may restrict by way of a legislative measure the scope of the obligations and rights provided for in Articles 12 to 22 and Article 34, as well as Article 5 in so far as its provisions correspond to the rights and obligations provided for in Articles 12 to 22, when such a restriction respects the essence of the fundamental rights and freedoms and is a necessary and proportionate measure in a democratic society to safeguard:

- (a) national security;
- (b) defence;
- (c) public security;
- (d) the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security;
- (e) other important objectives of general public interest of the Union or of a Member State, in particular an important economic or financial interest of the Union or of a Member State, including monetary, budgetary and taxation matters, public health and social security;
- (f) the protection of judicial independence and judicial proceedings;
- (g) the prevention, investigation, detection and prosecution of breaches of ethics for regulated professions;
- (h) a monitoring, inspection or regulatory function connected, even occasionally, to the exercise of official authority in the cases referred to in points (a) to (e) and (g);
- (i) the protection of the data subject or the rights and freedoms of others;
- (j) the enforcement of civil law claims.

2. In particular, any legislative measure referred to in paragraph 1 shall contain specific provisions at least, where relevant, as to:

- (a) the purposes of the processing or categories of processing;
- (b) the categories of personal data;
- (c) the scope of the restrictions introduced;
- (d) the safeguards to prevent abuse or unlawful access or transfer;
- (e) the specification of the controller or categories of controllers;
- (f) the storage periods and the applicable safeguards taking into account the nature, scope and purposes of the processing or categories of processing;
- (g) the risks to the rights and freedoms of data subjects; and
- (h) the right of data subjects to be informed about the restriction, unless that may be prejudicial to the purpose of the restriction.

CHAPTER IV

Controller and processor

Section 1

General obligations

Article 24

Responsibility of the controller

1. Taking into account the nature, scope, context and purposes of processing as well as the risks of varying likelihood and severity for the rights and freedoms of natural persons, the controller shall implement appropriate technical and organisational measures to ensure and to be able to demonstrate that processing is performed in accordance with this Regulation. Those measures shall be reviewed and updated where necessary.

2. Where proportionate in relation to processing activities, the measures referred to in paragraph 1 shall include the implementation of appropriate data protection policies by the controller.

3. Adherence to approved codes of conduct as referred to in Article 40 or approved certification mechanisms as referred to in Article 42 may be used as an element by which to demonstrate compliance with the obligations of the controller.

Article 25

Data protection by design and by default

1. Taking into account the state of the art, the cost of implementation and the nature, scope, context and purposes of processing as well as the risks of varying likelihood and severity for rights and freedoms of natural persons posed by the processing, the controller shall, both at the time of the determination of the means for processing and at the time of the processing itself, implement appropriate technical and organisational measures, such as pseudonymisation, which are designed to implement data-protection principles, such as data minimisation, in an effective manner and to integrate the necessary safeguards into the processing in order to meet the requirements of this Regulation and protect the rights of data subjects.

2. The controller shall implement appropriate technical and organisational measures for ensuring that, by default, only personal data which are necessary for each specific purpose of the processing are processed. That obligation applies to the amount of personal data collected, the extent of their processing, the period of their storage and their accessibility. In particular, such measures shall ensure that by default personal data are not made accessible without the individual's intervention to an indefinite number of natural persons.

3. An approved certification mechanism pursuant to Article 42 may be used as an element to demonstrate compliance with the requirements set out in paragraphs 1 and 2 of this Article.

Article 26

Joint controllers

1. Where two or more controllers jointly determine the purposes and means of processing, they shall be joint controllers. They shall in a transparent manner determine their respective responsibilities for compliance with the obligations under this Regulation, in particular as regards the exercising of the rights of the data subject and their respective duties to provide the information referred to in Articles 13 and 14, by means of an arrangement between them unless, and in so far as, the respective responsibilities of the controllers are determined by Union or Member State law to which the controllers are subject. The arrangement may designate a contact point for data subjects.

2. The arrangement referred to in paragraph 1 shall duly reflect the respective roles and relationships of the joint controllers vis-à-vis the data subjects. The essence of the arrangement shall be made available to the data subject.

3. Irrespective of the terms of the arrangement referred to in paragraph 1, the data subject may exercise his or her rights under this Regulation in respect of and against each of the controllers.

Article 27

Representatives of controllers or processors not established in the Union

1. Where Article 3(2) applies, the controller or the processor shall designate in writing a representative in the Union.

2. The obligation laid down in paragraph 1 of this Article shall not apply to:

- (a) processing which is occasional, does not include, on a large scale, processing of special categories of data as referred to in Article 9(1) or processing of personal data relating to criminal convictions and offences referred to in Article 10, and is unlikely to result in a risk to the rights and freedoms of natural persons, taking into account the nature, context, scope and purposes of the processing; or
- (b) a public authority or body.

3. The representative shall be established in one of the Member States where the data subjects, whose personal data are processed in relation to the offering of goods or services to them, or whose behaviour is monitored, are.

4. The representative shall be mandated by the controller or processor to be addressed in addition to or instead of the controller or the processor by, in particular, supervisory authorities and data subjects, on all issues related to processing, for the purposes of ensuring compliance with this Regulation.

5. The designation of a representative by the controller or processor shall be without prejudice to legal actions which could be initiated against the controller or the processor themselves.

Article 28

Processor

1. Where processing is to be carried out on behalf of a controller, the controller shall use only processors providing sufficient guarantees to implement appropriate technical and organisational measures in such a manner that processing will meet the requirements of this Regulation and ensure the protection of the rights of the data subject.

2. The processor shall not engage another processor without prior specific or general written authorisation of the controller. In the case of general written authorisation, the processor shall inform the controller of any intended changes concerning the addition or replacement of other processors, thereby giving the controller the opportunity to object to such changes.

3. Processing by a processor shall be governed by a contract or other legal act under Union or Member State law, that is binding on the processor with regard to the controller and that sets out the subject-matter and duration of the processing, the nature and purpose of the processing, the type of personal data and categories of data subjects and the obligations and rights of the controller. That contract or other legal act shall stipulate, in particular, that the processor:

- (a) processes the personal data only on documented instructions from the controller, including with regard to transfers of personal data to a third country or an international organisation, unless required to do so by Union or Member State law to which the processor is subject; in such a case, the processor shall inform the controller of that legal requirement before processing, unless that law prohibits such information on important grounds of public interest;
- (b) ensures that persons authorised to process the personal data have committed themselves to confidentiality or are under an appropriate statutory obligation of confidentiality;
- (c) takes all measures required pursuant to Article 32;
- (d) respects the conditions referred to in paragraphs 2 and 4 for engaging another processor;
- (e) taking into account the nature of the processing, assists the controller by appropriate technical and organisational measures, insofar as this is possible, for the fulfilment of the controller's obligation to respond to requests for exercising the data subject's rights laid down in Chapter III;
- (f) assists the controller in ensuring compliance with the obligations pursuant to Articles 32 to 36 taking into account the nature of processing and the information available to the processor;
- (g) at the choice of the controller, deletes or returns all the personal data to the controller after the end of the provision of services relating to processing, and deletes existing copies unless Union or Member State law requires storage of the personal data;
- (h) makes available to the controller all information necessary to demonstrate compliance with the obligations laid down in this Article and allow for and contribute to audits, including inspections, conducted by the controller or another auditor mandated by the controller.

With regard to point (h) of the first subparagraph, the processor shall immediately inform the controller if, in its opinion, an instruction infringes this Regulation or other Union or Member State data protection provisions.

4. Where a processor engages another processor for carrying out specific processing activities on behalf of the controller, the same data protection obligations as set out in the contract or other legal act between the controller and the processor as referred to in paragraph 3 shall be imposed on that other processor by way of a contract or other legal act under Union or Member State law, in particular providing sufficient guarantees to implement appropriate technical and organisational measures in such a manner that the processing will meet the requirements of this Regulation. Where that other processor fails to fulfil its data protection obligations, the initial processor shall remain fully liable to the controller for the performance of that other processor's obligations.

5. Adherence of a processor to an approved code of conduct as referred to in Article 40 or an approved certification mechanism as referred to in Article 42 may be used as an element by which to demonstrate sufficient guarantees as referred to in paragraphs 1 and 4 of this Article.

6. Without prejudice to an individual contract between the controller and the processor, the contract or the other legal act referred to in paragraphs 3 and 4 of this Article may be based, in whole or in part, on standard contractual clauses referred to in paragraphs 7 and 8 of this Article, including when they are part of a certification granted to the controller or processor pursuant to Articles 42 and 43.

7. The Commission may lay down standard contractual clauses for the matters referred to in paragraph 3 and 4 of this Article and in accordance with the examination procedure referred to in Article 93(2).

8. A supervisory authority may adopt standard contractual clauses for the matters referred to in paragraph 3 and 4 of this Article and in accordance with the consistency mechanism referred to in Article 63.

9. The contract or the other legal act referred to in paragraphs 3 and 4 shall be in writing, including in electronic form.

10. Without prejudice to Articles 82, 83 and 84, if a processor infringes this Regulation by determining the purposes and means of processing, the processor shall be considered to be a controller in respect of that processing.

Article 29

Processing under the authority of the controller or processor

The processor and any person acting under the authority of the controller or of the processor, who has access to personal data, shall not process those data except on instructions from the controller, unless required to do so by Union or Member State law.

Article 30

Records of processing activities

1. Each controller and, where applicable, the controller's representative, shall maintain a record of processing activities under its responsibility. That record shall contain all of the following information:

- (a) the name and contact details of the controller and, where applicable, the joint controller, the controller's representative and the data protection officer;
- (b) the purposes of the processing;
- (c) a description of the categories of data subjects and of the categories of personal data;
- (d) the categories of recipients to whom the personal data have been or will be disclosed including recipients in third countries or international organisations;

- (e) where applicable, transfers of personal data to a third country or an international organisation, including the identification of that third country or international organisation and, in the case of transfers referred to in the second subparagraph of Article 49(1), the documentation of suitable safeguards;
 - (f) where possible, the envisaged time limits for erasure of the different categories of data;
 - (g) where possible, a general description of the technical and organisational security measures referred to in Article 32(1).
2. Each processor and, where applicable, the processor's representative shall maintain a record of all categories of processing activities carried out on behalf of a controller, containing:
 - (a) the name and contact details of the processor or processors and of each controller on behalf of which the processor is acting, and, where applicable, of the controller's or the processor's representative, and the data protection officer;
 - (b) the categories of processing carried out on behalf of each controller;
 - (c) where applicable, transfers of personal data to a third country or an international organisation, including the identification of that third country or international organisation and, in the case of transfers referred to in the second subparagraph of Article 49(1), the documentation of suitable safeguards;
 - (d) where possible, a general description of the technical and organisational security measures referred to in Article 32(1).
 3. The records referred to in paragraphs 1 and 2 shall be in writing, including in electronic form.
 4. The controller or the processor and, where applicable, the controller's or the processor's representative, shall make the record available to the supervisory authority on request.
 5. The obligations referred to in paragraphs 1 and 2 shall not apply to an enterprise or an organisation employing fewer than 250 persons unless the processing it carries out is likely to result in a risk to the rights and freedoms of data subjects, the processing is not occasional, or the processing includes special categories of data as referred to in Article 9(1) or personal data relating to criminal convictions and offences referred to in Article 10.

Article 31

Cooperation with the supervisory authority

The controller and the processor and, where applicable, their representatives, shall cooperate, on request, with the supervisory authority in the performance of its tasks.

Section 2

Security of personal data

Article 32

Security of processing

1. Taking into account the state of the art, the costs of implementation and the nature, scope, context and purposes of processing as well as the risk of varying likelihood and severity for the rights and freedoms of natural persons, the controller and the processor shall implement appropriate technical and organisational measures to ensure a level of security appropriate to the risk, including inter alia as appropriate:
 - (a) the pseudonymisation and encryption of personal data;
 - (b) the ability to ensure the ongoing confidentiality, integrity, availability and resilience of processing systems and services;
 - (c) the ability to restore the availability and access to personal data in a timely manner in the event of a physical or technical incident;

(d) a process for regularly testing, assessing and evaluating the effectiveness of technical and organisational measures for ensuring the security of the processing.

2. In assessing the appropriate level of security account shall be taken in particular of the risks that are presented by processing, in particular from accidental or unlawful destruction, loss, alteration, unauthorised disclosure of, or access to personal data transmitted, stored or otherwise processed.

3. Adherence to an approved code of conduct as referred to in Article 40 or an approved certification mechanism as referred to in Article 42 may be used as an element by which to demonstrate compliance with the requirements set out in paragraph 1 of this Article.

4. The controller and processor shall take steps to ensure that any natural person acting under the authority of the controller or the processor who has access to personal data does not process them except on instructions from the controller, unless he or she is required to do so by Union or Member State law.

Article 33

Notification of a personal data breach to the supervisory authority

1. In the case of a personal data breach, the controller shall without undue delay and, where feasible, not later than 72 hours after having become aware of it, notify the personal data breach to the supervisory authority competent in accordance with Article 55, unless the personal data breach is unlikely to result in a risk to the rights and freedoms of natural persons. Where the notification to the supervisory authority is not made within 72 hours, it shall be accompanied by reasons for the delay.

2. The processor shall notify the controller without undue delay after becoming aware of a personal data breach.

3. The notification referred to in paragraph 1 shall at least:

(a) describe the nature of the personal data breach including where possible, the categories and approximate number of data subjects concerned and the categories and approximate number of personal data records concerned;

(b) communicate the name and contact details of the data protection officer or other contact point where more information can be obtained;

(c) describe the likely consequences of the personal data breach;

(d) describe the measures taken or proposed to be taken by the controller to address the personal data breach, including, where appropriate, measures to mitigate its possible adverse effects.

4. Where, and in so far as, it is not possible to provide the information at the same time, the information may be provided in phases without undue further delay.

5. The controller shall document any personal data breaches, comprising the facts relating to the personal data breach, its effects and the remedial action taken. That documentation shall enable the supervisory authority to verify compliance with this Article.

Article 34

Communication of a personal data breach to the data subject

1. When the personal data breach is likely to result in a high risk to the rights and freedoms of natural persons, the controller shall communicate the personal data breach to the data subject without undue delay.

2. The communication to the data subject referred to in paragraph 1 of this Article shall describe in clear and plain language the nature of the personal data breach and contain at least the information and measures referred to in points (b), (c) and (d) of Article 33(3).

3. The communication to the data subject referred to in paragraph 1 shall not be required if any of the following conditions are met:

- (a) the controller has implemented appropriate technical and organisational protection measures, and those measures were applied to the personal data affected by the personal data breach, in particular those that render the personal data unintelligible to any person who is not authorised to access it, such as encryption;
- (b) the controller has taken subsequent measures which ensure that the high risk to the rights and freedoms of data subjects referred to in paragraph 1 is no longer likely to materialise;
- (c) it would involve disproportionate effort. In such a case, there shall instead be a public communication or similar measure whereby the data subjects are informed in an equally effective manner.

4. If the controller has not already communicated the personal data breach to the data subject, the supervisory authority, having considered the likelihood of the personal data breach resulting in a high risk, may require it to do so or may decide that any of the conditions referred to in paragraph 3 are met.

Section 3

Data protection impact assessment and prior consultation

Article 35

Data protection impact assessment

1. Where a type of processing in particular using new technologies, and taking into account the nature, scope, context and purposes of the processing, is likely to result in a high risk to the rights and freedoms of natural persons, the controller shall, prior to the processing, carry out an assessment of the impact of the envisaged processing operations on the protection of personal data. A single assessment may address a set of similar processing operations that present similar high risks.

2. The controller shall seek the advice of the data protection officer, where designated, when carrying out a data protection impact assessment.

3. A data protection impact assessment referred to in paragraph 1 shall in particular be required in the case of:

- (a) a systematic and extensive evaluation of personal aspects relating to natural persons which is based on automated processing, including profiling, and on which decisions are based that produce legal effects concerning the natural person or similarly significantly affect the natural person;
- (b) processing on a large scale of special categories of data referred to in Article 9(1), or of personal data relating to criminal convictions and offences referred to in Article 10; or
- (c) a systematic monitoring of a publicly accessible area on a large scale.

4. The supervisory authority shall establish and make public a list of the kind of processing operations which are subject to the requirement for a data protection impact assessment pursuant to paragraph 1. The supervisory authority shall communicate those lists to the Board referred to in Article 68.

5. The supervisory authority may also establish and make public a list of the kind of processing operations for which no data protection impact assessment is required. The supervisory authority shall communicate those lists to the Board.

6. Prior to the adoption of the lists referred to in paragraphs 4 and 5, the competent supervisory authority shall apply the consistency mechanism referred to in Article 63 where such lists involve processing activities which are related to the offering of goods or services to data subjects or to the monitoring of their behaviour in several Member States, or may substantially affect the free movement of personal data within the Union.

7. The assessment shall contain at least:

- (a) a systematic description of the envisaged processing operations and the purposes of the processing, including, where applicable, the legitimate interest pursued by the controller;
- (b) an assessment of the necessity and proportionality of the processing operations in relation to the purposes;
- (c) an assessment of the risks to the rights and freedoms of data subjects referred to in paragraph 1; and
- (d) the measures envisaged to address the risks, including safeguards, security measures and mechanisms to ensure the protection of personal data and to demonstrate compliance with this Regulation taking into account the rights and legitimate interests of data subjects and other persons concerned.

8. Compliance with approved codes of conduct referred to in Article 40 by the relevant controllers or processors shall be taken into due account in assessing the impact of the processing operations performed by such controllers or processors, in particular for the purposes of a data protection impact assessment.

9. Where appropriate, the controller shall seek the views of data subjects or their representatives on the intended processing, without prejudice to the protection of commercial or public interests or the security of processing operations.

10. Where processing pursuant to point (c) or (e) of Article 6(1) has a legal basis in Union law or in the law of the Member State to which the controller is subject, that law regulates the specific processing operation or set of operations in question, and a data protection impact assessment has already been carried out as part of a general impact assessment in the context of the adoption of that legal basis, paragraphs 1 to 7 shall not apply unless Member States deem it to be necessary to carry out such an assessment prior to processing activities.

11. Where necessary, the controller shall carry out a review to assess if processing is performed in accordance with the data protection impact assessment at least when there is a change of the risk represented by processing operations.

Article 36

Prior consultation

1. The controller shall consult the supervisory authority prior to processing where a data protection impact assessment under Article 35 indicates that the processing would result in a high risk in the absence of measures taken by the controller to mitigate the risk.

2. Where the supervisory authority is of the opinion that the intended processing referred to in paragraph 1 would infringe this Regulation, in particular where the controller has insufficiently identified or mitigated the risk, the supervisory authority shall, within period of up to eight weeks of receipt of the request for consultation, provide written advice to the controller and, where applicable to the processor, and may use any of its powers referred to in Article 58. That period may be extended by six weeks, taking into account the complexity of the intended processing. The supervisory authority shall inform the controller and, where applicable, the processor, of any such extension within one month of receipt of the request for consultation together with the reasons for the delay. Those periods may be suspended until the supervisory authority has obtained information it has requested for the purposes of the consultation.

3. When consulting the supervisory authority pursuant to paragraph 1, the controller shall provide the supervisory authority with:

- (a) where applicable, the respective responsibilities of the controller, joint controllers and processors involved in the processing, in particular for processing within a group of undertakings;
- (b) the purposes and means of the intended processing;
- (c) the measures and safeguards provided to protect the rights and freedoms of data subjects pursuant to this Regulation;
- (d) where applicable, the contact details of the data protection officer;
- (e) the data protection impact assessment provided for in Article 35; and
- (f) any other information requested by the supervisory authority.

4. Member States shall consult the supervisory authority during the preparation of a proposal for a legislative measure to be adopted by a national parliament, or of a regulatory measure based on such a legislative measure, which relates to processing.

5. Notwithstanding paragraph 1, Member State law may require controllers to consult with, and obtain prior authorisation from, the supervisory authority in relation to processing by a controller for the performance of a task carried out by the controller in the public interest, including processing in relation to social protection and public health.

Section 4

Data protection officer

Article 37

Designation of the data protection officer

1. The controller and the processor shall designate a data protection officer in any case where:
 - (a) the processing is carried out by a public authority or body, except for courts acting in their judicial capacity;
 - (b) the core activities of the controller or the processor consist of processing operations which, by virtue of their nature, their scope and/or their purposes, require regular and systematic monitoring of data subjects on a large scale; or
 - (c) the core activities of the controller or the processor consist of processing on a large scale of special categories of data pursuant to Article 9 and personal data relating to criminal convictions and offences referred to in Article 10.
2. A group of undertakings may appoint a single data protection officer provided that a data protection officer is easily accessible from each establishment.
3. Where the controller or the processor is a public authority or body, a single data protection officer may be designated for several such authorities or bodies, taking account of their organisational structure and size.
4. In cases other than those referred to in paragraph 1, the controller or processor or associations and other bodies representing categories of controllers or processors may or, where required by Union or Member State law shall, designate a data protection officer. The data protection officer may act for such associations and other bodies representing controllers or processors.
5. The data protection officer shall be designated on the basis of professional qualities and, in particular, expert knowledge of data protection law and practices and the ability to fulfil the tasks referred to in Article 39.
6. The data protection officer may be a staff member of the controller or processor, or fulfil the tasks on the basis of a service contract.
7. The controller or the processor shall publish the contact details of the data protection officer and communicate them to the supervisory authority.

Article 38

Position of the data protection officer

1. The controller and the processor shall ensure that the data protection officer is involved, properly and in a timely manner, in all issues which relate to the protection of personal data.

2. The controller and processor shall support the data protection officer in performing the tasks referred to in Article 39 by providing resources necessary to carry out those tasks and access to personal data and processing operations, and to maintain his or her expert knowledge.
3. The controller and processor shall ensure that the data protection officer does not receive any instructions regarding the exercise of those tasks. He or she shall not be dismissed or penalised by the controller or the processor for performing his tasks. The data protection officer shall directly report to the highest management level of the controller or the processor.
4. Data subjects may contact the data protection officer with regard to all issues related to processing of their personal data and to the exercise of their rights under this Regulation.
5. The data protection officer shall be bound by secrecy or confidentiality concerning the performance of his or her tasks, in accordance with Union or Member State law.
6. The data protection officer may fulfil other tasks and duties. The controller or processor shall ensure that any such tasks and duties do not result in a conflict of interests.

Article 39

Tasks of the data protection officer

1. The data protection officer shall have at least the following tasks:
 - (a) to inform and advise the controller or the processor and the employees who carry out processing of their obligations pursuant to this Regulation and to other Union or Member State data protection provisions;
 - (b) to monitor compliance with this Regulation, with other Union or Member State data protection provisions and with the policies of the controller or processor in relation to the protection of personal data, including the assignment of responsibilities, awareness-raising and training of staff involved in processing operations, and the related audits;
 - (c) to provide advice where requested as regards the data protection impact assessment and monitor its performance pursuant to Article 35;
 - (d) to cooperate with the supervisory authority;
 - (e) to act as the contact point for the supervisory authority on issues relating to processing, including the prior consultation referred to in Article 36, and to consult, where appropriate, with regard to any other matter.
2. The data protection officer shall in the performance of his or her tasks have due regard to the risk associated with processing operations, taking into account the nature, scope, context and purposes of processing.

Section 5

Codes of conduct and certification

Article 40

Codes of conduct

1. The Member States, the supervisory authorities, the Board and the Commission shall encourage the drawing up of codes of conduct intended to contribute to the proper application of this Regulation, taking account of the specific features of the various processing sectors and the specific needs of micro, small and medium-sized enterprises.
2. Associations and other bodies representing categories of controllers or processors may prepare codes of conduct, or amend or extend such codes, for the purpose of specifying the application of this Regulation, such as with regard to:
 - (a) fair and transparent processing;

- (b) the legitimate interests pursued by controllers in specific contexts;
- (c) the collection of personal data;
- (d) the pseudonymisation of personal data;
- (e) the information provided to the public and to data subjects;
- (f) the exercise of the rights of data subjects;
- (g) the information provided to, and the protection of, children, and the manner in which the consent of the holders of parental responsibility over children is to be obtained;
- (h) the measures and procedures referred to in Articles 24 and 25 and the measures to ensure security of processing referred to in Article 32;
- (i) the notification of personal data breaches to supervisory authorities and the communication of such personal data breaches to data subjects;
- (j) the transfer of personal data to third countries or international organisations; or
- (k) out-of-court proceedings and other dispute resolution procedures for resolving disputes between controllers and data subjects with regard to processing, without prejudice to the rights of data subjects pursuant to Articles 77 and 79.

3. In addition to adherence by controllers or processors subject to this Regulation, codes of conduct approved pursuant to paragraph 5 of this Article and having general validity pursuant to paragraph 9 of this Article may also be adhered to by controllers or processors that are not subject to this Regulation pursuant to Article 3 in order to provide appropriate safeguards within the framework of personal data transfers to third countries or international organisations under the terms referred to in point (e) of Article 46(2). Such controllers or processors shall make binding and enforceable commitments, via contractual or other legally binding instruments, to apply those appropriate safeguards including with regard to the rights of data subjects.

4. A code of conduct referred to in paragraph 2 of this Article shall contain mechanisms which enable the body referred to in Article 41(1) to carry out the mandatory monitoring of compliance with its provisions by the controllers or processors which undertake to apply it, without prejudice to the tasks and powers of supervisory authorities competent pursuant to Article 55 or 56.

5. Associations and other bodies referred to in paragraph 2 of this Article which intend to prepare a code of conduct or to amend or extend an existing code shall submit the draft code, amendment or extension to the supervisory authority which is competent pursuant to Article 55. The supervisory authority shall provide an opinion on whether the draft code, amendment or extension complies with this Regulation and shall approve that draft code, amendment or extension if it finds that it provides sufficient appropriate safeguards.

6. Where the draft code, or amendment or extension is approved in accordance with paragraph 5, and where the code of conduct concerned does not relate to processing activities in several Member States, the supervisory authority shall register and publish the code.

7. Where a draft code of conduct relates to processing activities in several Member States, the supervisory authority which is competent pursuant to Article 55 shall, before approving the draft code, amendment or extension, submit it in the procedure referred to in Article 63 to the Board which shall provide an opinion on whether the draft code, amendment or extension complies with this Regulation or, in the situation referred to in paragraph 3 of this Article, provides appropriate safeguards.

8. Where the opinion referred to in paragraph 7 confirms that the draft code, amendment or extension complies with this Regulation, or, in the situation referred to in paragraph 3, provides appropriate safeguards, the Board shall submit its opinion to the Commission.

9. The Commission may, by way of implementing acts, decide that the approved code of conduct, amendment or extension submitted to it pursuant to paragraph 8 of this Article have general validity within the Union. Those implementing acts shall be adopted in accordance with the examination procedure set out in Article 93(2).

10. The Commission shall ensure appropriate publicity for the approved codes which have been decided as having general validity in accordance with paragraph 9.

11. The Board shall collate all approved codes of conduct, amendments and extensions in a register and shall make them publicly available by way of appropriate means.

Article 41

Monitoring of approved codes of conduct

1. Without prejudice to the tasks and powers of the competent supervisory authority under Articles 57 and 58, the monitoring of compliance with a code of conduct pursuant to Article 40 may be carried out by a body which has an appropriate level of expertise in relation to the subject-matter of the code and is accredited for that purpose by the competent supervisory authority.
2. A body as referred to in paragraph 1 may be accredited to monitor compliance with a code of conduct where that body has:
 - (a) demonstrated its independence and expertise in relation to the subject-matter of the code to the satisfaction of the competent supervisory authority;
 - (b) established procedures which allow it to assess the eligibility of controllers and processors concerned to apply the code, to monitor their compliance with its provisions and to periodically review its operation;
 - (c) established procedures and structures to handle complaints about infringements of the code or the manner in which the code has been, or is being, implemented by a controller or processor, and to make those procedures and structures transparent to data subjects and the public; and
 - (d) demonstrated to the satisfaction of the competent supervisory authority that its tasks and duties do not result in a conflict of interests.
3. The competent supervisory authority shall submit the draft criteria for accreditation of a body as referred to in paragraph 1 of this Article to the Board pursuant to the consistency mechanism referred to in Article 63.
4. Without prejudice to the tasks and powers of the competent supervisory authority and the provisions of Chapter VIII, a body as referred to in paragraph 1 of this Article shall, subject to appropriate safeguards, take appropriate action in cases of infringement of the code by a controller or processor, including suspension or exclusion of the controller or processor concerned from the code. It shall inform the competent supervisory authority of such actions and the reasons for taking them.
5. The competent supervisory authority shall revoke the accreditation of a body as referred to in paragraph 1 if the conditions for accreditation are not, or are no longer, met or where actions taken by the body infringe this Regulation.
6. This Article shall not apply to processing carried out by public authorities and bodies.

Article 42

Certification

1. The Member States, the supervisory authorities, the Board and the Commission shall encourage, in particular at Union level, the establishment of data protection certification mechanisms and of data protection seals and marks, for the purpose of demonstrating compliance with this Regulation of processing operations by controllers and processors. The specific needs of micro, small and medium-sized enterprises shall be taken into account.
2. In addition to adherence by controllers or processors subject to this Regulation, data protection certification mechanisms, seals or marks approved pursuant to paragraph 5 of this Article may be established for the purpose of demonstrating the existence of appropriate safeguards provided by controllers or processors that are not subject to this Regulation pursuant to Article 3 within the framework of personal data transfers to third countries or international organisations under the terms referred to in point (f) of Article 46(2). Such controllers or processors shall make binding and enforceable commitments, via contractual or other legally binding instruments, to apply those appropriate safeguards, including with regard to the rights of data subjects.
3. The certification shall be voluntary and available via a process that is transparent.

4. A certification pursuant to this Article does not reduce the responsibility of the controller or the processor for compliance with this Regulation and is without prejudice to the tasks and powers of the supervisory authorities which are competent pursuant to Article 55 or 56.
5. A certification pursuant to this Article shall be issued by the certification bodies referred to in Article 43 or by the competent supervisory authority, on the basis of criteria approved by that competent supervisory authority pursuant to Article 58(3) or by the Board pursuant to Article 63. Where the criteria are approved by the Board, this may result in a common certification, the European Data Protection Seal.
6. The controller or processor which submits its processing to the certification mechanism shall provide the certification body referred to in Article 43, or where applicable, the competent supervisory authority, with all information and access to its processing activities which are necessary to conduct the certification procedure.
7. Certification shall be issued to a controller or processor for a maximum period of three years and may be renewed, under the same conditions, provided that the relevant requirements continue to be met. Certification shall be withdrawn, as applicable, by the certification bodies referred to in Article 43 or by the competent supervisory authority where the requirements for the certification are not or are no longer met.
8. The Board shall collate all certification mechanisms and data protection seals and marks in a register and shall make them publicly available by any appropriate means.

Article 43

Certification bodies

1. Without prejudice to the tasks and powers of the competent supervisory authority under Articles 57 and 58, certification bodies which have an appropriate level of expertise in relation to data protection shall, after informing the supervisory authority in order to allow it to exercise its powers pursuant to point (h) of Article 58(2) where necessary, issue and renew certification. Member States shall ensure that those certification bodies are accredited by one or both of the following:
 - (a) the supervisory authority which is competent pursuant to Article 55 or 56;
 - (b) the national accreditation body named in accordance with Regulation (EC) No 765/2008 of the European Parliament and of the Council [\(20\)](#) in accordance with EN-ISO/IEC 17065/2012 and with the additional requirements established by the supervisory authority which is competent pursuant to Article 55 or 56.
2. Certification bodies referred to in paragraph 1 shall be accredited in accordance with that paragraph only where they have:
 - (a) demonstrated their independence and expertise in relation to the subject-matter of the certification to the satisfaction of the competent supervisory authority;
 - (b) undertaken to respect the criteria referred to in Article 42(5) and approved by the supervisory authority which is competent pursuant to Article 55 or 56 or by the Board pursuant to Article 63;
 - (c) established procedures for the issuing, periodic review and withdrawal of data protection certification, seals and marks;
 - (d) established procedures and structures to handle complaints about infringements of the certification or the manner in which the certification has been, or is being, implemented by the controller or processor, and to make those procedures and structures transparent to data subjects and the public; and
 - (e) demonstrated, to the satisfaction of the competent supervisory authority, that their tasks and duties do not result in a conflict of interests.
3. The accreditation of certification bodies as referred to in paragraphs 1 and 2 of this Article shall take place on the basis of criteria approved by the supervisory authority which is competent pursuant to Article 55 or 56 or by the Board pursuant to Article 63. In the case of accreditation pursuant to point (b) of paragraph 1 of this Article, those requirements shall complement those envisaged in Regulation (EC) No 765/2008 and the technical rules that describe the methods and procedures of the certification bodies.

4. The certification bodies referred to in paragraph 1 shall be responsible for the proper assessment leading to the certification or the withdrawal of such certification without prejudice to the responsibility of the controller or processor for compliance with this Regulation. The accreditation shall be issued for a maximum period of five years and may be renewed on the same conditions provided that the certification body meets the requirements set out in this Article.

5. The certification bodies referred to in paragraph 1 shall provide the competent supervisory authorities with the reasons for granting or withdrawing the requested certification.

6. The requirements referred to in paragraph 3 of this Article and the criteria referred to in Article 42(5) shall be made public by the supervisory authority in an easily accessible form. The supervisory authorities shall also transmit those requirements and criteria to the Board. The Board shall collate all certification mechanisms and data protection seals in a register and shall make them publicly available by any appropriate means.

7. Without prejudice to Chapter VIII, the competent supervisory authority or the national accreditation body shall revoke an accreditation of a certification body pursuant to paragraph 1 of this Article where the conditions for the accreditation are not, or are no longer, met or where actions taken by a certification body infringe this Regulation.

8. The Commission shall be empowered to adopt delegated acts in accordance with Article 92 for the purpose of specifying the requirements to be taken into account for the data protection certification mechanisms referred to in Article 42(1).

9. The Commission may adopt implementing acts laying down technical standards for certification mechanisms and data protection seals and marks, and mechanisms to promote and recognise those certification mechanisms, seals and marks. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 93(2).

CHAPTER V

Transfers of personal data to third countries or international organisations

Article 44

General principle for transfers

Any transfer of personal data which are undergoing processing or are intended for processing after transfer to a third country or to an international organisation shall take place only if, subject to the other provisions of this Regulation, the conditions laid down in this Chapter are complied with by the controller and processor, including for onward transfers of personal data from the third country or an international organisation to another third country or to another international organisation. All provisions in this Chapter shall be applied in order to ensure that the level of protection of natural persons guaranteed by this Regulation is not undermined.

Article 45

Transfers on the basis of an adequacy decision

1. A transfer of personal data to a third country or an international organisation may take place where the Commission has decided that the third country, a territory or one or more specified sectors within that third country, or the international organisation in question ensures an adequate level of protection. Such a transfer shall not require any specific authorisation.

2. When assessing the adequacy of the level of protection, the Commission shall, in particular, take account of the following elements:

(a) the rule of law, respect for human rights and fundamental freedoms, relevant legislation, both general and sectoral, including concerning public security, defence, national security and criminal law and the access of

- public authorities to personal data, as well as the implementation of such legislation, data protection rules, professional rules and security measures, including rules for the onward transfer of personal data to another third country or international organisation which are complied with in that country or international organisation, case-law, as well as effective and enforceable data subject rights and effective administrative and judicial redress for the data subjects whose personal data are being transferred;
- (b) the existence and effective functioning of one or more independent supervisory authorities in the third country or to which an international organisation is subject, with responsibility for ensuring and enforcing compliance with the data protection rules, including adequate enforcement powers, for assisting and advising the data subjects in exercising their rights and for cooperation with the supervisory authorities of the Member States; and
 - (c) the international commitments the third country or international organisation concerned has entered into, or other obligations arising from legally binding conventions or instruments as well as from its participation in multilateral or regional systems, in particular in relation to the protection of personal data.

3. The Commission, after assessing the adequacy of the level of protection, may decide, by means of implementing act, that a third country, a territory or one or more specified sectors within a third country, or an international organisation ensures an adequate level of protection within the meaning of paragraph 2 of this Article. The implementing act shall provide for a mechanism for a periodic review, at least every four years, which shall take into account all relevant developments in the third country or international organisation. The implementing act shall specify its territorial and sectoral application and, where applicable, identify the supervisory authority or authorities referred to in point (b) of paragraph 2 of this Article. The implementing act shall be adopted in accordance with the examination procedure referred to in Article 93(2).

4. The Commission shall, on an ongoing basis, monitor developments in third countries and international organisations that could affect the functioning of decisions adopted pursuant to paragraph 3 of this Article and decisions adopted on the basis of Article 25(6) of Directive 95/46/EC.

5. The Commission shall, where available information reveals, in particular following the review referred to in paragraph 3 of this Article, that a third country, a territory or one or more specified sectors within a third country, or an international organisation no longer ensures an adequate level of protection within the meaning of paragraph 2 of this Article, to the extent necessary, repeal, amend or suspend the decision referred to in paragraph 3 of this Article by means of implementing acts without retro-active effect. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 93(2).

On duly justified imperative grounds of urgency, the Commission shall adopt immediately applicable implementing acts in accordance with the procedure referred to in Article 93(3).

6. The Commission shall enter into consultations with the third country or international organisation with a view to remedying the situation giving rise to the decision made pursuant to paragraph 5.

7. A decision pursuant to paragraph 5 of this Article is without prejudice to transfers of personal data to the third country, a territory or one or more specified sectors within that third country, or the international organisation in question pursuant to Articles 46 to 49.

8. The Commission shall publish in the Official Journal of the European Union and on its website a list of the third countries, territories and specified sectors within a third country and international organisations for which it has decided that an adequate level of protection is or is no longer ensured.

9. Decisions adopted by the Commission on the basis of Article 25(6) of Directive 95/46/EC shall remain in force until amended, replaced or repealed by a Commission Decision adopted in accordance with paragraph 3 or 5 of this Article.

Article 46

Transfers subject to appropriate safeguards

1. In the absence of a decision pursuant to Article 45(3), a controller or processor may transfer personal data to a third country or an international organisation only if the controller or processor has provided appropriate

safeguards, and on condition that enforceable data subject rights and effective legal remedies for data subjects are available.

2. The appropriate safeguards referred to in paragraph 1 may be provided for, without requiring any specific authorisation from a supervisory authority, by:

- (a) a legally binding and enforceable instrument between public authorities or bodies;
- (b) binding corporate rules in accordance with Article 47;
- (c) standard data protection clauses adopted by the Commission in accordance with the examination procedure referred to in Article 93(2);
- (d) standard data protection clauses adopted by a supervisory authority and approved by the Commission pursuant to the examination procedure referred to in Article 93(2);
- (e) an approved code of conduct pursuant to Article 40 together with binding and enforceable commitments of the controller or processor in the third country to apply the appropriate safeguards, including as regards data subjects' rights; or
- (f) an approved certification mechanism pursuant to Article 42 together with binding and enforceable commitments of the controller or processor in the third country to apply the appropriate safeguards, including as regards data subjects' rights.

3. Subject to the authorisation from the competent supervisory authority, the appropriate safeguards referred to in paragraph 1 may also be provided for, in particular, by:

- (a) contractual clauses between the controller or processor and the controller, processor or the recipient of the personal data in the third country or international organisation; or
- (b) provisions to be inserted into administrative arrangements between public authorities or bodies which include enforceable and effective data subject rights.

4. The supervisory authority shall apply the consistency mechanism referred to in Article 63 in the cases referred to in paragraph 3 of this Article.

5. Authorisations by a Member State or supervisory authority on the basis of Article 26(2) of Directive 95/46/EC shall remain valid until amended, replaced or repealed, if necessary, by that supervisory authority. Decisions adopted by the Commission on the basis of Article 26(4) of Directive 95/46/EC shall remain in force until amended, replaced or repealed, if necessary, by a Commission Decision adopted in accordance with paragraph 2 of this Article.

Article 47

Binding corporate rules

1. The competent supervisory authority shall approve binding corporate rules in accordance with the consistency mechanism set out in Article 63, provided that they:

- (a) are legally binding and apply to and are enforced by every member concerned of the group of undertakings, or group of enterprises engaged in a joint economic activity, including their employees;
- (b) expressly confer enforceable rights on data subjects with regard to the processing of their personal data; and
- (c) fulfil the requirements laid down in paragraph 2.

2. The binding corporate rules referred to in paragraph 1 shall specify at least:

- (a) the structure and contact details of the group of undertakings, or group of enterprises engaged in a joint economic activity and of each of its members;
- (b) the data transfers or set of transfers, including the categories of personal data, the type of processing and its purposes, the type of data subjects affected and the identification of the third country or countries in question;
- (c) their legally binding nature, both internally and externally;
- (d) the application of the general data protection principles, in particular purpose limitation, data minimisation, limited storage periods, data quality, data protection by design and by default, legal basis for processing,

- processing of special categories of personal data, measures to ensure data security, and the requirements in respect of onward transfers to bodies not bound by the binding corporate rules;
- (e) the rights of data subjects in regard to processing and the means to exercise those rights, including the right not to be subject to decisions based solely on automated processing, including profiling in accordance with Article 22, the right to lodge a complaint with the competent supervisory authority and before the competent courts of the Member States in accordance with Article 79, and to obtain redress and, where appropriate, compensation for a breach of the binding corporate rules;
 - (f) the acceptance by the controller or processor established on the territory of a Member State of liability for any breaches of the binding corporate rules by any member concerned not established in the Union; the controller or the processor shall be exempt from that liability, in whole or in part, only if it proves that that member is not responsible for the event giving rise to the damage;
 - (g) how the information on the binding corporate rules, in particular on the provisions referred to in points (d), (e) and (f) of this paragraph is provided to the data subjects in addition to Articles 13 and 14;
 - (h) the tasks of any data protection officer designated in accordance with Article 37 or any other person or entity in charge of the monitoring compliance with the binding corporate rules within the group of undertakings, or group of enterprises engaged in a joint economic activity, as well as monitoring training and complaint-handling;
 - (i) the complaint procedures;
 - (j) the mechanisms within the group of undertakings, or group of enterprises engaged in a joint economic activity for ensuring the verification of compliance with the binding corporate rules. Such mechanisms shall include data protection audits and methods for ensuring corrective actions to protect the rights of the data subject. Results of such verification should be communicated to the person or entity referred to in point (h) and to the board of the controlling undertaking of a group of undertakings, or of the group of enterprises engaged in a joint economic activity, and should be available upon request to the competent supervisory authority;
 - (k) the mechanisms for reporting and recording changes to the rules and reporting those changes to the supervisory authority;
 - (l) the cooperation mechanism with the supervisory authority to ensure compliance by any member of the group of undertakings, or group of enterprises engaged in a joint economic activity, in particular by making available to the supervisory authority the results of verifications of the measures referred to in point (j);
 - (m) the mechanisms for reporting to the competent supervisory authority any legal requirements to which a member of the group of undertakings, or group of enterprises engaged in a joint economic activity is subject in a third country which are likely to have a substantial adverse effect on the guarantees provided by the binding corporate rules; and
 - (n) the appropriate data protection training to personnel having permanent or regular access to personal data.

3. The Commission may specify the format and procedures for the exchange of information between controllers, processors and supervisory authorities for binding corporate rules within the meaning of this Article. Those implementing acts shall be adopted in accordance with the examination procedure set out in Article 93(2).

Article 48

Transfers or disclosures not authorised by Union law

Any judgment of a court or tribunal and any decision of an administrative authority of a third country requiring a controller or processor to transfer or disclose personal data may only be recognised or enforceable in any manner if based on an international agreement, such as a mutual legal assistance treaty, in force between the requesting third country and the Union or a Member State, without prejudice to other grounds for transfer pursuant to this Chapter.

Article 49

Derogations for specific situations

1. In the absence of an adequacy decision pursuant to Article 45(3), or of appropriate safeguards pursuant to Article 46, including binding corporate rules, a transfer or a set of transfers of personal data to a third country or an international organisation shall take place only on one of the following conditions:

- (a) the data subject has explicitly consented to the proposed transfer, after having been informed of the possible risks of such transfers for the data subject due to the absence of an adequacy decision and appropriate safeguards;
- (b) the transfer is necessary for the performance of a contract between the data subject and the controller or the implementation of pre-contractual measures taken at the data subject's request;
- (c) the transfer is necessary for the conclusion or performance of a contract concluded in the interest of the data subject between the controller and another natural or legal person;
- (d) the transfer is necessary for important reasons of public interest;
- (e) the transfer is necessary for the establishment, exercise or defence of legal claims;
- (f) the transfer is necessary in order to protect the vital interests of the data subject or of other persons, where the data subject is physically or legally incapable of giving consent;
- (g) the transfer is made from a register which according to Union or Member State law is intended to provide information to the public and which is open to consultation either by the public in general or by any person who can demonstrate a legitimate interest, but only to the extent that the conditions laid down by Union or Member State law for consultation are fulfilled in the particular case.

Where a transfer could not be based on a provision in Article 45 or 46, including the provisions on binding corporate rules, and none of the derogations for a specific situation referred to in the first subparagraph of this paragraph is applicable, a transfer to a third country or an international organisation may take place only if the transfer is not repetitive, concerns only a limited number of data subjects, is necessary for the purposes of compelling legitimate interests pursued by the controller which are not overridden by the interests or rights and freedoms of the data subject, and the controller has assessed all the circumstances surrounding the data transfer and has on the basis of that assessment provided suitable safeguards with regard to the protection of personal data. The controller shall inform the supervisory authority of the transfer. The controller shall, in addition to providing the information referred to in Articles 13 and 14, inform the data subject of the transfer and on the compelling legitimate interests pursued.

2. A transfer pursuant to point (g) of the first subparagraph of paragraph 1 shall not involve the entirety of the personal data or entire categories of the personal data contained in the register. Where the register is intended for consultation by persons having a legitimate interest, the transfer shall be made only at the request of those persons or if they are to be the recipients.

3. Points (a), (b) and (c) of the first subparagraph of paragraph 1 and the second subparagraph thereof shall not apply to activities carried out by public authorities in the exercise of their public powers.

4. The public interest referred to in point (d) of the first subparagraph of paragraph 1 shall be recognised in Union law or in the law of the Member State to which the controller is subject.

5. In the absence of an adequacy decision, Union or Member State law may, for important reasons of public interest, expressly set limits to the transfer of specific categories of personal data to a third country or an international organisation. Member States shall notify such provisions to the Commission.

6. The controller or processor shall document the assessment as well as the suitable safeguards referred to in the second subparagraph of paragraph 1 of this Article in the records referred to in Article 30.

Article 50

International cooperation for the protection of personal data

In relation to third countries and international organisations, the Commission and supervisory authorities shall take appropriate steps to:

- (a) develop international cooperation mechanisms to facilitate the effective enforcement of legislation for the protection of personal data;
- (b) provide international mutual assistance in the enforcement of legislation for the protection of personal data, including through notification, complaint referral, investigative assistance and information exchange, subject to appropriate safeguards for the protection of personal data and other fundamental rights and freedoms;

- (c) engage relevant stakeholders in discussion and activities aimed at furthering international cooperation in the enforcement of legislation for the protection of personal data;
- (d) promote the exchange and documentation of personal data protection legislation and practice, including on jurisdictional conflicts with third countries.

[...]

Article 99

Entry into force and application

1. This Regulation shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.
2. It shall apply from 25 May 2018.

3. IMPROVING THE EU'S INSTITUTIONAL FUNCTIONING

European Union law and its accompanying tools and doctrines not only enable the perfection of the internal market or EU regulations, they also directly contribute to the organisation and functioning of the EU institutions. It is true that the EU is a peculiar international organisation, structured by legal rules and principles. Those rules and principles above all aim to improve the EU's institutional functioning and to increase its legitimacy vis-à-vis the Member States and individual citizens. In creating a legally certain environment in which EU decisions can be taken, EU law directly encapsulates the institutions' functioning in a "rule of law" framework. At the same time, however, EU institutional functioning and the legal principles underlying it are not free from criticism. Indeed, attempts to make the EU institutions function better through law have not always attained the desired result.

In this part of the course, three themes outlining the role, potential and limits of EU law in perfecting the institutions' operations will be analysed. They have been chosen for two reasons. On the one hand, they all allow to better understand existing legal gaps or lack of coherence situations in the EU's institutional functioning. On the other hand, they permit to demonstrate how law has been used by the Masters of the Treaties or the institutions themselves to remedy defects in the EU's functioning.

First of all, the European Union has endeavoured for the past two decades to become ever more transparent and open in its decision-making processes. To that extent, EU institutions have had to adopt pro-active openness strategies in addition to granting individuals, upon request, access to their documents. A regulatory framework enabling and restricting such access has been in place since the mid-1990s, the most recent elaboration of it contained in Regulation 1049/2001. Although that Regulation envisages access to EU documents to the "widest extent possible", that does not mean unfettered access to each document. Indeed, EU law – backed by the Court of Justice – acknowledged the need for confidentiality safe zones as an inherent part of its transparency rules. One could therefore wonder to what extent different transparency standards should govern decision-making processes of different kinds of (legislative or non-legislative) acts.

Secondly, the EU's institutional functioning is embedded in the "rule of law", which above all includes respect for fundamental human rights. Human rights protection has been recognised and embedded consistently in EU law – through general principles of law and in looking for inspiration from the Council of Europe's European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR) – resulting in the adoption of a now-binding Charter of Fundamental Rights. Despite those legal initiatives, however, questions remain to be asked regarding the scope of that Charter in day-to-day legal relationships and to its interaction with the ECHR. The latter situation is complicated by the obligation, stated in Article 6 TEU to accede to the ECHR system. In its Opinion 2/13, the Court of Justice nevertheless advised against this. Coupled with its interpretation on the scope of the Charter, the Opinion allows to determine the potential and limits of fundamental rights protection within the current EU law framework.

Finally, a session of the course will be devoted to a rather peculiar institutional development in EU law, which seems to have taken off recently: enhanced cooperation. Inserted as a possibility in the Treaty of Amsterdam, enhanced cooperation allows for a group of Member States to proceed with integration under the banner of EU law, without however involving all

EU Member States. The Treaty envisages specific procedures and steps to be taken, which have led to litigation by non-participating Member States. Recent examples have included the unitary patent and the financial transaction tax regimes, which demonstrate the potential and limits of enhanced cooperation in the current EU Treaty framework. It will be questioned to what extent enhanced cooperation renders EU law more or rather less coherent and predictable as a body of legal norms in its own right.

LECTURE 5: OPENNESS AND TRANSPARENCY IN EU INSTITUTIONAL FUNCTIONING

The European Union consistently has been reproached rather consistently by Member States' parliaments and citizens' groups for being opaque and non-transparent. In an attempt to increase the visibility of its activities and to increase its legitimacy with those actors, the EU adopted a transparency-oriented decision-making approach. Transparency comprises two features in this respect. Firstly, it implies openness concerning decision-making processes, procedures and criteria employed in legislative or regulatory decision-making itself. Openness as such implies that the balances struck by the institutions should be open for anyone willing to understand and retrace. Secondly and complementarily, such openness also presupposes a right for individuals to obtain access to documents relevant for the general public in understanding how a specific decision has come to being. General openness and specific access to documents entitlements have been enshrined in Article 15 TFEU. In addition, Article 42 of the Charter also acknowledges a fundamental right of access to documents. In relation to access, the Council and European Parliament adopted Regulation 1049/2001, which rendered that fundamental right operational in relation to both institutions and the European Commission. The same right has later on been extended to other institutions, offices and bodies of the European Union. The Court of Justice has subsequently been called upon to interpret and apply that Regulation, which is premised on the "widest possible access" to EU-held or – authored documents. In practice, it soon turned out that the "widest possible access" does not necessarily imply full and unrestricted access to all documents; indeed, some categories of documents appear to be *prima facie* per se excluded from access. The judicial recognition of such categories in itself raises interesting and new questions regarding the scope of the widest possible access. In this lecture, we will study the access regime against the background of the post-Lisbon openness approach to EU decision-making. We will particularly outline how the Court struck a balance between openness, access and confidentiality in that regard and how that balance impacts on citizens' legitimate expectations vis-à-vis a transparent European Union.

Materials to read:

- Regulation 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, [2001] O.J. L145/43.
- Court of Justice, 17 October 2013, Case C-280/11 P, *Council v Access Info Europe*, ECLI:EU:C:2013:671.
- Court of Justice, 3 July 2014, Case C-350/12 P, *Council v in 't Veld*, ECLI:EU:C:2014:2039.
- General Court, 7 July 2015, Case T-677/13, *Axa Versicherung AG v European Commission*, ECLI:EU:T:2015:473.

Lecture 5 outline:

- a. Transparency: a buzzword in the wake of the Maastricht Treaty
 1. Calls for increased transparency

2. Transparency as access to documents
3. From Report to Recommendation to binding decision
4. The complementary role of the European Ombudsman
- b. Enhancing transparency through access: Regulation 1049/2001
 1. The 'widest possible access' to Council, Commission and Parliament documents
 2. Widest possible in practice: exceptions
 3. Exceptions in the Court's case law: EU legislation premised on transparency – administrative and Treaty negotiations premised on confidentiality?
- c. Embedding access within a more general openness focus
 1. Access and openness: two sides of the same coin?
 2. What relationship between access and openness? Reconstructing Article 15 TFEU
 3. Communicating vessels?
 4. The importance of ex ante communication strategies
- d. Recalibrating access to documents and openness within a general transparency principle narrative
 1. More openness, less access?
 2. More openness, more access?
 3. In search for judicial clarifications and directions...

Questions for discussion:

- How do openness and access elements relate to each other in the context of Article 15 TFEU?
- Does EU law still allow the institutions to maintain, develop and structure policy areas premised on confidential decision-making?

Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 255(2) thereof,

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

Acting in accordance with the procedure referred to in Article 251 of the Treaty(2),

Whereas:

(1) The second subparagraph of Article 1 of the Treaty on European Union enshrines the concept of openness, stating that the Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen.

(2) Openness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system. Openness contributes to strengthening the principles of democracy and respect for fundamental rights as laid down in Article 6 of the EU Treaty and in the Charter of Fundamental Rights of the European Union.

(3) The conclusions of the European Council meetings held at Birmingham, Edinburgh and Copenhagen stressed the need to introduce greater transparency into the work of the Union institutions. This Regulation consolidates the initiatives that the institutions have already taken with a view to improving the transparency of the decision-making process.

(4) The purpose of this Regulation is to give the fullest possible effect to the right of public access to documents and to lay down the general principles and limits on such access in accordance with Article 255(2) of the EC Treaty.

(5) Since the question of access to documents is not covered by provisions of the Treaty establishing the European Coal and Steel Community and the Treaty establishing the European Atomic Energy Community, the European Parliament, the Council and the Commission should, in accordance with Declaration No 41 attached to the Final Act of the Treaty of Amsterdam, draw guidance from this Regulation as regards documents concerning the activities covered by those two Treaties.

(6) Wider access should be granted to documents in cases where the institutions are acting in their legislative capacity, including under delegated powers, while at the same time preserving the effectiveness of the institutions' decision-making process. Such documents should be made directly accessible to the greatest possible extent.

(7) In accordance with Articles 28(1) and 41(1) of the EU Treaty, the right of access also applies to documents relating to the common foreign and security policy and to police and judicial cooperation in criminal matters. Each institution should respect its security rules.

(8) In order to ensure the full application of this Regulation to all activities of the Union, all agencies established by the institutions should apply the principles laid down in this Regulation.

(9) On account of their highly sensitive content, certain documents should be given special treatment. Arrangements for informing the European Parliament of the content of such documents should be made through interinstitutional agreement.

(10) In order to bring about greater openness in the work of the institutions, access to documents should be granted by the European Parliament, the Council and the Commission not only to documents drawn up by the institutions, but also to documents received by them. In this context, it is recalled that Declaration No 35 attached to the Final

Act of the Treaty of Amsterdam provides that a Member State may request the Commission or the Council not to communicate to third parties a document originating from that State without its prior agreement.

(11) In principle, all documents of the institutions should be accessible to the public. However, certain public and private interests should be protected by way of exceptions. The institutions should be entitled to protect their internal consultations and deliberations where necessary to safeguard their ability to carry out their tasks. In assessing the exceptions, the institutions should take account of the principles in Community legislation concerning the protection of personal data, in all areas of Union activities.

(12) All rules concerning access to documents of the institutions should be in conformity with this Regulation.

(13) In order to ensure that the right of access is fully respected, a two-stage administrative procedure should apply, with the additional possibility of court proceedings or complaints to the Ombudsman.

(14) Each institution should take the measures necessary to inform the public of the new provisions in force and to train its staff to assist citizens exercising their rights under this Regulation. In order to make it easier for citizens to exercise their rights, each institution should provide access to a register of documents.

(15) Even though it is neither the object nor the effect of this Regulation to amend national legislation on access to documents, it is nevertheless clear that, by virtue of the principle of loyal cooperation which governs relations between the institutions and the Member States, Member States should take care not to hamper the proper application of this Regulation and should respect the security rules of the institutions.

(16) This Regulation is without prejudice to existing rights of access to documents for Member States, judicial authorities or investigative bodies.

(17) In accordance with Article 255(3) of the EC Treaty, each institution lays down specific provisions regarding access to its documents in its rules of procedure. Council Decision 93/731/EC of 20 December 1993 on public access to Council documents(3), Commission Decision 94/90/ECSC, EC, Euratom of 8 February 1994 on public access to Commission documents(4), European Parliament Decision 97/632/EC, ECSC, Euratom of 10 July 1997 on public access to European Parliament documents(5), and the rules on confidentiality of Schengen documents should therefore, if necessary, be modified or be repealed,

HAVE ADOPTED THIS REGULATION:

Article 1

Purpose

The purpose of this Regulation is:

(a) to define the principles, conditions and limits on grounds of public or private interest governing the right of access to European Parliament, Council and Commission (hereinafter referred to as "the institutions") documents provided for in Article 255 of the EC Treaty in such a way as to ensure the widest possible access to documents,

(b) to establish rules ensuring the easiest possible exercise of this right, and

(c) to promote good administrative practice on access to documents.

Article 2

Beneficiaries and scope

1. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, subject to the principles, conditions and limits defined in this Regulation.

2. The institutions may, subject to the same principles, conditions and limits, grant access to documents to any natural or legal person not residing or not having its registered office in a Member State.

3. This Regulation shall apply to all documents held by an institution, that is to say, documents drawn up or received by it and in its possession, in all areas of activity of the European Union.

4. Without prejudice to Articles 4 and 9, documents shall be made accessible to the public either following a written application or directly in electronic form or through a register. In particular, documents drawn up or received in the course of a legislative procedure shall be made directly accessible in accordance with Article 12.

5. Sensitive documents as defined in Article 9(1) shall be subject to special treatment in accordance with that Article.

6. This Regulation shall be without prejudice to rights of public access to documents held by the institutions which might follow from instruments of international law or acts of the institutions implementing them.

Article 3

Definitions

For the purpose of this Regulation:

(a) "document" shall mean any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility;

(b) "third party" shall mean any natural or legal person, or any entity outside the institution concerned, including the Member States, other Community or non-Community institutions and bodies and third countries.

Article 4

Exceptions

1. The institutions shall refuse access to a document where disclosure would undermine the protection of:

(a) the public interest as regards:

- public security,
- defence and military matters,
- international relations,
- the financial, monetary or economic policy of the Community or a Member State;

(b) privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data.

2. The institutions shall refuse access to a document where disclosure would undermine the protection of:

- commercial interests of a natural or legal person, including intellectual property,
- court proceedings and legal advice,
- the purpose of inspections, investigations and audits,

unless there is an overriding public interest in disclosure.

3. Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

Access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

4. As regards third-party documents, the institution shall consult the third party with a view to assessing whether an exception in paragraph 1 or 2 is applicable, unless it is clear that the document shall or shall not be disclosed.

5. A Member State may request the institution not to disclose a document originating from that Member State without its prior agreement.

6. If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released.

7. The exceptions as laid down in paragraphs 1 to 3 shall only apply for the period during which protection is justified on the basis of the content of the document. The exceptions may apply for a maximum period of 30 years. In the case of documents covered by the exceptions relating to privacy or commercial interests and in the case of sensitive documents, the exceptions may, if necessary, continue to apply after this period.

Article 5

Documents in the Member States

Where a Member State receives a request for a document in its possession, originating from an institution, unless it is clear that the document shall or shall not be disclosed, the Member State shall consult with the institution concerned in order to take a decision that does not jeopardise the attainment of the objectives of this Regulation.

The Member State may instead refer the request to the institution.

Article 6

Applications

1. Applications for access to a document shall be made in any written form, including electronic form, in one of the languages referred to in Article 314 of the EC Treaty and in a sufficiently precise manner to enable the institution to identify the document. The applicant is not obliged to state reasons for the application.

2. If an application is not sufficiently precise, the institution shall ask the applicant to clarify the application and shall assist the applicant in doing so, for example, by providing information on the use of the public registers of documents.

3. In the event of an application relating to a very long document or to a very large number of documents, the institution concerned may confer with the applicant informally, with a view to finding a fair solution.

4. The institutions shall provide information and assistance to citizens on how and where applications for access to documents can be made.

Article 7

Processing of initial applications

1. An application for access to a document shall be handled promptly. An acknowledgement of receipt shall be sent to the applicant. Within 15 working days from registration of the application, the institution shall either grant access to the document requested and provide access in accordance with Article 10 within that period or, in a written reply, state the reasons for the total or partial refusal and inform the applicant of his or her right to make a confirmatory application in accordance with paragraph 2 of this Article.
2. In the event of a total or partial refusal, the applicant may, within 15 working days of receiving the institution's reply, make a confirmatory application asking the institution to reconsider its position.
3. In exceptional cases, for example in the event of an application relating to a very long document or to a very large number of documents, the time-limit provided for in paragraph 1 may be extended by 15 working days, provided that the applicant is notified in advance and that detailed reasons are given.
4. Failure by the institution to reply within the prescribed time-limit shall entitle the applicant to make a confirmatory application.

Article 8

Processing of confirmatory applications

1. A confirmatory application shall be handled promptly. Within 15 working days from registration of such an application, the institution shall either grant access to the document requested and provide access in accordance with Article 10 within that period or, in a written reply, state the reasons for the total or partial refusal. In the event of a total or partial refusal, the institution shall inform the applicant of the remedies open to him or her, namely instituting court proceedings against the institution and/or making a complaint to the Ombudsman, under the conditions laid down in Articles 230 and 195 of the EC Treaty, respectively.
2. In exceptional cases, for example in the event of an application relating to a very long document or to a very large number of documents, the time limit provided for in paragraph 1 may be extended by 15 working days, provided that the applicant is notified in advance and that detailed reasons are given.
3. Failure by the institution to reply within the prescribed time limit shall be considered as a negative reply and entitle the applicant to institute court proceedings against the institution and/or make a complaint to the Ombudsman, under the relevant provisions of the EC Treaty.

Article 9

Treatment of sensitive documents

1. Sensitive documents are documents originating from the institutions or the agencies established by them, from Member States, third countries or International Organisations, classified as "TRÈS SECRET/TOP SECRET", "SECRET" or "CONFIDENTIEL" in accordance with the rules of the institution concerned, which protect essential interests of the European Union or of one or more of its Member States in the areas covered by Article 4(1)(a), notably public security, defence and military matters.
2. Applications for access to sensitive documents under the procedures laid down in Articles 7 and 8 shall be handled only by those persons who have a right to acquaint themselves with those documents. These persons shall also, without prejudice to Article 11(2), assess which references to sensitive documents could be made in the public register.
3. Sensitive documents shall be recorded in the register or released only with the consent of the originator.
4. An institution which decides to refuse access to a sensitive document shall give the reasons for its decision in a manner which does not harm the interests protected in Article 4.

5. Member States shall take appropriate measures to ensure that when handling applications for sensitive documents the principles in this Article and Article 4 are respected.

6. The rules of the institutions concerning sensitive documents shall be made public.

7. The Commission and the Council shall inform the European Parliament regarding sensitive documents in accordance with arrangements agreed between the institutions.

Article 10

Access following an application

1. The applicant shall have access to documents either by consulting them on the spot or by receiving a copy, including, where available, an electronic copy, according to the applicant's preference. The cost of producing and sending copies may be charged to the applicant. This charge shall not exceed the real cost of producing and sending the copies. Consultation on the spot, copies of less than 20 A4 pages and direct access in electronic form or through the register shall be free of charge.

2. If a document has already been released by the institution concerned and is easily accessible to the applicant, the institution may fulfil its obligation of granting access to documents by informing the applicant how to obtain the requested document.

3. Documents shall be supplied in an existing version and format (including electronically or in an alternative format such as Braille, large print or tape) with full regard to the applicant's preference.

Article 11

Registers

1. To make citizens' rights under this Regulation effective, each institution shall provide public access to a register of documents. Access to the register should be provided in electronic form. References to documents shall be recorded in the register without delay.

2. For each document the register shall contain a reference number (including, where applicable, the interinstitutional reference), the subject matter and/or a short description of the content of the document and the date on which it was received or drawn up and recorded in the register. References shall be made in a manner which does not undermine protection of the interests in Article 4.

3. The institutions shall immediately take the measures necessary to establish a register which shall be operational by 3 June 2002.

Article 12

Direct access in electronic form or through a register

1. The institutions shall as far as possible make documents directly accessible to the public in electronic form or through a register in accordance with the rules of the institution concerned.

2. In particular, legislative documents, that is to say, documents drawn up or received in the course of procedures for the adoption of acts which are legally binding in or for the Member States, should, subject to Articles 4 and 9, be made directly accessible.

3. Where possible, other documents, notably documents relating to the development of policy or strategy, should be made directly accessible.

4. Where direct access is not given through the register, the register shall as far as possible indicate where the document is located.

Article 13

Publication in the Official Journal

1. In addition to the acts referred to in Article 254(1) and (2) of the EC Treaty and the first paragraph of Article 163 of the Euratom Treaty, the following documents shall, subject to Articles 4 and 9 of this Regulation, be published in the Official Journal:

- (a) Commission proposals;
- (b) common positions adopted by the Council in accordance with the procedures referred to in Articles 251 and 252 of the EC Treaty and the reasons underlying those common positions, as well as the European Parliament's positions in these procedures;
- (c) framework decisions and decisions referred to in Article 34(2) of the EU Treaty;
- (d) conventions established by the Council in accordance with Article 34(2) of the EU Treaty;
- (e) conventions signed between Member States on the basis of Article 293 of the EC Treaty;
- (f) international agreements concluded by the Community or in accordance with Article 24 of the EU Treaty.

2. As far as possible, the following documents shall be published in the Official Journal:

- (a) initiatives presented to the Council by a Member State pursuant to Article 67(1) of the EC Treaty or pursuant to Article 34(2) of the EU Treaty;
- (b) common positions referred to in Article 34(2) of the EU Treaty;
- (c) directives other than those referred to in Article 254(1) and (2) of the EC Treaty, decisions other than those referred to in Article 254(1) of the EC Treaty, recommendations and opinions.

3. Each institution may in its rules of procedure establish which further documents shall be published in the Official Journal.

Article 14

Information

1. Each institution shall take the requisite measures to inform the public of the rights they enjoy under this Regulation.
2. The Member States shall cooperate with the institutions in providing information to the citizens.

Article 15

Administrative practice in the institutions

1. The institutions shall develop good administrative practices in order to facilitate the exercise of the right of access guaranteed by this Regulation.

2. The institutions shall establish an interinstitutional committee to examine best practice, address possible conflicts and discuss future developments on public access to documents.

Article 16

Reproduction of documents

This Regulation shall be without prejudice to any existing rules on copyright which may limit a third party's right to reproduce or exploit released documents.

Article 17

Reports

1. Each institution shall publish annually a report for the preceding year including the number of cases in which the institution refused to grant access to documents, the reasons for such refusals and the number of sensitive documents not recorded in the register.

2. At the latest by 31 January 2004, the Commission shall publish a report on the implementation of the principles of this Regulation and shall make recommendations, including, if appropriate, proposals for the revision of this Regulation and an action programme of measures to be taken by the institutions.

Article 18

Application measures

1. Each institution shall adapt its rules of procedure to the provisions of this Regulation. The adaptations shall take effect from 3 December 2001.

2. Within six months of the entry into force of this Regulation, the Commission shall examine the conformity of Council Regulation (EEC, Euratom) No 354/83 of 1 February 1983 concerning the opening to the public of the historical archives of the European Economic Community and the European Atomic Energy Community(6) with this Regulation in order to ensure the preservation and archiving of documents to the fullest extent possible.

3. Within six months of the entry into force of this Regulation, the Commission shall examine the conformity of the existing rules on access to documents with this Regulation.

Article 19

Entry into force

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

It shall be applicable from 3 December 2001.

Case C-280/11 P, *Council v Access Info Europe*

In Case C-280/11 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 31 May 2011,

Council of the European Union, represented by B. Driessen and C. Fekete, acting as Agents,

appellant,

supported by

Czech Republic, represented by M. Smolek and D. Hadroušek, acting as Agents,

Kingdom of Spain, represented by S. Centeno Huerta, acting as Agent,

French Republic, represented by G. de Bergues and N. Rouam, acting as Agents,

interveners in the appeal,

the other parties to the proceedings being:

Access Info Europe, established in Madrid (Spain), represented by O. Brouwer and J. Blockx, advocaten,

applicant at first instance,

supported by:

European Parliament, represented by A. Caiola and M. Dean, acting as Agents, with an address for service in Luxembourg,

intervener in the appeal,

Hellenic Republic, represented by E.-M. Mamouna and K. Boskovits, acting as Agents,

United Kingdom of Great Britain and Northern Ireland,

interveners at first instance,

THE COURT (First Chamber),

composed of A. Tizzano (Rapporteur), President of the Chamber, K. Lenaerts, Vice-President of the Court, acting as Judge of the First Chamber, A. Borg Barthet, E. Levits and M. Berger, Judges,

Advocate General: P. Cruz Villalón,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure and further to the hearing on 21 February 2013,

after hearing the Opinion of the Advocate General at the sitting on 16 May 2013

gives the following

Judgment

1 By its appeal, the Council of the European Union seeks to have set aside the judgment of 22 March 2011 in Case T-233/09 *Access Info Europe v Council* [2011] ECR II-1073 ('the judgment under appeal') by which the General Court of the European Union annulled the Council's decision of 26 February 2009 ('the decision at issue') refusing to let Access Info Europe ('Access Info') have access to certain information contained in a note of 26 November 2008 from the Secretariat General of the Council to the Working Party on Information, set up by the Council, concerning the proposal for a new regulation regarding public access to European Parliament, Council and Commission documents ('the requested document').

Legal context

2 Recital 6 in the preamble to Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43) is worded as follows:

'Wider access should be granted to documents in cases where the institutions are acting in their legislative capacity, including under delegated powers, while at the same time preserving the effectiveness of the institutions' decision-making process. Such documents should be made directly accessible to the greatest possible extent.'

3 Under Article 1 of that regulation:

'The purpose of this Regulation is:

(a) to define the principles, conditions and limits on grounds of public or private interest governing the right of access to European Parliament, Council and Commission ... documents ... in such a way as to ensure the widest possible access to documents.

...'

4 The first subparagraph of Article 4(3) of Regulation No 1049/2001 provides:

'Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure'.

Background to the dispute

5 By e-mail of 3 December 2008, Access Info applied to the Council for access to the requested document. That document contained the proposals for amendments, or for re-drafting, tabled by a number of Member States at the meeting of the Working Party on Information, referred to in paragraph 1 above, on 25 November 2008.

6 By the decision at issue, the Council granted partial access to the requested document. In particular, the Council sent Access Info a version of that document which did not make it possible to identify the Member States which had put those proposals forward.

7 The Council justified its refusal to disclose the identities of those Member States on the basis of the exception provided for in the first subparagraph of Article 4(3) of Regulation No 1049/2001, on the ground that disclosure of those identities would have seriously undermined its decision-making process and there was no overriding public interest in such disclosure. Indeed, bearing in mind the preliminary nature of the discussions under way at that time, disclosure of the identities of the Member States concerned would have reduced the delegations' room for manoeuvre during the negotiations, which are a feature of the legislative procedure in the Council, and would therefore have impaired its ability to reach an agreement.

8 On 26 November 2008 – that is to say, the very day on which the requested document was created – an unedited version of the requested document was made available to the public on the internet site of the organisation Statewatch, without authorisation (‘the unauthorised disclosure’).

The judgment under appeal

9 By application lodged at the Registry of the General Court on 12 June 2009, Access Info brought an action for annulment of the decision at issue, which was upheld by the judgment under appeal.

10 The General Court first set out the basic principles relating to access to documents. In particular, in paragraphs 55 to 58 of that judgment, it stated that the right of access to documents of the institutions is connected with the democratic nature of those institutions and that, since the purpose of Regulation No 1049/2001 is, in accordance with Article 1 thereof, to ensure the widest possible right of access, the exceptions to disclosure must be interpreted and applied strictly. The General Court observed that those principles are clearly of particular relevance where the Council is acting in its legislative capacity, as in that case.

11 Next, in paragraphs 59 and 60 of the judgment under appeal, the General Court stated that the mere fact that a document concerns an interest protected by an exception to disclosure is not sufficient to justify the application of that exception: such application may be justified only if access to that document could specifically and effectively undermine the protected interest. Moreover, the risk of the protected interest being undermined must not be purely hypothetical and must be reasonably foreseeable. It is up to the institution concerned to weigh the specific interest which must be protected through non-disclosure of part of the requested document – in the circumstances, the identity of the Member States which put forward the proposals – against the general interest in the entire document being made accessible.

12 Applying those principles, the General Court went on in paragraphs 68 to 80 of the judgment under appeal to examine the main reason put forward by the Council as justification for only partly disclosing the requested document, that is to say, the alleged reduction in the delegations’ room for manoeuvre within the Council as a result of the fact that disclosure of the identities of the Member States which put forward proposals would give rise to so much public pressure on those States that it would no longer be possible for a delegation from those States to submit a proposal tending towards the restriction of openness.

13 First, in paragraphs 69 to 74 of the judgment under appeal, the General Court found that it is specifically the principle of democratic legitimacy which requires those responsible for the proposals contained in the requested document to be publicly accountable for their actions, especially where that document is part of the legislative procedure. The General Court also found that the disclosure of the identities of those who put forward a proposal would not prevent the delegations from subsequently departing from that proposal. It explained that a proposal is designed to be discussed, whether it be anonymous or not, not to remain unchanged following that discussion if the identity of its author is known. Public opinion is perfectly capable of understanding that aspect of proposals made in the legislative process. Moreover, according to the General Court, it cannot be presumed that all sections of public opinion are opposed to limiting the principle of transparency. Lastly, the General Court found that even the unauthorised disclosure had not had adverse effects on the Council’s decision-making process.

14 Secondly, in paragraphs 75 and 76 of the judgment under appeal, the General Court rejected the Council’s argument that it was necessary to take into consideration the preliminary nature of the discussions in order to assess the risk, in terms of undermining the decision-making process, associated with the reduction of the Member States’ room for manoeuvre. According to the General Court, the preliminary nature of the discussions does not, in itself, justify application of the exception provided for in the first subparagraph of Article 4(3) of Regulation No 1049/2001, as that provision does not make a distinction according to the state of progress of the discussions.

15 Thirdly, in paragraphs 77 and 78 of the judgment, the General Court rejected the argument that it was necessary to take into consideration the particularly sensitive nature of the proposals made by the Member State delegations. In that regard, the General Court stated that proposals for amendments are part of the normal legislative process. As a result, they are not ‘particularly sensitive’ to the point that a fundamental interest of the European Union or of the Member States would be jeopardised if the identity of those who made the proposals were to be disclosed, especially since it was not the content of the proposals made by the Member States that was at issue, but solely the identification of the delegations who had tabled them. Furthermore, the General Court

found that it is in the very nature of democratic debate that a proposal for amendment of a draft regulation can be subject to both positive and negative comments on the part of the public and the media.

16 Fourthly, in paragraph 79 of the judgment under appeal, the General Court rejected the argument that the unusual lengthiness of the procedure for approving the new regulation on access to documents was attributable to the difficulties which the unauthorised disclosure had created for the negotiations. According to the General Court, the true position was that there were other political and legal reasons which could account for the length of the legislative process.

17 Lastly, in paragraphs 82 and 83 of the judgment under appeal, the General Court rejected the Council's argument blaming the unauthorised disclosure for the subsequent loss of detail, in particular as regards the identification of delegations, from the reports of the meetings of the Council's working parties. In that connection, the General Court stated that this change could also be explained by the fact that Access Info had brought an action contesting the decision at issue. In any event, the absence of any causal link between disclosure to the public of the names of the delegations and the serious undermining of the decision-making process was confirmed, according to the General Court, by a document which post-dated the unauthorised disclosure and which did not simply refer, without mentioning names, to the proposals to amend the legislative text, but specified the identity of the delegations, at least in the original version of that document.

18 On the basis of the above considerations, inter alia, the General Court upheld the action and annulled the decision at issue.

The procedure before the Court of Justice and the forms of order sought by the parties

19 By order of 17 October 2011, the Czech Republic and the Kingdom of Spain were granted leave to intervene in support of the form of order sought by the Council, and the European Parliament was granted leave to intervene in support of the form of order sought by Access Info. By order of 2 February 2012, the French Republic was granted leave to intervene in support of the form of order sought by the Council.

20 The Council, the Czech Republic, the Hellenic Republic, the Kingdom of Spain and the French Republic claim that the Court should:

- set aside the judgment under appeal;
- give final judgment in the matters that are the subject of this appeal; and
- order Access Info to pay the costs both of the appeal proceedings and of the proceedings at first instance.

21 Access Info and the European Parliament contend that the Court should dismiss the appeal and order the Council to pay the costs.

The appeal

22 The Council relies, essentially, on three grounds of appeal.

The first ground of appeal

Arguments of the parties

23 By its first ground of appeal, the Council, supported in this regard by the Kingdom of Spain, submits that the General Court disregarded the balanced approach laid down both in primary law (Article 207(3) EC and Article 255 EC, applicable *ratione temporis*) and secondary law (recital 6 to Regulation No 1049/2001 and the first subparagraph of Article 4(3) thereof) between, on the one hand, the wider right of access to documents relating to the legislative activity of the institutions and, on the other, the need to preserve the effectiveness of the decision-making process. In particular, the General Court – inter alia in paragraph 69 of the judgment under appeal – construed the first subparagraph of Article 4(3) in such a way as to attribute undue and excessive weight to the

transparency of the decision-making process, without taking any account of the needs associated with the effectiveness of that process.

24 More specifically, the Council – supported by the Czech Republic, the Hellenic Republic and the Kingdom of Spain – argues that its legislative process is very fluid and requires a high level of flexibility on the part of Member States so that they can modify their initial position, thus maximising the chances of reaching an agreement. In order to ensure a ‘negotiating space’ and thereby preserve the effectiveness of the legislative process, it is necessary to ensure that Member States have maximum room for manoeuvre in the discussions and that they do so from the earliest stages of the procedure. That room for manoeuvre would be reduced if the identity of the delegations were disclosed too early in the procedure, in that it would have the effect of triggering pressure from public opinion, which would deprive the delegations themselves of the flexibility needed to ensure the effectiveness of the Council’s decision-making process.

25 In that connection, the Czech Republic and the Kingdom of Spain add that, in the present case, it was not necessary to name the delegations in order to attain the objective pursued by Regulation No 1049/2001. Full access to the content of the requested document would be sufficient to ensure a democratic debate on the issues which that document concerns. Moreover, the only consequence of disclosing the identity of the delegations would have been to enable pressure to be exerted, not on the Council, but on the Member States.

26 Access Info contends that, by its first ground of appeal, the Council criticises only three paragraphs of the judgment under appeal, namely, paragraphs 57 and 58, in which the General Court merely set out the relevant case-law, and paragraph 69, in which – according to Access Info, supported in that regard by the European Parliament – the General Court specifically weighed the requirements of transparency against the need to protect the decision-making process, and concluded that disclosure of the identities of the Member States concerned did not appear liable, in the case before it, to undermine the Council’s decision-making process.

Findings of the Court

27 In order to rule on this ground of appeal, it should be noted that, in accordance with recital 1 to Regulation No 1049/2001, that regulation reflects the intention expressed in the second paragraph of Article 1 TEU of marking a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen. As is stated in recital 2 to that regulation, the public right of access to documents of the institutions is related to the democratic nature of those institutions (Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco v Council* [2008] ECR I-4723, paragraph 34; Joined Cases C-514/07 P, C-528/07 P and C-532/07 P *Sweden and Others v API and Commission* [2010] ECR I-8533, paragraph 68; and Case C-506/08 P *Sweden v MyTravel and Commission* [2011] ECR I-6237, paragraph 72).

28 To that end, Regulation No 1049/2001 is designed – as is stated in recital 4 and reflected in Article 1 – to confer on the public as wide a right of access as possible to documents of the institutions (*Sweden and Turco v Council*, paragraph 33; *Sweden and Others v API and Commission*, paragraph 69; and *Sweden v MyTravel and Commission*, paragraph 73).

29 However, that right is none the less subject to certain limitations based on grounds of public or private interest. More specifically, and in reflection of recital 11, Article 4 of Regulation No 1049/2001 provides that the institutions are to refuse access to a document where its disclosure would undermine the protection of one of the interests protected by that provision (see Case C-266/05 P *Sison v Council* [2007] ECR I-1233, paragraph 62; *Sweden and Others v API and Commission*, paragraphs 70 and 71; and *Sweden v MyTravel and Commission*, paragraph 74).

30 Nevertheless, as such exceptions derogate from the principle of the widest possible public access to documents, they must be interpreted and applied strictly (*Sison v Council*, paragraph 63; *Sweden and Turco v Council*, paragraph 36; *Sweden and Others v API and Commission*, paragraph 73; and *Sweden v MyTravel and Commission*, paragraph 75).

31 Thus, if the institution concerned decides to refuse access to a document which it has been asked to disclose, it must, in principle, first explain how disclosure of that document could specifically and actually undermine the interest protected by the exception – among those provided for in Article 4 of Regulation No 1049/2001 – upon

which it is relying. Moreover, the risk of the interest being undermined must be reasonably foreseeable and must not be purely hypothetical (*Sweden v MyTravel and Commission*, paragraph 76 and the case-law cited).

32 Moreover, if the institution applies one of the exceptions provided for in Article 4 of Regulation 1049/2001, it is for that institution to weigh the particular interest to be protected through non-disclosure of the document concerned against, inter alia, the public interest in the document being made accessible, having regard to the advantages of increased openness, as described in recital 2 to Regulation No 1049/2001, in that it enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system (*Sweden and Turco v Council*, paragraph 45).

33 Moreover, the Court has also held that those considerations are clearly of particular relevance where the Council is acting in its legislative capacity, a fact reflected in recital 6 to Regulation No 1049/2001, which states that wider access must be granted to documents in precisely such cases. Openness in that respect contributes to strengthening democracy by enabling citizens to scrutinise all the information which has formed the basis for a legislative act. The possibility for citizens to find out the considerations underpinning legislative action is a precondition for the effective exercise of their democratic rights (*Sweden and Turco v Council*, paragraph 46).

34 It is on the basis of those principles that the Court of Justice must examine the first ground of appeal, by which the Council claims, in essence, that the General Court did not take any account of the needs associated with the protection of its decision-making process.

35 It should be noted that, in paragraph 69 of the judgment under appeal, the General Court specifically stated that, in accordance with the case-law referred to in paragraph 30 above, public access to the entire content of Council documents constitutes the principle, or general rule, and that that principle is subject to exceptions which must be interpreted and applied strictly.

36 Contrary to the assertions made by the Council, the General Court did take account of the needs associated with the effectiveness of the decision-making process: in paragraphs 69 to 83 of the judgment under appeal, it carried out a detailed examination of the arguments adduced by the Council to justify the application, in the circumstances, of the exception concerning the protection of the Council's decision-making process.

37 Thus, far from disregarding the balance between the principle of transparency and the preservation of the effectiveness of the Council's decision-making process, the General Court, in accordance with the principles set out in paragraphs 31 to 33 above, examined the substance of all the arguments put forward by the Council to justify the application, in the circumstances, of the exception referred to in the first subparagraph of Article 4(3) of Regulation 1049/2001.

38 It was not until after it had examined those arguments and found that none of them could prove that disclosure of the information relating to the identity of the Member States in question would have given rise to a genuine risk of seriously undermining the interest protected by the exception in question that the General Court concluded, in paragraph 84 of the judgment under appeal, that the Council had infringed the first subparagraph of Article 4(3) of Regulation 1049/2001 by precluding, through the decision at issue, the disclosure of that information.

39 Moreover, to the extent that the Council's criticism could be seen as an attempt to put in question the General Court's assessment of those arguments, it must be stated that the Council does not, in support of this ground of appeal, put forward anything to refute the General Court's conclusion that the Council's arguments at first instance were not sufficiently substantiated to establish that disclosure of the information concerning the identity of the Member States in question would have given rise to a genuine risk of seriously undermining the Council's decision-making process.

40 Lastly, as regards the argument of the Czech Republic and the Kingdom of Spain that disclosure of the identity of the delegations was not necessary to attain the objective of Regulation No 1049/2001, suffice it to state that, as was pointed out in paragraph 28 above, the aim of Regulation No 1049/2001, as stated in Article 1 thereof, is to confer on the public as wide a right of access as possible to documents of the institutions. It is in the light of that principle that the General Court rightly stated in paragraph 69 of the judgment under appeal that Regulation No 1049/2001 aims to ensure public access to the entire content of Council documents, including, in this case, the

identity of those who put forward the proposals, and full access to those documents may be limited only on the basis of the exceptions to that right laid down in that regulation, which must, for their part, be based on a genuine risk that the interest which they protect might be undermined. As the General Court ruled out the existence of such a risk in the circumstances of the case, partial access to the requested document cannot be regarded as sufficient for the purposes of attaining the objective pursued by Regulation No 1049/2001.

41 In those circumstances, the first ground of appeal must be rejected as unfounded.

The third ground of appeal

Arguments of the parties

42 By its third ground of appeal, which it is appropriate to examine in second place and which comprises three parts, the Council alleges that the General Court committed several errors in law, which led it to conclude that the Council had not established ‘to the requisite legal and factual standard’ the risk that its decision-making process might be seriously undermined.

43 By the first part of its third ground of appeal, the Council, supported by the Hellenic Republic and the Kingdom of Spain, criticises the General Court for having required, in paragraphs 73 and 74 of the judgment under appeal, proof that the interest protected by the exception had actually been seriously undermined. According to the Council, for it to be possible to rely on the exception under the first subparagraph of Article 4(3) of Regulation 1049/2001, there need only be a risk of harm and, accordingly, an institution which receives a request for access to documents need only establish the likelihood of harm to its decision-making process as a result of the disclosure of that document.

44 For their part, Access Info and the European Parliament contend that, far from requiring the Council to provide proof of an actual adverse effect on the decision-making process, the General Court merely examined, in paragraphs 73 and 74, the argument raised by the Council itself that the Council’s decision-making process had been genuinely and specifically undermined as a result of the unauthorised disclosure.

45 By the second part of its third ground of appeal, the Council, with the backing of the Hellenic Republic, argues that, in paragraph 76 of the judgment under appeal, the General Court did not take due account of the importance of the state of progress of discussions when assessing the risk posed to the decision-making process by disclosure of the identities of the delegations. According to the Council, if the public were recognised as having the right to scrutinise all the preparatory documents throughout the entire decision-making process, delegations would be dissuaded from expressing their points of view during the initial stages of the procedure. Indeed, given the ‘peculiarities’ of the Council’s *modus operandi*, those opinions – especially when they relate to technical matters – are often exploratory in nature and do not necessarily reflect the precise and definitive position of the Member State from which those delegations come, which means that they are liable to evolve during the procedure. The effect of recognising a public right of scrutiny at that preliminary stage of the procedure would be that delegations would refrain from expressing their points of view until they had been assigned a negotiation position by their respective governments, and this would make the legislative process more rigid.

46 In response to those arguments, Access Info contends, first of all, that the Council did not explain the precise nature of the ‘peculiarities’ that purportedly distinguish its decision-making process. Secondly, it was not until the appeal that the Council raised the argument based on the allegation that the ability of the Member States’ delegations to modify their point of view during the procedure would be undermined. In any event, as the General Court found in paragraph 76 of the judgment under appeal, there is no reference in the first subparagraph of Article 4(3) of Regulation No 1049/2001 to the stage of the negotiations as a criterion to be taken into account in order to justify application of the exception to the right of access. Admittedly, that factor could be a relevant consideration when assessing the risk that the interest protected by that provision might be adversely affected. However, identifying the delegations which put forward proposals at an early stage in the discussions would not prevent those delegations from being able to change their position at a later stage. Lastly, Access Info states that it is precisely at the point when the procedure is initiated that maximum transparency is vital: by the time that discussions have already been held and compromise positions reached, transparency and public debate are no longer of any use at all.

47 By the third part of its third ground of appeal, the Council submits in essence that, contrary to the requirements laid down in paragraph 69 of *Sweden and Turco v Council*, the General Court did not take due account, in paragraphs 72 and 79 to 83 of the judgment under appeal, of the sensitive nature of the requested document when assessing the risk that full disclosure of that document would cause serious harm to the decision-making process. According to the Council, the sensitive nature of that document stems from the fact that the proposals in question concerned the provision to be made in the new regulation on access to documents regarding exceptions from the principle of transparency. Moreover, the sensitivity of those issues is confirmed by the fact that the European Union Courts have recently ruled on the interpretation of the exceptions and by the level of debate, and the pressure from public opinion, generated by those issues.

48 In support of that part of the ground of appeal, the Council puts forward a number of arguments. First of all, it claims that *Sweden and Turco v Council* allows it to rely on the exception under the first subparagraph of Article 4(3) of Regulation No 1049/2001 where the requested document is of a particularly sensitive nature. In paragraph 78 of the judgment under appeal, however, the General Court construed that provision as being applicable only where a fundamental interest of the European Union or of the Members States is involved. There is nothing in the wording of that provision or in other parts of the regulation to support that interpretation; nor is it borne out by *Sweden and Turco v Council*. Moreover, that interpretation, together with the high standard of proof required by the General Court to establish that level of harm, makes it almost impossible to rely on that provision.

49 Next, in order to emphasise once more the sensitive nature of the issues in question, the Council claims that the General Court erred in finding, in paragraph 79 of the judgment under appeal, that the unusual lengthiness of the legislative procedure in question could be accounted for by political and legal factors connected with the entry into force of the Lisbon Treaty, the European Parliament elections and the renewal of the Commission. Referring to certain changes in the drafting rules for documents from its working parties with effect from the second half of 2008 – that is to say, after the unauthorised disclosure – the Council states that in actual fact that delay was attributable, at least in part, to the decline in the candour and completeness of the discussions that followed the unauthorised disclosure, which diminished the effectiveness of the decision-making process within the Council.

50 Lastly, according to the Council, the impasse over the legislative dossier was also attributable, at least in part, to the fact that, precisely because of the unauthorised disclosure, Member States found it very difficult to move out of their initial negotiation positions. In particular, the delegations from those States which wanted to propose amendments that could be perceived by the public as restricting the right of public access were unwilling to do so. The Council claims that the General Court was wrong not to acknowledge the adverse effects on the Council's decision-making process produced by the unauthorised disclosure. First, the General Court erred in finding, in paragraph 72 of the judgment under appeal, that such an argument was unfounded because one of the proposals in question, made after the unauthorised disclosure, restricted the right of public access, whereas, contrary to the statements made by the General Court, that proposal had not been tabled by a delegation from a Member State, but originated with the Commission itself. Secondly, in paragraphs 82 and 83 of the judgment under appeal, the General Court was wrong to reject evidence provided by the Council to explain the decline in the level of detail in the reports for the legislative file, and in relation to the identification of the delegations in the working parties by name. Whereas the General Court found an explanation for this in the fact that proceedings had been brought before it, the Council maintains that, given the sensitive nature of the issues in question, that change was attributable precisely to the unauthorised disclosure. The Council illustrates the reduction in the level of detail with a reference to a report established in July 2009 from the working party in question, in which the identity of the delegations was no longer mentioned but, instead, use was made of expressions like 'a certain number of delegations' and 'other delegations'.

51 Access Info contends first of all that the General Court referred to a situation in which 'a fundamental interest of the European Union or of the Members States' is involved only as an example of a situation in which an issue might be regarded as 'particularly sensitive'. It did not state, however, that only such situations may be regarded as sensitive. Secondly, in contrast with the document at issue in *Sweden and Turco v Council*, the requested document contained, not legal opinions, but merely proposals for amendments to draft legislation. Lastly, Access Info adds that the Council failed to provide a detailed statement of reasons for its refusal, even though this is required by *Sweden and Turco v Council*.

52 As to the remainder, Access Info contends that the third part of the Council's third ground of appeal must be ruled inadmissible in that it calls into question the General Court's findings as to the sensitive nature of the requested document, as well as those relating to the reasons for the unusual lengthiness of the legislative procedure

in question. In any event, Access Info – supported in substance by the European Parliament – argues, first, that the Council’s position regarding the sensitive nature of the issues covered by the requested document is based on the fact that those issues give rise to public debate and that they are covered by the case-law of the European Union Courts. Access Info maintains, however, that the Council has failed to substantiate those assertions. Moreover, according to Access Info, the vast majority of legislative procedures concern issues that could give rise to lobbying from interest groups or to debate in the media. Yet that is precisely what transparency and democracy involve, and it does not demonstrate the sensitive nature of an issue, justifying the confidential treatment of a document such as the document requested. Furthermore, if the issues examined were so very sensitive, it would have warranted the redaction, not just of the names of the Member States, but also of the content of the proposals. Secondly, Access Info disputes the Council’s submission that the unusual delay in the legislative process in question was caused by the unauthorised disclosure. In fact, that delay could also be explained by the lack of any political agreement between the Council and the European Parliament over the revision of the regulation. Thirdly, Access Info contests the assertion that the unauthorised disclosure led to changes in the detail provided in the working party’s reports.

Findings of the Court

53 As regards the first part of the Council’s third ground of appeal, it must be stated that this is based on a misreading of the judgment under appeal.

54 In paragraph 59 of the judgment, the General Court rightly stated that application of the exceptions to the right of access is justified only if there is a risk that one of the protected interests might be undermined; and that risk must be reasonably foreseeable and must not be purely hypothetical.

55 In order to determine whether such a risk existed in the circumstances of the case, the General Court first of all found, in paragraphs 70 to 72 of the judgment under appeal, that the Council had not demonstrated the accuracy of the premiss on which it based its arguments, that is to say, the assumption that the public pressure generated by disclosure of the identity of the delegations would be so great that it would no longer be possible for those delegations to submit a proposal tending towards the restriction of openness. Since that was not demonstrated, the General Court rightly found that disclosure of the identity of the delegations which wished to put forward such proposals was not likely to undermine the Council’s decision-making process.

56 The General Court then examined, in paragraphs 73 and 74 of the judgment under appeal, the argument – summarised in paragraph 50 of that judgment, which is not criticised by the Council – that the unauthorised disclosure ‘had a negative effect on the sincerity and exhaustiveness of the discussions within the Council Working Party, preventing the delegations from contemplating different solutions and amendments so as to reach agreement on the most controversial questions’.

57 In paragraphs 73 and 74, the General Court confined itself to responding to that plea and concluded that, contrary to the submissions made by the Council, the unauthorised disclosure was not, in the circumstances of the case, such as to undermine the Council’s decision-making process.

58 In those circumstances, the first part of the third ground of appeal must be rejected as unfounded.

59 As regards the second part of the third ground of appeal, according to which the General Court did not take due account of the importance of the state of progress of discussions when assessing the risk posed by full disclosure of the positions of the delegations, in terms of seriously undermining the Council’s decision-making process, it must be stated that that part is also based on a misreading of the judgment under appeal.

60 In paragraph 76 of the judgment under appeal, the General Court stated that the preliminary nature of the discussions does not, in itself, justify application of the exception provided for in the first subparagraph of Article 4(3) of Regulation No 1049/2001. Accordingly, having ruled out the possibility that the Council’s other arguments could establish a risk of its decision-making process being undermined, the General Court rightly found that the mere fact that the request for disclosure was made at a very early stage in the legislative process was not sufficient to allow the application of that exception.

61 Consequently, the second part is unfounded.

62 Lastly, as regards the third part of the Council's third ground of appeal, it must be stated first that, when the General Court found, in paragraph 78 of the judgment under appeal, that the matters covered by the requested document were not particularly sensitive, it did not refer to *Sweden and Turco v Council*; and rightly so, given that paragraph 69 of that judgment, on which this part of the ground of appeal is based, concerns only specific documents, namely, legal opinions. In the present case, not only was the requested document created as part of the legislative process, but it does not belong to any category of documents in respect of which Regulation No 1049/2001 recognises an interest that specifically merits being protected, such as the category for legal opinions.

63 In any event, even if the General Court were wrong in finding that the criterion for establishing the particularly sensitive nature of a document is that of the risk that disclosure of the document would jeopardise a fundamental interest of the European Union or of the Member States, it must be noted that, in paragraph 77 of the judgment under appeal, it was not by reference to that criterion that, in the circumstances of the case, the General Court ruled out the possibility that the requested document was particularly sensitive. Its conclusion was based, rather, on the finding that the various proposals for amendment or re-drafting made by the four Member State delegations which are described in the requested document are part of the normal legislative process, from which it follows that the requested documents could not be regarded as sensitive – not solely by reference to the criterion concerning the involvement of a fundamental interest of the European Union or of the Member States, but by reference to any criterion whatsoever.

64 Consequently, the Council was wrong to allege that the General Court disregarded the particularly sensitive nature of the requested document.

65 Secondly, as concerns the other arguments relied on by the Council in support of the third part of its third ground of appeal, it should be recalled that, according to settled case-law of the Court of Justice, it is clear from Article 256 TFEU and the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union that the General Court has exclusive jurisdiction to find the facts, except where the substantive inaccuracy of its findings is apparent from the documents submitted to it, and to assess those facts. When the General Court has found or assessed the facts, the Court of Justice has jurisdiction under Article 256 TFEU to review the legal characterisation of those facts by the General Court and the legal conclusions it has drawn from them. The Court of Justice thus has no jurisdiction to establish the facts or, in principle, to examine the evidence which the General Court accepted in support of those facts. Save where the clear sense of the evidence has been distorted, that assessment does not therefore constitute a point of law which is subject as such to review by the Court of Justice (see, *inter alia*, Case C-510/06 P *Archer Daniels Midland v Commission* [2009] ECR I-1843, paragraph 105, and the Order of 10 November 2011 in Case C-626/10 P *Agapiou Joséphidès v Commission and EACEA* [2011] ECR I-169, paragraph 107).

66 By its argument that the General Court was wrong to hold that the unusual lengthiness of the legislative procedure in question could be accounted for by political and legal factors connected with the entry into force of the Lisbon Treaty, the European Parliament elections and the renewal of the Commission, the Council, without pleading any distortion of the evidence, seeks to challenge the General Court's finding that the unusual lengthiness of the legislative procedure was attributable, not to the difficulties brought about by disclosure of the information relating to the identity of those who had made the proposals, but to those factors of a legal and political nature – as the Council itself also maintains, as can be seen from paragraph 46 of the judgment under appeal.

67 Similarly, as regards the alleged effects of the unauthorised disclosure on the Council's decision-making process, the Council, without clearly pleading any distortion of the evidence, is simply attempting to challenge assessments made at first instance. First, it challenges the assessment made by the General Court, in paragraph 72 of the judgment under appeal, of an item of evidence – that is to say, the public version of a document containing written proposals relating to the legislative procedure in question, drawn up by the delegations, namely, Document No 9716/09 of 11 May 2009 – in concluding that, contrary to the assertions made by the Council at first instance, that disclosure had not forced the delegations to avoid submitting proposals tending towards the restriction of openness. Secondly, the Council challenges the General Court's assessment, in paragraphs 82 and 83 of the judgment under appeal, of another item of evidence – namely, Document 10859/1/09 REV 1 – from which the General Court inferred that there had been a change in Council practice after the unauthorised disclosure, in that the information relating to the identity of the Member States which made comments or suggestions about the Commission's proposal was no longer included, and that that change could be explained by the fact that Access Info had brought an action contesting the lawfulness of the decision at issue.

68 Consequently, since those arguments are inadmissible, the third ground of appeal must be rejected as being in part inadmissible and in part unfounded.

The second ground of appeal

Arguments of the parties

69 By its second ground of appeal, the Council submits essentially that the General Court's reasoning is inconsistent with the case-law of the Court of Justice which allows the institutions to rely on general considerations in order to refuse to disclose certain categories of document. The Council maintains, as does the Hellenic Republic, that the decision at issue set out the general considerations explaining the reasons why the requested document could not be disclosed and the reasons why those considerations were in fact applicable to the requested document. Thus, the Council did not confine its examination to the nature of the document, but based its refusal on detailed explanations relating to the sensitive nature of the issues covered and on the fact that those issues formed part of preliminary discussions engaged in before the legislative procedure proper.

70 Access Info contends first that, as the second ground of appeal does not expressly refer to any particular paragraph in the judgment under appeal, it is inadmissible and ineffective. In any event, according to Access Info, supported on this point by the European Parliament, the Council did not make explicit, either in its appeal or in the decision at issue, which general presumption formed the basis for its refusal of access in the circumstances. Moreover, contrary to the requirements of the relevant case-law, there is no basis in any provision of European Union law or any general principle of law for a general presumption of confidentiality for documents such as the requested document, all the more so since that document originated from a procedure of a legislative nature.

Findings of the Court

71 It should be noted at the outset that, contrary to the assertions made by Access Info, this ground of appeal is admissible, given that, although the Council admittedly does not identify any specific paragraph in the judgment under appeal as containing an error of law, it is clear from the arguments in support of this ground of appeal that the Council takes issue with the General Court for not finding that it was open to the Council to rely on a presumption of confidentiality based on general considerations as justification for refusing access to the requested document.

72 As regards the substance, it should be noted that, according to settled case-law, although, in order to justify refusing access to a document, it is not sufficient, in principle, for the document to fall within an activity or an interest referred to in Article 4 of Regulation No 1049/2001, as the institution concerned must also explain how access to that document could specifically and actually undermine the interest protected by an exception laid down in that provision, it is nevertheless open to that institution to base its decisions in that regard on general presumptions which apply to certain categories of document, as similar general considerations are likely to apply to requests for disclosure relating to documents of the same nature (*Sweden and Turco v Council*, paragraph 50; Case C-139/07 P *Commission v Technische Glaswerke Ilmenau* [2010] ECR I-5885, paragraph 54; and Case C-477/10 P *Commission v Agrofert Holding* [2012] ECR, paragraph 57).

73 While, in such a case, the institution concerned would not be under an obligation to carry out a specific assessment of the content of each of those documents, it must nevertheless specify on which general considerations it bases the presumption that disclosure of the documents would undermine one of the interests protected by the exceptions under Article 4 of Regulation No 1049/2001 (see, to that effect, *Sweden and Others v API and Commission*, paragraph 76).

74 In the present case, even if it were to be taken as established that the Council had argued at first instance that it was entitled to refuse access to a document, such as the requested document, by relying on a presumption based on the considerations summarised in paragraph 43 of the judgment under appeal concerning the need to protect the delegations' room for manoeuvre during preliminary discussions on the Commission's legislative proposal, it is clear, first, that, in paragraphs 70 to 79 of the judgment under appeal, the General Court examined those considerations and that, in paragraph 80, it concluded that they were not a sufficient basis for application of the exception under the first subparagraph of Article 4(3) of Regulation No 1049/2001. Secondly, the Council's attempt to challenge that assessment by the third ground of appeal was unsuccessful, that ground having been rejected.

75 Consequently, the Council cannot reasonably argue that it was entitled to refuse access to the requested document by relying on a presumption based on such considerations.

76 In view of the above, the arguments seeking to show that the General Court did not take into account the reasons why the Council had considered that those general considerations were applicable to the requested document are ineffective.

77 It follows that the second ground of appeal must be rejected as unfounded.

78 It follows from all the foregoing considerations that the appeal must be dismissed.

Costs

79 Under Article 184(2) of the Rules of Procedure, where the appeal is unfounded, the Court is to make a decision as to costs. Under Article 138(1) of those Rules, applicable to appeal proceedings by virtue of Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Article 140(1) of those Rules provides that the Member States and institutions which have intervened in the proceedings are to bear their own costs.

80 Since the Council's appeal has been dismissed, it is appropriate, in accordance with the forms of order sought by Access Info, for the Council to be ordered to pay, in addition to its own costs, the costs incurred by Access Info.

81 The Czech Republic, the Hellenic Republic, the Kingdom of Spain, the French Republic and the European Parliament must bear their own costs.

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

1. **Dismisses the appeal;**
2. **Orders the Council of the European Union to pay the costs incurred by Access Info Europe;**
3. **Orders the Czech Republic, the Hellenic Republic, the Kingdom of Spain, the French Republic and the European Parliament to bear their own costs.**

Case C-350/12 P, *Council v in 't Veld*

In Case C-350/12 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 17 July 2012,

Council of the European Union, represented by P. Berman, B. Driessen and C. Fekete, acting as Agents,
applicant,

the other parties to the proceedings being:

Sophie in 't Veld, represented by O. Brouwer, E. Raedts and J. Blockx, advocaten,
applicant at first instance,

supported by:

European Parliament, represented by N. Lorenz and N. Görlitz, acting as Agents,
intervener in the appeal,

European Commission, represented by B. Smulders and P. Costa de Oliveira, acting as Agents, with an address
for service in Luxembourg,

intervener at first instance,

THE COURT (First Chamber),

composed of A. Tizzano (Rapporteur), President of the Chamber, A. Borg Barthet, E. Levits, M. Berger and
S. Rodin, Judges,

Advocate General: E. Sharpston,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure and further to the hearing on 17 October 2013,

after hearing the Opinion of the Advocate General at the sitting on 13 February 2014,

gives the following

Judgment

1 By its appeal, the Council of the European Union seeks to have set aside the judgment of the General Court of the European Union in *In 't Veld v Council*, T-529/09, EU:T:2012:215 ('the judgment under appeal'), by which the General Court annulled in part the decision of the Council of 29 October 2009 refusing Ms in 't Veld full access to a document containing the opinion of the Council's Legal Service concerning a recommendation from the European Commission to the Council to authorise the opening of negotiations between the European Union and the United States of America for the conclusion of an international agreement to make available to the United States Treasury Department financial messaging data ('the decision at issue').

Legal context

2 Recitals 2, 4 and 11 in the preamble to Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43) read as follows:

‘(2) Openness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system. Openness contributes to strengthening the principles of democracy and respect for fundamental rights as laid down in Article 6 of the EU Treaty and in the Charter of Fundamental Rights of the European Union.

...

(4) The purpose of this Regulation is to give the fullest possible effect to the right of public access to documents and to lay down the general principles and limits on such access in accordance with Article 255(2) of the EC Treaty.

...

(11) In principle, all documents of the institutions should be accessible to the public. However, certain public and private interests should be protected by way of exceptions. The institutions should be entitled to protect their internal consultations and deliberations where necessary to safeguard their ability to carry out their tasks. In assessing the exceptions, the institutions should take account of the principles in Community legislation concerning the protection of personal data, in all areas of Union activities.’

3 Article 1 of Regulation No 1049/2001 provides:

‘The purpose of this Regulation is:

(a) to define the principles, conditions and limits on grounds of public or private interest governing the right of access to European Parliament, Council and Commission (hereinafter referred to as “the institutions”) documents provided for in Article 255 of the EC Treaty in such a way as to ensure the widest possible access to documents,

...’

4 Article 2(3) of that regulation is worded as follows:

‘This Regulation shall apply to all documents held by an institution, that is to say, documents drawn up or received by it and in its possession, in all areas of activity of the European Union.’

5 Article 4(1), (2) and (6) of that same regulation provides:

‘1. The institutions shall refuse access to a document where disclosure would undermine the protection of:

(a) the public interest as regards:

...

– international relations,

...

2. The institutions shall refuse access to a document where disclosure would undermine the protection of:

...

– ... legal advice,

...

unless there is an overriding public interest in disclosure.

...

6. If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released.'

Background to the dispute

6 On 28 July 2009, Ms in 't Veld, a Member of the European Parliament, requested access, under Regulation No 1049/2001, to document 11897/09 of 9 July 2009, containing an opinion of the Council's Legal Service on the 'recommendation from the Commission to the Council to authorise the opening of negotiations between the European Union and the United States of America for an international agreement to make available to the United States Treasury Department financial messaging data to prevent and combat terrorism and terrorist financing' ('the proposed agreement').

7 By the decision at issue, the Council authorised only partial access to the document, full access being refused on the basis of the exceptions laid down in the third indent of Article 4(1)(a) and the second indent of Article 4(2) of Regulation No 1049/2001, relating to the protection, respectively, of the public interest as regards international relations and of legal advice.

8 In that decision, the Council stated, first, that 'disclosure of [document 11897/09] would reveal to the public information relating to certain provisions in the [proposed agreement] ... and consequently, would negatively impact on the [European Union]'s negotiating position and would also damage the climate of confidence in the ongoing negotiations'. The Council added that 'disclosure of the document would also reveal to the ... counterpart elements pertaining to the position to be taken by the [European Union] in the negotiations which — in the case [where] the legal advice was critical — could be exploited so as to weaken the [European Union]'s negotiating position'.

9 Secondly, the Council stated that document 11897/09 contained 'legal advice, where the Legal Service analyses the legal basis and the respective competences of the [European Union] and the European Community to conclude the [proposed agreement]', and that this 'sensitive issue, which has an impact on the powers of the European Parliament in the conclusion of the [proposed agreement], has been [the] subject of divergent positions between the institutions'. In those circumstances, according to the Council, '[d]ivulcation of the contents of [document 11897/09] would undermine the protection of legal advice, since it would make known to the public an internal opinion of the Legal Service, intended only for the members of the Council within the context of the Council's preliminary discussions on the [proposed agreement]'. In addition, the Council considered 'that the protection of its internal legal advice relating to a draft international agreement ... outweighs the public interest in disclosure'.

The judgment under appeal and the forms of order sought

10 On 31 December 2009, Ms in 't Veld brought an action for annulment of the decision at issue, relying on four pleas in law in support of the action.

11 The first two pleas in that action alleged infringement of the third indent of Article 4(1)(a) and the second indent of Article 4(2) of Regulation No 1049/2001. The third plea in support of that action was based on the infringement of Article 4(6) of that regulation, relating to partial access to documents of the institutions. The fourth plea alleged breach of the obligation to state reasons.

12 By the judgment under appeal, the General Court upheld, in part, the first plea of Ms in 't Veld, and the second plea in its entirety. Since those first two pleas were considered well founded, the General Court also upheld

the third plea. The fourth plea was rejected. On that basis, the General Court partially annulled the decision at issue.

13 On 24 July 2012, the Council brought the present appeal, by which, supported by the Commission, it asks the Court to set aside the judgment under appeal, give final judgment on the matters raised in the appeal and order Ms in 't Veld to pay the costs of both sets of proceedings.

14 Ms in 't Veld, supported by the European Parliament, asks the Court of Justice to dismiss the appeal and to order the Council to pay the costs.

The appeal

15 By its appeal, the Council claims that the General Court infringed two provisions of Regulation No 1049/2001 restricting the right of access to documents of the institutions. The first plea is thus based on an infringement of the third indent of Article 4(1)(a) of Regulation No 1049/2001, relating to the protection of the public interest as regards international relations, and the second alleges infringement of the second indent of Article 4(2) of the regulation, which provides for an exception in respect of legal advice.

The first plea, alleging infringement of the third indent of Article 4(1)(a) of Regulation No 1049/2001

The judgment under appeal

16 In order to respond to the first plea in law put forward by Ms in 't Veld in support of her action for annulment, alleging infringement of the third indent of Article 4(1)(a) of Regulation No 1049/2001, the General Court noted, in paragraphs 24 and 25 of the judgment under appeal, that the decision to be adopted by an institution pursuant to that provision is of a complex and delicate nature and calls for the exercise of particular care, having regard in particular to the singularly sensitive and essential nature of the protected interest, and that, therefore, the adoption of such a decision calls for the institution concerned to have a wide margin of discretion for that purpose; the General Court's review of the legality of that decision must be limited to verifying whether the procedural rules and the duty to state reasons have been complied with, whether the facts have been accurately stated, and whether there has been a manifest error of assessment of the facts or a misuse of powers.

17 In paragraph 26 of the judgment under appeal, the General Court found that the opinion to which access had been requested in the present case was, in essence, concerned with the legal basis of the Council decision authorising the opening of negotiations, on behalf of the European Union, for the conclusion of the proposed agreement. The General Court therefore considered, in paragraph 30 of the judgment under appeal, that it had to be ascertained whether the Council had shown that access to the undisclosed elements of document 11897/09 could have specifically and actually undermined the public interest concerned.

18 To that end, the General Court examined the two grounds on which the Council relied in order to establish that there was a risk of such a threat. As regards the ground that disclosure would have revealed to the public information relating to certain provisions in the proposed agreement, which would have damaged the climate of confidence in the ongoing negotiations, the General Court held, in paragraphs 35 to 39 of the judgment under appeal, that the Council had, on the basis of that ground, lawfully refused access to those passages in document 11897/09 containing the analysis of the specific content of that agreement which could have revealed the strategic objectives pursued by the European Union in the negotiations on the conclusion of that agreement.

19 As regards the ground that disclosure of document 11897/09 would have revealed to the counterpart elements pertaining to the position to be taken by the European Union in the negotiations (in particular as regards the choice of legal basis for the proposed agreement), elements which, where the legal advice had been critical, could have been exploited so as to weaken the European Union's negotiating position, the General Court noted in paragraph 46 of the judgment under appeal that the risk involved in the disclosure of positions taken within the institutions regarding the legal basis for concluding a future international agreement was not liable in itself to establish the existence of a threat to the European Union's interest in the field of international relations.

20 In that regard, in paragraphs 47 to 50 of the judgment under appeal, the General Court noted, first of all, that the choice of the appropriate legal basis, both for internal and international European Union activity, has constitutional significance and that such a choice does not follow merely from the conviction of its author, but

must rest on objective factors which are amenable to judicial review, such as, in particular, the aim and the content of the measure. As a consequence, since that choice does not fall within the discretion of the institution, any divergence of opinions on that subject cannot be equated with a difference of opinion between the institutions as to matters which relate to the substance of the agreement. Accordingly, the mere fear of disclosing a disagreement within the institutions regarding the legal basis of a decision authorising the opening of negotiations on behalf of the European Union is not a sufficient basis for concluding that the protected public interest in the field of international relations may be undermined.

21 Furthermore, in response to the argument put forward by the Commission in that respect, the General Court, in paragraphs 52 and 53 of the judgment under appeal, held that the disclosure of a document establishing the existence of doubts regarding the choice of the legal basis in relation to the conclusion of the proposed agreement was not liable to give rise, in itself, to a threat to the European Union's credibility as a negotiating partner in respect of that agreement. Indeed, any confusion as to the nature of the powers of the European Union could only be made worse in the absence of a prior objective debate between the institutions concerned regarding the legal basis of the action envisaged.

22 Next, in paragraph 54 of the judgment under appeal, the General Court noted that, at the material time, there was a procedure under EU law, in Article 300(6) EC, that was specifically designed to prevent complications, both at EU level and in international law, resulting from an incorrect choice of legal basis in relation to the conclusion of an international agreement binding the European Union.

23 In that regard, the General Court, in paragraphs 55 and 56 of the judgment under appeal, underlined the fact that, at the time of the adoption of the decision at issue, the existence of different views concerning the legal basis of the proposed agreement was within the public domain, owing, *inter alia*, to the fact that a Parliament resolution of 17 September 2009 relating to the proposed agreement established the existence of such different views.

24 Lastly, in paragraph 57 of the judgment under appeal, the General Court noted that, in invoking the exception based on the protection of the public interest as regards international relations, the Council also made reference to the fact that the opinion of its Legal Service touched on certain points of the draft negotiating directives, knowledge of which could have been exploited by the other party to those negotiations. The General Court held that that consideration did indeed establish a risk that the European Union's interest in the field of international relations might be undermined, but that it justified the exception in question only with respect to those elements of document 11897/09 that related to the content of the negotiating directives.

25 In paragraphs 58 to 60 of the judgment under appeal, the General Court concluded from the foregoing considerations that, with the exception of those elements of document 11897/09 concerning the specific content of the proposed agreement or the negotiating directives which could reveal the strategic objectives pursued by the European Union in the negotiations on that agreement, the Council had not shown that the disclosure of other aspects of that document would specifically and actually have undermined the public interest in the field of international relations.

26 Consequently, the General Court upheld in part the first plea in law put forward by Ms in 't Veld in support of her action for annulment.

Arguments of the parties

27 The first ground of appeal raised by the Council alleges infringement, by the judgment under appeal, of the third indent of Article 4(1)(a) of Regulation No 1049/2001, and is in two parts.

28 By the first part of this plea, the Council, supported by the Commission, submits that the General Court misinterpreted that provision by considering that a disagreement as to the choice of the legal basis of the EU act regarding the conclusion of an international agreement is not capable of undermining the European Union's interest in the field of international relations.

29 According to the Council, since the legal basis of an EU act determines the decision-making procedure that applies, it necessarily affects the balance of powers between the institutions as well. Disputes concerning the applicable legal basis therefore remain, by their very nature, of very great political significance and are potentially highly contentious.

30 Referring to *Commission v Council*, 22/70 (EU:C:1971:32) and to Opinion 1/75 (EU:C:1975:145) and Opinion 2/00 (EU:C:2001:664), the Council maintains that the issue of the legal basis of an EU act concerning the conclusion of an international agreement is vitally important for the European Union's position in the negotiations on such an agreement, since uncertainty as to the determination of the legal basis of such an agreement has a negative impact on those negotiations.

31 The European Union's negotiating partners could exploit the differences of opinion between the institutions to the European Union's disadvantage. Moreover, any doubts as to the legal capacity of an institution to conduct negotiations would also have an impact on the European Union's credibility and effectiveness in international negotiations, and would adversely affect its ability to bring them to a successful conclusion.

32 As regards the reference to Article 300(6) EC, in the Council's submission this is wholly irrelevant. First, no institution had availed itself of this possibility in the present case. Secondly, the availability of that procedure does not in any way mitigate the harm caused by disclosing legal advice relating to a dispute about a legal basis.

33 In addition, the Parliament resolution of 17 September 2009 referred to by the General Court, which was adopted a few months after document 11897/09 was drawn up, had revealed the substance of divergent opinions unlawfully, since that information had never been disclosed by the Council under Regulation No 1049/2001. In those circumstances, the General Court was wrong to justify its decision on the basis, in particular, that the information had been made public by the European Parliament; to conclude otherwise would condone the disclosure of information in contravention of Articles 6 to 8 of that regulation. In any event, that resolution merely noted the existence of a difference of views between the institutions, which did not imply that the full content of the opinion in question had been put in the public domain.

34 By contrast, Ms in 't Veld, supported by the European Parliament, submits that the Council's arguments are based on a misreading of the judgment under appeal, in so far as the General Court did not consider that disagreement as to the legal basis of an international agreement could never undermine the public interest in the field of international relations. In fact the General Court merely stated that such a disagreement is not, in itself, a sufficient basis for concluding that there is a threat to that interest.

35 That error in the premiss of the Council's reasoning rendered its arguments in support of the first part of the first plea ineffective.

36 In any event, according to Ms in 't Veld, those arguments are unfounded. Whilst the decision of an institution to proceed on an incorrect basis could actually undermine the European Union's international relations, the fact remains that the disclosure of an opinion of that institution as to the legal basis of negotiations does not affect this.

37 Ms in 't Veld adds that the choice of legal basis is a purely internal issue, so that it is doubtful that the European Union's negotiating partners could use uncertainties as to its choice in order to obtain a better deal. On the contrary, the negotiating partners of the European Union in principle have an interest in ensuring that the proposed international agreement is concluded on a lawful basis, so as to reduce to a minimum the risk of any future challenge to that agreement, including on the grounds of lack of competence of the institutions to represent the parties to it. Likewise, the European Union's credibility in negotiations can be undermined only by the choice of a wrong legal basis and not by the debate on that choice.

38 Lastly, as regards the Parliament resolution of 17 September 2009, the General Court had referred to it only in so far as it confirmed not the content but the existence of differences of opinion between the Council and the European Parliament on the choice of an adequate legal basis for the purpose of conducting such negotiations, which was public knowledge and which also appeared in the decision at issue itself.

39 By the second part of its first ground of appeal, the Council, supported by the Commission, submits that where the institutions rely on one of the exceptions laid down in Article 4(1) of Regulation No 1049/2001 in order to justify a decision relating to access to a document, they have a wide margin of discretion; therefore the Court's review of the legality of such a decision should be limited.

40 However, in the present case, the General Court had undertaken a full review of the decision at issue. In particular, in paragraph 58 of the judgment under appeal, it had explicitly concluded that 'the Council has not shown how, specifically and actually, wider access to [document 11897/09] would have undermined the public

interest in the field of international relations'. According to the Council, that phrase, and in particular the words 'specifically and actually', demonstrate that the General Court did not just check whether the facts had been accurately stated and whether there had been a manifest error of assessment of the facts, but rather required the Council to prove that the disclosure of that document would lead to harm.

41 Ms in 't Veld, supported by the European Parliament, contends, in opposition to that argument, that it is the case-law of the Court of Justice that requires the institution concerned to provide proof that the disclosure of a document to which access has been refused would specifically and actually undermine one of the interests protected by Article 4 of Regulation No 1049/2001. The General Court had confined itself to examining the two arguments raised by the Council and by the Commission to justify the non-disclosure of document 11897/09 without infringing the Council's discretion, given that the arguments of those institutions referred to manifest errors of assessment which the General Court is empowered to review in the context of a limited review. The General Court had not, therefore, assessed the specific content of the proposed agreement or the negotiating directives, and therefore did not replace the Council's assessment with its own.

Findings of the Court

42 As regards the first part of the first plea put forward by the Council in support of its appeal, it must be held that that part of the plea is based on a misreading of the judgment under appeal.

43 Contrary to what may be inferred from the Council's and the Commission's reasoning, the General Court did not in any way rule out the possibility that the disclosure of a disagreement between institutions as to the choice of legal basis empowering an institution to conclude an international agreement on behalf of the European Union might undermine the protection of the interest protected by the third indent of Article 4(1)(a) of Regulation No 1049/2001.

44 On the contrary, the General Court merely stated, in paragraph 46 of the judgment under appeal, first of all, that the risk involved in disclosing positions taken within the institutions with regard to that choice does not in itself establish the existence of a threat to the European Union's interest in the field of international relations. It went on to point out, in paragraph 50 of that judgment, that the mere fear of disclosure of the existence of divergent opinions within the institutions regarding the appropriate legal basis on which to adopt a decision authorising the opening of negotiations on behalf of the European Union is not a sufficient basis for concluding that the public interest in the field of international relations may be undermined. Lastly, in paragraph 52 of that judgment, it ruled out the possibility that the existence of a legal debate as to the extent of the powers of the institutions with regard to the international activity of the European Union might give rise to a presumption of the existence of a threat to the credibility of the European Union in the negotiations for an international agreement.

45 Such an interpretation of the third indent of Article 4(1)(a) of Regulation No 1049/2001 is not incorrect in law.

46 It must be noted in that regard that Regulation No 1049/2001 is designed — as is stated in recital 4 and reflected in Article 1 — to confer on the public as wide a right of access as possible to documents of the institutions (*Council v Access Info Europe*, C-280/11 P, EU:C:2013:671, paragraph 28 and the case-law cited).

47 However, that right is none the less subject to certain limitations based on grounds of public or private interest. More specifically, and in reflection of recital 11, Article 4 of Regulation No 1049/2001 provides for a number of exceptions enabling the institutions to refuse access to a document where its disclosure would undermine the protection of one of the interests protected by that provision (*Council v Access Info Europe*, EU:C:2013:671, paragraph 29 and the case-law cited).

48 Nevertheless, as such exceptions derogate from the principle of the widest possible public access to documents, they must be interpreted and applied strictly (*Council v Access Info Europe*, EU:C:2013:671, paragraph 30 and the case-law cited).

49 As is apparent from the judgment under appeal, document 11897/09 contains an opinion of the Council's Legal Service, issued in the context of the adoption of the Council's decision authorising the opening of negotiations, on behalf of the European Union, in respect of the proposed agreement.

50 Ms in 't Veld does not dispute, moreover, that the exception to the right of access linked to the protection of the public interest as regards the European Union's international relations is capable of applying to such a document.

51 However, the mere fact that a document concerns an interest protected by an exception to the right of access laid down in Article 4 of Regulation No 1049/2001 is not sufficient to justify the application of that provision (see, to that effect, *Commission v Éditions Odile Jacob*, C-404/10 P, EU:C:2012:393, paragraph 116).

52 Indeed, if the institution concerned decides to refuse access to a document which it has been asked to disclose, it must, in principle, first explain how disclosure of that document could specifically and actually undermine the interest protected by the exception — among those provided for in Article 4 of Regulation No 1049/2001 — upon which it is relying. In addition, the risk of the interest being undermined must be reasonably foreseeable and must not be purely hypothetical (*Council v Access Info Europe*, EU:C:2013:671, paragraph 31 and the case-law cited).

53 Moreover, if the institution applies one of the exceptions provided for in Article 4(2) and (3) of Regulation No 1049/2001, it is for that institution to weigh the particular interest to be protected through non-disclosure of the document concerned against, inter alia, the public interest in the document being made accessible, having regard to the advantages of increased openness, as described in recital 2 to Regulation No 1049/2001, in that it enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system (*Council v Access Info Europe*, EU:C:2013:671, paragraph 32 and the case-law cited).

54 However, as is evident from paragraph 7 of the judgment under appeal, the Council did not provide anything in the decision at issue to demonstrate how disclosure of document 11897/09 would risk specifically and actually undermining the interest protected by the third indent of Article 4(1)(a) of Regulation No 1049/2001.

55 Furthermore, the arguments put forward by the Council do not establish that the General Court's reasoning in relation to the interpretation of that provision is incorrect in law.

56 In the first place, the case-law invoked by the Council does not reveal any general rule under which disclosure of the existence of a divergence of views among the institutions as to the legal basis on which one of them is empowered to open negotiations to conclude an international agreement and, therefore, the determination of the appropriate EU act for that purpose, would in itself undermine the public interest as regards the European Union's international relations.

57 First of all, in *Commission v Council* (EU:C:1971:32, paragraph 86), the Court held that to have suggested to third countries, at an advanced stage of the negotiations in respect of an international agreement, that there was now a new distribution of powers within the European Union could jeopardise the successful outcome of those negotiations. That does not correspond at all to the situation in which there is disclosure, at most, of a divergence of opinion between institutions as to the legal basis of a decision authorising the negotiation of an international agreement. Nor does it mean that the decision in question could, on that basis, be invalidated.

58 Next, in Opinion 1/75 (EU:C:1975:145), the Court referred to the negative international repercussions that might flow from a possible decision of the Court to the effect that an agreement is, either by reason of its content or of the procedure adopted for its conclusion, incompatible with the provisions of the Treaty. Lastly, in Opinion 2/00 (EU:C:2001:664, paragraphs 5 and 6), the Court emphasised that to proceed on an incorrect legal basis is liable to invalidate the act concluding the agreement, and that that is liable to create complications both at EU level and in international law. The Court's considerations in the context of those Opinions are set in the context of an examination of the objective of the procedure laid down in Article 300(6) EC (now Article 218(11) TFEU). In the present case, not only did the parties not avail themselves of that procedure for prior referral to the Court of Justice before the conclusion of the proposed agreement, but in any case the risk that the Council's decision on the opening of negotiations might be the subject of a judicial decision declaring it to be incompatible with the Treaties was not contemplated.

59 In the second place, the General Court's reference in paragraph 54 of the judgment under appeal to the procedure laid down under Article 300(6) EC is merely descriptive. Such a reference must clearly be understood as an indication that it is the Treaty itself which lays down a judicial procedure concerning the legal issues that

may be linked to the legal basis of a decision concerning the conclusion of an international agreement, a procedure which precedes the signing of the agreement and which is public, thereby ruling out any presumption that a discussion that is made public, concerning the correct legal basis for such a decision, can automatically specifically and actually undermine the public interest as regards international relations.

60 Lastly, in third place, in its assessment of the existence of a risk of a threat to that interest, the General Court was fully entitled, in paragraph 55 of the judgment under appeal, to take into consideration the fact that the main content of document 11897/09 had been made public in a Parliament resolution. In the context of that assessment, which concerns the risk that disclosure of a document would lead to harm to the interest protected under Article 4 of Regulation No 1049/2001, the fact that the earlier disclosure was not in accordance with that regulation is not relevant; the inferences to be drawn from such unlawfulness may have to be drawn in the context of other legal remedies provided for by the Treaties.

61 Having regard to the foregoing, it must be concluded that the first part of the first plea put forward by the Council in support of its appeal is unfounded.

62 By the second part of that plea, the Council submits that the General Court wrongly carried out a full review of the legality of the decision at issue, when it should have confined itself to a limited review, as is clear from the case-law of the Court of Justice.

63 It must be noted in that regard that while it is true that, as regards the scope of the judicial review of the legality of a decision of an institution refusing public access to a document on the basis of one of the exceptions relating to the public interest provided for in Article 4(1)(a) of Regulation No 1049/2001, that institution must be recognised as enjoying a wide discretion for the purpose of determining whether the disclosure of documents relating to the fields covered by those exceptions could undermine the public interest. The review by the Courts of the European Union of the legality of such a decision must therefore be limited to verifying whether the procedural rules and the duty to state reasons have been complied with, whether the facts have been accurately stated, and whether there has been a manifest error of assessment or a misuse of powers (*Sison v Council*, C-266/05 P, EU:C:2007:75, paragraph 34).

64 However, where the institution concerned refuses access to a document the disclosure of which would undermine one of the interests protected by Article 4(1)(a) of Regulation No 1049/2001, that institution remains obliged, as noted in paragraph 52 of the present judgment, to explain how disclosure of that document could specifically and actually undermine the interest protected by an exception provided for in that provision, and the risk of the interest being undermined must be reasonably foreseeable and must not be purely hypothetical.

65 In paragraph 58 of the judgment under appeal, the General Court found that, with the exception of those elements of document 11897/09 which concern the specific content of the proposed agreement or the negotiating directives, which could reveal the strategic objectives pursued by the European Union in the negotiations concerning that agreement, the Council had not shown how, specifically and actually, wider access to that document would have undermined the public interest in the field of international relations.

66 To that end, the General Court confined itself to verifying the statement of reasons for the decision at issue in that regard. After having pointed out, in paragraph 41 of the judgment under appeal, that the Council was maintaining that that decision referred to the risk associated with the disclosure of those elements of the analysis relating to the legal basis of the proposed agreement, even if that was not explicitly apparent from that decision, the General Court, on the basis of that consideration, then confined itself to declaring, in paragraphs 46 to 50 of that judgment, that that statement of reasons for the decision at issue was insufficient in law, since merely noting the existence of that risk did not in itself satisfy the requirement whereby the institution concerned must establish, specifically and actually, the existence of a threat to the European Union's interest in the field of international relations. The General Court ruled in that regard that, since the choice of the legal basis rests on objective factors and does not fall within the discretion of the institution, any divergence of opinion on that subject cannot be equated with a difference of opinion between the institutions as to matters which relate to the substance of the agreement, and which might have been liable to damage the interests of the European Union in the field of international relations.

67 By contrast, in paragraphs 57 and 58 of the judgment under appeal, the General Court considered that the statement of reasons put forward by the Council in support of the decision at issue was sufficient in itself as

regards the elements of document 11897/09 concerning the specific content of the proposed agreement or the negotiating directives, and concluded in paragraph 59 of that judgment that the Council had established the risk of a threat to the public interest in the field of international relations with regard to those elements only.

68 It follows from the foregoing that the General Court confined itself to reviewing the statement of reasons underpinning the decision at issue and did not, therefore, infringe the Council's discretion.

69 In the light of those considerations, the second part of the first plea put forward by the Council in support of its appeal is also unfounded; accordingly this plea must be rejected in its entirety.

The second plea, alleging infringement of the second indent of Article 4(2) of Regulation No 1049/2001

The judgment under appeal

70 In the light of its finding following examination of the first plea in law put forward by Ms in 't Veld in support of her action for annulment, the General Court limited its examination of the second plea, alleging infringement of the second indent of Article 4(2) of Regulation No 1049/2001, to the undisclosed parts of document 11897/09 only, and excluded those dealing with the specific content of the proposed agreement or the negotiating directives.

71 In paragraphs 69 and 70 of the judgment under appeal, first of all, the General Court held that the grounds of the decision at issue, according to which the Council and its Legal Service could be deterred from asking for and providing written opinions relating to sensitive issues if those opinions subsequently had to be disclosed, were not substantiated by any specific, detailed evidence which could establish in the present case the existence of a reasonably foreseeable and not purely hypothetical threat to the Council's interest in receiving frank, objective and comprehensive legal advice.

72 In paragraph 71 of the judgment under appeal, the General Court also held that, since the possibility that the public interest in the field of international relations could be undermined was provided for by a separate exception, covered by the third indent of Article 4(1)(a) of Regulation No 1049/2001, the mere fact that the legal advice contained in document 11897/09 concerned the field of the international relations of the European Union was not in itself sufficient for the application of the exception laid down in the second indent of Article 4(2) of that regulation.

73 In paragraphs 72 to 74 of the judgment under appeal, the General Court went on to note that, although it may be conceded that where international negotiations are still ongoing, enhanced protection is necessary in respect of the documents of the institution involved in those negotiations, in order to rule out any threat to the interests of the European Union during the process of those negotiations, that consideration has already been taken into account by the recognition of the wide discretion given to the institutions in applying the exception under the third indent of Article 4(1)(a) of Regulation No 1049/2001. In the context of the exception provided for in the second indent of Article 4(2) of that regulation, the Council cannot legitimately rely on the general consideration that a threat to a protected public interest may be presumed in a sensitive area, in particular concerning legal advice given during the negotiation process for an international agreement. Nor may a specific and foreseeable threat to the interest in question be established by a mere fear of disclosing to EU citizens differences of opinion between the institutions regarding the legal basis for the international activity of the European Union and, thus, of creating doubts as to the lawfulness of that activity.

74 Regarding the Council's argument concerning the risk of a threat to the ability of its Legal Service to defend, in court proceedings, a position on which it had issued a negative opinion, the General Court considered, in paragraph 78 of the judgment under appeal, that an argument of such a general nature could not justify an exception to the transparency required by Regulation No 1049/2001.

75 Lastly, according to the General Court, it was for the Council to balance the particular interest to be protected by non-disclosure of document 11897/09 against any overriding public interest justifying disclosure.

76 In that regard, the General Court, in paragraphs 81 to 95 of the judgment under appeal, noted that the requirements for transparency are greater where the Council is acting in its legislative capacity. Yet, initiating and conducting negotiations in order to conclude an international agreement fall, in principle, within the domain of

the executive. However, the General Court also added that application of the principle of the transparency of the decision-making process of the European Union could not be ruled out in international affairs, especially where a decision authorising the opening of negotiations involves an international agreement which may have an impact on an area of the European Union's legislative activity, such as the proposed agreement which concerns, in essence, the processing and exchange of information in the context of police cooperation, which may also affect the protection of personal data. In that regard, the fact that document 11897/09 concerns an area potentially covered by the exception referred to in the third indent of Article 4(1)(a) of Regulation No 1049/2001, relating to the protection of the public interest in the field of international relations, is irrelevant for the purposes of an assessment of the application of the separate exception, relating to the protection of legal advice, provided for in the second indent of Article 4(2) of that regulation. Moreover, the fact that the procedure for concluding the proposed agreement was still ongoing at the time of the adoption of the decision at issue is not conclusive in ascertaining whether, despite that risk, there exists any overriding public interest justifying disclosure. Indeed, the public interest in the transparency of the decision-making process would become meaningless if, as the Commission proposes, it were to be taken into account only in those cases where the decision-making process has come to an end.

77 On the basis of those considerations, the General Court upheld the second plea in law put forward by Ms in 't Veld in support of her action for annulment.

Arguments of the parties

78 The second ground of appeal raised by the Council alleges infringement of the second indent of Article 4(2) of Regulation No 1049/2001, and is in two parts.

79 By the first part of this plea, the Council, supported by the Commission, claims that the General Court failed to consider the specific nature of the subject-matter dealt with in the legal opinion contained in document 11897/09 and erroneously applied the 'specific and actual harm' standard.

80 In particular, the General Court had overlooked the specific circumstances of the present case, in particular the fact that the international negotiations on a sensitive matter relating to cooperation in the fight against terrorism were ongoing at the material time, and that the institutions were in disagreement regarding the choice of the legal basis of the proposed agreement. The fact that the General Court failed to take into consideration, for the purposes of the exception in the second indent of Article 4(2) of Regulation No 1049/2001, the subject-matter dealt with in the legal opinion was inconsistent with the case-law of the Court of Justice, according to which the area of activity to which a document relates and its sensitive nature are relevant for the purposes of applying the relative exceptions provided for in Article 4(2) and (3) of that regulation.

81 According to the Council, the General Court's insistence, in paragraph 73 of the judgment under appeal, on the fact that the interests related to the negotiation of the international agreement had already been taken into account 'by the recognition of the wide discretion given to the institutions in applying the exception under the third indent of Article 4(1)(a) of Regulation No 1049/2001' is based on the false premiss that an institution cannot rely on the same factual elements in order to justify the application of different exceptions under Article 4 of that regulation, since that premiss is supported neither by the wording of the regulation itself nor by the relevant case-law, the Council citing in support of its view *Commission v Agrofert Holding*, C-477/10 P, EU:C:2012:394, paragraph 55, and *Commission v Éditions Odile Jacob* EU:C:2012:393, paragraphs 113 to 115.

82 The Council adds in that regard that the General Court committed an error of law by requiring it to establish the existence of specific and actual harm to the protection of legal advice and to submit specific, detailed evidence proving the existence of that harm.

83 In any event, the Council had explained, in the decision at issue, how, in the present case, public access to document 11897/09 was likely to undermine the interest protected by the exception in the second indent of Article 4(2) of Regulation No 1049/2001. In particular, there was a real risk that the European Parliament might seek to use elements in the legal opinion in the political exchanges between the institutions in order to influence the pending negotiations. Moreover, the negotiations had still been pending at the material time, while the Court of Justice had never ruled in favour of disclosure of a legal opinion in such circumstances.

84 Lastly, the Council submits that the General Court's view, in paragraph 101 of the judgment under appeal, that 'the public interest in the transparency of the decision-making process would become meaningless if, as the Commission proposes, it were to be taken into account only in those cases where the decision-making process has come to an end', is inconsistent with the case-law of the Court of Justice, which admits that internal documents including legal opinions benefit from a higher level of protection while the relevant procedure is pending. It is also contrary to the wording of the second subparagraph of Article 4(3) of Regulation No 1049/2001, which provides for a specific exception regarding the protection of internal documents relating to a matter where the decision has not been taken by the institution.

85 According to Ms in 't Veld, supported by the European Parliament, the General Court in fact confined itself to considering whether the fact that the legal advice related to the European Union's international relations should have changed its analysis, and concluded in paragraph 71 of the judgment under appeal that this circumstance was not 'in itself' sufficient to justify a refusal based on the protection of legal advice.

86 In addition, the General Court's statement in paragraph 88 of the judgment under appeal that 'public participation in the procedure relating to the negotiation and the conclusion of an international agreement is necessarily restricted, in view of the legitimate interest in not revealing strategic elements of the negotiations' did not mean that legal advice in relation to the legal basis of those negotiations is 'particularly sensitive'. In fact, the judgment under appeal already allowed the Council to redact information from the opinion containing 'strategic elements of the negotiations' because it allowed the Council to redact 'those passages in the requested document containing the analysis of the specific content of the [proposed] agreement which could have revealed the strategic objectives pursued by the European Union in the negotiations'. The part of the judgment which concerns the exception relating to legal advice therefore discussed only the remainder of document 11897/09. The Council's arguments are therefore unfounded.

87 As to the General Court's alleged error in the application of the 'specific and actual harm' standard, Ms in 't Veld refers back to her arguments in that regard which were set out in the second part of the first plea.

88 Lastly, with regard to the alleged existence of exceptional circumstances in the present case, Ms in 't Veld maintains, in response to the Council's arguments, that, first, as regards the fact that disclosure should be refused on the ground that the legal advice related to an internal discussion in the Council on the commencement of the negotiations, that is not relevant, since all legal advice constitutes internal discussions on the topic on which they are prepared. Secondly, as regards the fact that the advice relates to the 'sensitive matter' of terrorism and terrorist-financing, the Council had not explained why this would be relevant for the purposes of justifying the restriction of access to an opinion concerning the legal basis for concluding an international agreement such as the proposed agreement. To the extent that the opinion describes the content of that agreement and the strategic objectives of the European Union, the General Court had decided that the Council was not obliged to disclose them. As to the other parts of the opinion — that is those concerning the legal basis on which to conclude the proposed agreement — their possibly sensitive nature would not depend on the subject-matter of the agreement itself. Thirdly, as regards the fact that the negotiations on that agreement were still ongoing, the General Court had rightly explained that if citizens were precluded from gaining access to internal documents of the institutions on the ground that the decision-making process had not been concluded, they would never be able to participate in that process. Furthermore, the Council's reference in that context to Article 4(3) of Regulation No 1049/2001 was irrelevant, since that exception had not been invoked in the decision at issue. Fourthly, in the light of the argument that disclosure of the document would increase the chances that the European Parliament 'might seek to use elements in the legal opinion in the political exchanges between the institutions in order to influence the pending negotiations', Ms in 't Veld notes that, as a Member of that Parliament, she had already been able to take cognisance of the content of document 11897/09 even before the decision at issue was adopted, and therefore, if she had wanted to use those elements in the negotiations with the Council, she could already have done so.

89 By the second part of its second plea, the Council, supported by the Commission, claims that the General Court made an error of law in applying, in the context of the present case, case-law of the Court of Justice according to which it is necessary, in the balancing exercise required by the last phrase of Article 4(2) of Regulation No 1049/2001, to take account of the fact that a legal opinion has been issued in the context of a legislative procedure (*Sweden and Turco v Council*, C-39/05 P and C-52/05 P, EU:C:2008:374). The General Court's reasoning was based on the premiss that the same level of transparency should apply to the European Union's decision-making process during the negotiation of an international agreement affecting the European Union's legislative activity as applies to the legislative process of the European Union itself, which would amount

to an unwarranted extension of the judgment in *Sweden and Turco v Council* (EU:C:2008:374) beyond the legislative sphere.

90 In fact, there is an important distinction between cases where the European Union is acting in its legislative capacity and those where it is acting in its executive capacity in conducting international relations. Regulation No 1049/2001 itself recognised the special protection to be accorded to international relations, the confidentiality of which is protected by an exception set out in the third indent of Article 4(1)(a), a provision in respect of which the legislator had not, however, foreseen a balancing of the competing interests.

91 Although issues of democratic accountability and EU citizens' participation do arise in relation to the conclusion of an international agreement and its subsequent implementation by means of EU legislative acts, the Council maintains that that cannot be the case during the preceding negotiation phase, in so far as it is impossible to inform EU citizens at large without simultaneously informing the international partners with whom the European Union is negotiating.

92 Against that argument, Ms in 't Veld notes that the General Court allowed the Council to redact the passages in document 11897/09 discussing the specific content of the proposed agreement which could have revealed the strategic objectives of the European Union; therefore those arguments could not be relevant for the discussion of the legal basis of the agreement, as no 'strategic elements' derived from that.

93 In addition, the fact that the legal advice related to international relations and that Article 4(1) of Regulation No 1049/2001 contains a special 'mandatory' exception protecting the European Union's international relations does not remove the need to take into account the possibility of an overriding public interest in the context of Article 4(2) of that regulation. It is precisely because of the impact of the proposed agreement on the legislative activity of the European Union — that is the impact it has on rules that are binding on all EU citizens — that the need to confer greater legitimacy on the institutions and the increased confidence of citizens in them constitute an overriding interest.

94 Lastly, as regards the point raised by the Council that, in the context of ongoing negotiations, it is impossible to inform citizens at large without simultaneously informing the international partners with whom the European Union is negotiating, Ms in 't Veld states that, while that may be a relevant consideration for the refusal of public access to that part of document 11897/09 concerning the strategic objectives and negotiating tactics, that would not be the case as regards the remainder of that document, which concerns only the question of the legal basis.

Findings of the Court

95 As a preliminary point, it should be borne in mind that, according to the case-law of the Court, as regards the exception relating to legal advice laid down in the second indent of Article 4(2) of Regulation No 1049/2001, the examination to be undertaken by the Council when it is asked to disclose a document must necessarily be carried out in three stages, corresponding to the three criteria in that provision (*Sweden and Turco v Council*, EU:C:2008:374, paragraph 37).

96 Accordingly, the Council must first satisfy itself that the document which it is asked to disclose does indeed relate to legal advice. Secondly, it must examine whether disclosure of the parts of the document in question which have been identified as relating to legal advice would undermine the protection which must be afforded to that advice, in the sense that it would be harmful to an institution's interest in seeking legal advice and receiving frank, objective and comprehensive advice. The risk of that interest being undermined must, in order to be capable of being relied on, be reasonably foreseeable and not purely hypothetical. Thirdly and lastly, if the Council takes the view that disclosure of a document would undermine the protection of legal advice as defined above, it is incumbent on the Council to ascertain whether there is any overriding public interest justifying disclosure despite the fact that its ability to seek legal advice and receive frank, objective and comprehensive advice would thereby be undermined (see, to that effect, *Sweden and Turco v Council*, EU:C:2008:374, paragraphs 38 to 44).

97 By the first part of its second ground of appeal, the Council, in the first place, claims that the General Court failed to take account, when assessing the risk that the disclosure of document 11897/09 would undermine the interest protected by the second indent of Article 4(2) of Regulation No 1049/2001, of the fact that the content of that document was particularly sensitive, since it concerned ongoing international negotiations on a matter relating to cooperation in the fight against terrorism.

98 It is sufficient to note in that regard that the General Court did in fact take that point into consideration in paragraph 71 of the judgment under appeal, but ruled that that fact, in itself, was not sufficient for the application of the relevant exception to the right of access, since the possibility that the public interest in the field of international relations could be undermined is provided for by a separate exception.

99 That interpretation is not wrong in law.

100 First, it is true that an EU institution, when assessing a request for access to documents which it holds, may take into account more than one of the grounds for refusal set out in Article 4 of Regulation No 1049/2001 (see, to that effect, *Commission v Éditions Odile Jacob* EU:C:2012:393, paragraph 113, and *Commission v Agrofert Holding* EU:C:2012:394, paragraph 55).

101 However, by its arguments, the Council is really seeking to justify the application of a single ground for refusal — the protection of the public interest as regards international relations — by invoking to that end two different exceptions set out in Article 4 of Regulation No 1049/2001. Yet even on the assumption that identical facts could justify the application of two different exceptions, where — as in the present case — an applicant has unsuccessfully relied on the exception expressly laid down for the protection of international relations, that applicant cannot then be justified in referring to the same facts in order to establish a presumption that an exception protecting another interest — such as legal advice — should apply, without explaining how the disclosure of those documents could specifically and actually undermine that other interest.

102 Secondly, the General Court itself acknowledged in paragraph 88 of the judgment under appeal that public participation in the procedure relating to the negotiation and the conclusion of an international agreement is necessarily restricted, in view of the legitimate interest in not revealing strategic elements of the negotiations. In that regard, the Council's complaint that the General Court failed to draw the appropriate conclusions from that consideration has no basis in fact, since it is precisely on the basis of that consideration that the General Court, in paragraphs 35 to 39 of the judgment under appeal, considered that access to that part of document 11897/09 which contained the strategic elements of the negotiations could legitimately be refused on the basis of the exception set out in the third indent of Article 4(1)(a) of Regulation No 1049/2001.

103 In the second place, the Council claims that the General Court erroneously applied the 'specific and actual harm' standard.

104 In that regard, it is sufficient to note that, in the light of the case-law mentioned in paragraph 52 of the present judgment, the General Court correctly observed in paragraph 69 of the judgment under appeal that the risk that the disclosure of document 11897/09 could specifically and actually undermine an institution's interest in seeking and receiving frank, objective and comprehensive advice must be reasonably foreseeable and not purely hypothetical.

105 In order to provide the necessary explanations to establish the existence of such a risk, it is necessary, contrary to the Council's and Commission's assertions, to carry out the examination described in paragraph 96 of the present judgment, even if the document to which access is sought does not concern a legislative procedure.

106 Admittedly the Court emphasised, in paragraph 46 of the judgment in *Sweden and Turco v Council* (EU:C:2008:374), that the considerations, whereby it is for the Council to balance the particular interest to be protected by non-disclosure of the document concerned against, inter alia, the public interest in the document being made accessible in the light of the advantages stemming, as noted in recital 2 in the preamble to Regulation No 1049/2001, from increased openness, in that this enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system, are of particular relevance where the Council is acting in its legislative capacity.

107 However, the Court of Justice has also stated that the non-legislative activity of the institutions does not fall outside the scope of Regulation No 1049/2001. Suffice it to note in that respect that Article 2(3) of that regulation states that the latter applies to all documents held by an institution, that is to say, drawn up or received by it and in its possession, in all areas of EU activity (see, to that effect, *Sweden v MyTravel and Commission*, C-506/08 P, EU:C:2011:496, paragraphs 87, 88 and 109).

108 In the third place, the Council claims that, contrary to the criticism levelled at it by the General Court, as set out in the judgment under appeal, it had explained why, in the light of the circumstances of the case, public access to document 11897/09 was likely to undermine the interest protected by the exception in Article 4 of Regulation No 1049/2001.

109 As regards, on the one hand, the Council's arguments as to the existence of a real risk of harm to the international negotiations, in that the European Parliament would seek to use the information contained in the legal opinion in order to influence the ongoing negotiations and to challenge the legality of the Council's decision on the conclusion of the proposed agreement, suffice it to note that that criticism overlooks the fact that the General Court decided that the Council was justified in refusing access to those parts of document 11897/09 that related to the specific content of the proposed agreement and the strategic objectives which the European Union pursued in the negotiations. However the Council did not provide any evidence to establish how the disclosure of the remainder of that document would have given rise to such risks.

110 On the other hand, as regards the Council's argument that the General Court failed to take account of the fact that the negotiations were ongoing at the time of the request for access to document 11897/09, it must be noted that the General Court did in fact explicitly examine that consideration in paragraphs 72 and 73 of the judgment under appeal, and concluded that it had already been taken into account by the recognition of the wide discretion given to the institutions in applying the exception under the third indent of Article 4(1)(a) of Regulation No 1049/2001.

111 In the light of the foregoing considerations, the first part of the second plea raised by the Council in support of its appeal must be rejected.

112 Given that the Council has, in the context of the first part of its second ground of appeal, unsuccessfully challenged the General Court's reasoning in the judgment under appeal — on the basis of which the General Court held, in paragraph 102 of that judgment, that the matters invoked in the decision at issue did not prove that the disclosure of document 11897/09 would have undermined the protection of legal advice —, there is no need to examine the second part of that plea, since the arguments set out are ineffective. That part of the plea relates to the General Court's alternative grounds, according to which the Council had in any event failed to ascertain whether there was an overriding public interest justifying fuller disclosure of document 11897/09 in accordance with the second indent of Article 4(2) of Regulation No 1049/2001.

113 It follows from all of the foregoing considerations that the second plea must also be rejected; accordingly the appeal must be dismissed in its entirety.

Costs

114 Under Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is unfounded, the Court is to make a decision as to the costs.

115 Under Article 138(1) of the Rules of Procedure, which applies to the procedure on an appeal by virtue of Article 184(1) of those rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Article 140(1) of the Rules of Procedure provides that the institutions which have intervened in the proceedings are to bear their own costs.

116 Since the Council has been unsuccessful and Ms in 't Veld has applied for costs, the Council must be ordered to pay the costs. The European Parliament and the Commission shall bear their own costs.

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

1. **Dismisses the appeal;**
2. **Orders the Council of the European Union to pay the costs;**
3. **Orders the European Parliament and the European Commission to bear their own costs.**

Case T-677/13, *Axa Versicherung AG v European Commission*

In Case T-677/13,

Axa Versicherung AG, established in Cologne (Germany), represented by C. Bahr, S. Dethof and A. Malec, lawyers,

applicant,

v

European Commission, represented by F. Clotuche-Duvieusart and H. Krämer, acting as Agents, assisted by R. Van der Hout and A. Köhler, lawyers,

defendant,

supported by

Saint-Gobain Sekurit Deutschland GmbH & Co. KG, established in Aachen (Germany), represented by B. Meyring and E. Venot, lawyers,

intervener,

APPLICATION for annulment of Commission Decision 2012/817 and 2012/3021 Gestdem of 29 October 2013, refusing two requests for access to documents in the file of Case COMP/39.125 (Carglass),

THE GENERAL COURT (Third Chamber),

[...]

gives the following

Judgment

Background to the dispute

1 By decision C(2008) 6815 final of 12 November 2008 relating to a proceeding pursuant to Article [101 TFEU] and Article 53 of the EEA Agreement (COMP/39.125 — Carglass) ('the Carglass decision'), the Commission of the European Communities found that a number of undertakings had participated in a set of agreements or concerted practices in the automotive glass sector and imposed fines on them totalling some EUR 1.383 billion.

2 The undertakings concerned and addressees of the Carglass decision include AGC Flat Glass Europe SA (since renamed AGC Glass Europe SA), AGC Automotive Europe SA and AGC Automotive Germany GmbH (since renamed AGC Glass Germany GmbH) (together 'AGC'), as well as Saint-Gobain Glass France SA, Saint-Gobain Sekurit France SA and Saint-Gobain Sekurit Deutschland GmbH & Co. KG (together 'SG').

3 By letter of 16 February 2012, registered under reference Gestdem 2012/817, the applicant, Axa Versicherung AG, which is active in particular in the motor insurance sector in Germany, submitted to the Commission a request for access to the complete version of the table of contents in the file of Case COMP/39.125, under Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43; 'the first request'). The applicant based this first request on the need to support an action for damages lodged on 31 January 2012 before the Landgericht Düsseldorf (Regional Court of Düsseldorf, Germany) against AGC, in the course of which SG was subsequently joined as a third party. By decision of 7 March 2012, the Commission granted the applicant partial access to the requested document, stating that the other parts of the document could not be

disclosed to it since they were covered by certain exceptions to the right of access to documents laid down in Article 4 of Regulation No 1049/2001 ('the decision of 7 March 2012').

4 By letter of 18 June 2012, registered under the reference Gestdem 2012/3021, the applicant submitted to the Commission a further request for access relating to the complete version of a set of documents included in the file of Case COMP/39.125 ('the second request'). That request was refused by decision of 3 August 2012.

5 By letters of 23 March and 17 August 2012, the applicant submitted to the Commission two confirmatory applications for access to the documents in question. By decision Gestdem 2012/817 and 2012/3021 of 29 October 2013 ('the contested decision'), the Commission granted more extensive access to the table of contents in the file of Case COMP/39.125, which it had not done in its decision of 7 March 2012, and refused the two confirmatory applications as to the remainder.

6 In reaching that conclusion, the Commission found, in the first place, that the documents covered by the applicant's two requests formed part of the file in the proceeding resulting in the Carglass decision, that several actions for annulment had been brought before the General Court against that decision and that those actions were still pending. In addition, it stated that actions for annulment were also pending before the General Court against decisions of its Hearing Officer relating to the publication of a final non-confidential version of the Carglass decision (point 1 of the contested decision).

7 In the second place, the Commission clarified the scope of the applicant's two requests. It essentially found that the first request concerned the complete version of the table of contents in the file of Case COMP/39.125 and, in particular, three categories of information which had not previously been disclosed to the applicant by the decision of 7 March 2012, that is, first, references to correspondence exchanged in the context of that case with undertakings that had submitted an application under the Commission Notice on immunity from fines and reduction of fines in cartel cases of 8 December 2006 (OJ 2006 C 298, p. 17; 'the leniency programme'), since such information could not be inferred from the provisional non-confidential version of the Carglass decision or had not been disclosed in the actions for annulment brought against that decision; secondly, the names of natural persons, third-party undertakings and law firms that had participated in the proceeding; and thirdly, some non-public, potentially sensitive, commercial information (points 2.1 and 2.3 of the contested decision). As regards the second request, the Commission stated that it concerned a large set of documents included in the file of Case COMP/39.125. It also pointed out that, at an earlier stage of the proceeding, the Commission's services had divided the documents at issue into four separate categories, having regard to how the applicant had classified the documents, namely correspondence exchanged with the addressees of the Carglass decision (category A); correspondence exchanged with third parties (category B); documents seized in the course of the inspections carried out during the proceedings (category C); and the internal documents of the Commission (category D) (points 2.2 and 2.3 of the contested decision).

8 In the third place, the Commission noted that a number of reasons had led it to refuse the second request (points 3 and 4 of the contested decision). First of all, it submitted, in essence, that in view of the provisions specific to proceedings pursuant to the competition rules set out in Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101 TFEU] and [102 TFEU] (OJ 2003 L 1, p. 1) and in Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles [101 TFEU] and [102 TFEU] (OJ 2004 L 123, p. 18), the documents included in the file of proceedings pursuant to the competition rules were covered by a general presumption of inaccessibility under Regulation No 1049/2001 (point 4.1 of the contested decision). Next, it stated that in the present case, it should be presumed, in a general way, that all of the documents covered by the second request fell within the exceptions to the right of access to documents laid down in the third indent of Article 4(2) of Regulation No 1049/2001, relating to the protection of the purpose of inspections, investigations and audits, and the first indent of Article 4(2) of that regulation, relating to the protection of commercial interests (point 4.2 of the contested decision). Lastly, the Commission argued that all of the documents in category D also fell within the exception laid down in the second subparagraph of Article 4(3) of that regulation, relating to the protection of opinions for the internal use of the institution concerned (point 4.2 of the contested decision).

9 In the fourth place, the Commission decided to give the applicant additional access to the table of contents in the file of Case COMP/39.125 (points 3 and 5 of the contested decision). It stated that it could disclose information to the applicant from which the identity of the law firms that had represented the undertakings party to the proceeding could be ascertained, since such information was already in the public domain. However, it maintained that the other information to which it had refused the applicant access in its decision of 7 March 2012

could still not be disclosed, be it references to correspondence exchanged with the undertakings that had submitted an application under the leniency programme in the context of the proceeding (point 5.1 of the contested decision), the names of natural persons (point 5.2 of the contested decision) and third-party undertakings (point 5.3 of the contested decision) which were involved in the proceeding, or various items of commercially sensitive information (point 5.4 of the contested decision).

10 In the fifth and last place, the Commission indicated that it could not grant the applicant partial access to the documents in question, aside from the table of contents of the file (point 6 of the contested decision). It also stated that it was unable to identify any overriding public interest within the meaning of Regulation No 1049/2001 which might justify disclosure notwithstanding the applicability of some of the exceptions laid down in Article 4(2) and (3) thereof (point 7 of the contested decision).

Procedure and forms of order sought by the parties

11 By application lodged at the Court Registry on 19 December 2013, the applicant brought the present action.

12 Following delivery of the judgment of the Court of Justice of 27 February 2014 in *Commission v EnBW* (C-365/12 P, ECR, EU:C:2014:112), the General Court asked the parties to submit written observations on the possible effect of that judgment on the present case. The parties complied with that request within the time allowed.

13 By document lodged at the Court Registry on 28 April 2014, Saint-Gobain Sekurit Deutschland GmbH & Co. KG ('SGSD') applied for leave to intervene in the action in support of the form of order sought by the Commission. The parties did not raise any objections in that regard.

14 By order of the President of the Third Chamber of the General Court of 27 June 2014, SGSD was granted leave to intervene.

15 The Court also asked the Commission to produce the full version of the table of contents in the file of Case COMP/39.125, by order of 24 June 2014, and on 25 June 2014 put written questions to the parties. The parties did what was required.

16 After deciding, pursuant to Article 47(1) of the Rules of Procedure of the General Court of 2 May 1991, that a second exchange of pleadings was not necessary, the Court authorised the parties to supplement the documents, following a reasoned request from the applicant for leave to submit more detailed submissions on the judgment in *Commission v EnBW*, cited in paragraph 12 above (EU:C:2014:112).

17 Acting upon a report of the Judge-Rapporteur, the President of the Third Chamber of the General Court decided to open the oral part of the procedure.

18 At the hearing held on 11 February 2015, the parties presented their oral arguments and answered the oral questions put by the Court.

[...]

Law

22 In support of its action, the applicant relies on five pleas in law, alleging, in essence:

– first, infringement of Articles 2 and 4 of Regulation No 1049/2001 in so far as the Commission failed to comply with its obligation to carry out an individual and specific examination of the documents covered by the second request;

– secondly, infringement of the first and third indents of Article 4(2) and of the second subparagraph of Article 4(3) of Regulation No 1049/2001 in so far as the Commission misinterpreted and misapplied the exceptions to the right of access to documents and the notion of overriding public interest set out in those provisions when examining the second request;

- thirdly, infringement of Article 4(6) of Regulation No 1049/2001 in so far as the Commission wrongly refused to grant the applicant partial access to the documents covered by the second request;
- fourthly, infringement of the first and third indents of Article 4(2), of the second subparagraph of Article 4(3) and of Article 4(1)(b) of Regulation No 1049/2001 in so far as the Commission wrongly refused to disclose to the applicant the whole of the document covered by the first request; and
- fifthly, that the statement of reasons was inadequate.

23 In the light of their content, the first, second and third pleas should be considered together, alongside the fifth plea in so far as it concerns the second request (see, by analogy, judgment in *Commission v EnBW*, cited in paragraph 12 above, EU:C:2014:112, paragraphs 33 and 34), followed by the fourth plea and the fifth plea in so far as it concerns the first request.

A – The first, second and third pleas in law, as well as the fifth plea in law in so far as it concerns the second request

24 By its first plea, the applicant contends, in essence, that the Commission erred in law by considering, based on rigid and abstract reasoning that could be invoked to refuse all requests for access to documents relating to a proceeding pursuant to the competition rules, that all of the documents covered by the second request were caught by a general presumption of inaccessibility under Regulation No 1049/2001 and, consequently, by refusing the request without first carrying out an individual and specific examination of the requested documents.

25 By its second plea, the applicant submits, in essence, that the Commission misinterpreted and misapplied the three exceptions to the right of access to documents relied on in the contested decision, which is argued in relation to all of the documents covered by the second request or in relation to the categories of documents artificially identified by the Commission's services (see paragraph 7 above). Neither the exception laid down in the first indent of Article 4(2) of Regulation No 1049/2001 concerning the protection of commercial interests, nor that provided for in the third indent of Article 4(2) thereof concerning the protection of the purpose of inspections, investigations and audits, nor that set out in the second subparagraph of Article 4(3) thereof concerning the protection of the internal opinions of the institutions, can be relied on in this case. In any event, the Commission committed an error of law or of assessment by failing to take account of the overriding public interest in allowing the victims of anticompetitive practices to exercise their right to compensation and, after striking a balance between this overriding public interest and the interest protected by each of the three exceptions in question, to disclose to the applicant the documents in the file of Case COMP/39.125 which it needed so that it could actually exercise its right.

26 By its third plea, the applicant claims that the Commission infringed Article 4(6) of Regulation No 1049/2001 as well as the principle of proportionality by refusing it access to the documents or parts of documents covered by the second request which were not capable of falling within the exceptions on which the Commission relied in the contested decision.

27 By its fifth plea, the applicant asserts, in particular, that the Commission failed to comply with the requirement to state reasons set out in Article 296 TFEU by refusing the second request based on general and abstract reasoning applied to all of the documents or categories of documents in question, instead of taking their specific content into account.

28 In response to the written questions put by the Court following the judgment in *Commission v EnBW*, cited in paragraph 12 above (EU:C:2014:112), and in its reply, the applicant essentially argued that this judgment did not affect the substance of its various pleas.

29 The Commission, supported by SGSD, disputes all of those arguments.

30 It is appropriate to examine, first of all, the different arguments put forward by the applicant challenging the Commission's finding that it should be presumed, in a general way, that the documents covered by the second request fell within some of the exceptions to the right of access to documents established by Regulation No 1049/2001 and, secondly, the arguments objecting to the Commission's finding that there was no overriding public interest in disclosure of the documents.

1. *The general presumption and the exceptions applied by the Commission*

31 Pursuant to Article 15(3) TFEU, all citizens of the European Union and all natural or legal persons residing or having their registered office in a Member State have a right of access to documents of the European Union's institutions.

32 On that basis, Regulation No 1049/2001 is designed to confer on the public as wide a right of access as possible to documents of the European Union's institutions, subject to — as is apparent from, inter alia, the system of exceptions laid down in Article 4 thereof — certain limits based on reasons of public or private interest (judgments of 29 June 2010 in *Commission v Technische Glaswerke Ilmenau*, C-139/07 P, ECR, EU:C:2010:376, paragraph 51, and *Commission v EnBW*, cited in paragraph 12 above, EU:C:2014:112, paragraph 61).

33 In particular, under the first and third indents of Article 4(2) of Regulation No 1049/2001, the institutions are to refuse access to a document where its disclosure would undermine the protection of the commercial interests of a specific natural or legal person or the purpose of inspections, investigations and audits, unless there is an overriding public interest in such disclosure.

34 That system of exceptions is based on a balancing of the different interests at stake, that is to say the interests which would be favoured by disclosure of the requested document or documents and those which would be jeopardised by such disclosure (judgments of 14 November 2013 in *LPN and Finland v Commission*, C-514/11 P and C-605/11 P, ECR, EU:C:2013:738, paragraph 42, and *Commission v EnBW*, cited in paragraph 12 above, EU:C:2014:112, paragraph 63).

35 Since such exceptions derogate from the principle of the widest possible public access to documents of the European Union's institutions, they must be interpreted and applied strictly (judgments of 17 October 2013 in *Council v Access Info Europe*, C-280/11 P, ECR, EU:C:2013:671, paragraph 30, and 3 July 2014 *Council v in't Veld*, C-350/12 P, ECR, EU:C:2014:2039, paragraph 48).

36 Consequently, in order to justify a refusal to grant access to a document disclosure of which has been requested, it is not sufficient, in principle, for the requested document to be covered by an activity mentioned in Article 4(2) of Regulation No 1049/2001. As a rule, the institution to which the request is addressed must also provide explanations as to how access to that document could specifically and actually undermine the interest protected by the exception or exceptions relied on (judgments of 1 July 2008 in *Sweden and Turco v Council*, C-39/05 P and C-52/05 P, ECR, EU:C:2008:374, paragraph 49, and *Commission v EnBW*, cited in paragraph 12 above, EU:C:2014:112, paragraph 64). Moreover, the risk of the interest being undermined must be reasonably foreseeable and must not be purely hypothetical (judgments in *Sweden and Turco v Council*, paragraph 43, and *Council v Access Info Europe*, cited in paragraph 35 above, EU:C:2013:671, paragraph 31).

37 However, it is open to the institution concerned to base its decisions on general presumptions which apply to certain categories of documents, as considerations of a similar kind are likely to apply to requests relating to documents of the same nature (judgments in *Commission v Technische Glaswerke Ilmenau*, cited in paragraph 32 above, EU:C:2010:376, paragraph 54, and *Commission v EnBW*, cited in paragraph 12 above, EU:C:2014:112, paragraph 65).

38 Thus, where the request relates to a set of documents of a given kind, it is open to the institution concerned to base its decision on a general presumption that their disclosure would, in principle, undermine the protection of one or other of the interests listed in Article 4 of Regulation No 1049/2001, enabling it to deal with a global request accordingly (judgments in *LPN and Finland v Commission*, cited in paragraph 34 above, EU:C:2013:738, paragraphs 47 and 48, and *Commission v EnBW*, cited in paragraph 12 above, EU:C:2014:112, paragraphs 67 and 68).

39 In particular, in the case of requests relating to a set of documents included in the file of a proceeding pursuant to the competition rules, the EU judiciary has held, first of all, that the Commission was entitled to presume, without carrying out an individual and specific examination of each of those documents, that their disclosure would, in principle, undermine the protection of the purpose of inspections and investigations as well as the protection of the commercial interests of the undertakings party to the proceeding, which are closely linked in such a context (see, to that effect, judgments in *Commission v EnBW*, cited in paragraph 12 above,

EU:C:2014:112, paragraphs 79 to 93, and 13 September 2013 *Netherlands v Commission*, T-380/08, ECR, EU:T:2013:480, paragraphs 30 to 42).

40 In the light of the reasons underpinning this case-law (see paragraphs 37 and 38 above), the application of a presumption of this kind is not restricted to requests seeking access to ‘all’ of the documents included in the file of a proceeding pursuant to the competition rules, or even to requests relating to a ‘general and undifferentiated’ set of documents within such a proceeding, as the applicant claimed in its reply. On the contrary, as the Commission and SGSD correctly pointed out in the rejoinder and the statement in intervention, this presumption can also be applied to requests relating to a more specific set of documents in the file, identified by reference to their common characteristics or the fact they fall within one or more general categories (see, to that effect, judgment of 28 June 2012 in *Commission v Éditions Odile Jacob*, C-404/10 P, ECR, EU:C:2012:393, paragraphs 10 and 123), as the applicant claims to have done in this case. All the same, the identification carried out by the applicant is very relative, since the interested party simply divided all of the documents referred to in the table of contents of the file into three categories, depending on whether it considered them to be ‘relevant’, ‘possibly relevant’ or ‘irrelevant’, and appended the numbers ‘1’, ‘2’ or ‘3’ beside the appropriate references according to that categorisation.

41 The EU judicature has also held that the Commission is entitled to apply such a general presumption provided that the proceeding concerned cannot be regarded as closed, either because it has not yet resulted in the adoption of a decision, or because actions for annulment were brought against that decision and are still pending when the Commission receives the request for access to the documents included in the corresponding file and takes a decision thereon (see, to that effect, judgments in *Commission v EnBW*, cited in paragraph 12 above, EU:C:2014:112, paragraphs 70, 98 and 99, and *Netherlands v Commission*, cited in paragraph 39 above, EU:T:2013:480, paragraph 43).

42 Lastly, the Court of Justice has found that the possibility for the Commission to apply a general presumption in order to deal with a request for access relating to a set of documents means that the documents in question fall outside the scope of the obligation to disclose their content, in full or even in part (see, to that effect, judgments in *Commission v EnBW*, cited in paragraph 12 above, EU:C:2014:112, paragraph 134, and 7 October 2014 *Schenker v Commission*, T-534/11, ECR, EU:T:2014:854, paragraph 108).

43 In the present case, first and foremost, it is common ground that the second request related to a set of documents in the file of Case COMP/39.125. In response to the written questions put by the Court, the applicant made clear that this request related to two categories of documents, namely 2 425 documents it considered to be ‘relevant’ as well as 1 523 documents it considered to be ‘possibly relevant’ for the purpose of its action for damages against AGC and SG, thus totalling 3 948 documents. The Commission stated, without being contradicted, that this represented approximately 90% of the documents in the file at issue.

44 In addition, all of these 3 948 documents clearly related to an inspection and investigation within the meaning of the third indent of Article 4(2) of Regulation No 1049/2001. They were drawn up or collected by the Commission during the investigation, which included inspections, conducted in Case COMP/39.125 in order to gather information and evidence so that the Commission could determine whether or not the EU rules on competition had been infringed. Furthermore, in the light of the objective of that proceeding, these documents were likely to contain commercially sensitive information relating to the strategy and activities of the parties, as well as their business dealings with third parties (see, to that effect, judgments in *Commission v EnBW*, cited in paragraph 12 above, EU:C:2014:112, paragraph 79, and *Netherlands v Commission*, cited in paragraph 39 above, EU:T:2013:480, paragraph 34).

45 Lastly, it is not disputed that, both when the applicant submitted the second request to the Commission and when the Commission took a decision thereon, there were several actions for annulment of the Carglass decision pending before the General Court. These actions subsequently gave rise to judgments of 27 March 2014 in *Saint-Gobain Glass France and Others v Commission* (T-56/09 and T-73/09, ECR, EU:T:2014:160); 10 October 2014 *Soliver v Commission* (T-68/09, ECR, EU:T:2014:867); and 17 December 2014 *Pilkington Group and Others v Commission* (T-72/09, EU:T:2014:1094).

46 In view of this information, mentioned in points 1 and 2.2 to 2.3 of the contested decision, the Commission was able to find, without failing to comply with its obligation to state reasons and without committing an error of law or of assessment, that the 3 948 documents to which the applicant’s second request related were all covered by a general presumption that their disclosure would, in principle, undermine the exception relating to the

protection of the purpose of inspections and investigations laid down in the third indent of Article 4(2) of Regulation No 1049/2001.

47 Having regard to the case-law mentioned in paragraph 42 above, the Commission also found, without causing the contested decision to be vitiated by an inadequate statement of reasons and without committing an error of law or of appreciation, that it could not grant even partial access to the 3 948 documents in question.

48 None of the other arguments put forward by the applicant in the context of these pleas is capable of calling that finding into question.

49 In particular, first of all, the applicant has no grounds for taking issue with the Commission for having drawn up artificial categories of documents and having applied abstract and interchangeable reasoning to them.

50 It is true that, when describing the scope of the second request, the Commission stated that its services had found, at an earlier and provisional stage of dealing with the request, that the 3 948 documents concerned fell within four different categories, based on the applicants' own classification (point 2.2 of the contested decision).

51 However, when it subsequently assessed that request, the Commission did not reproduce the categories previously identified by its services, but instead considered, in essence, that the general presumption which it had decided to rely on covered all of the categories of documents to which the request related, all of the documents in each of those categories and each of those documents in their entirety.

52 In any event, it made no difference whether the 3 948 documents in question fell within one or other of the categories drawn up by the Commission's services, since the case-law allowed that institution to base itself, as it did in the contested decision, on a single general presumption applicable to all of the documents, regarded for the purpose of applying the presumption as falling within a single category (see, to that effect and by analogy, judgments in *Commission v Technische Glaswerke Ilmenau*, cited in paragraph 32 above, EU:C:2010:376, paragraph 61, and *LPN and Finland v Commission*, cited in paragraph 34 above, EU:C:2013:738, paragraph 64), without first carrying out an individual and specific examination of each document.

53 Secondly, the applicant's complaints relating to the specific reasoning that the Commission dedicated to the risks associated with the possible disclosure of the documents collected under the leniency programme (sixth subparagraph of point 4.1 and eighth to tenth subparagraphs of point 4.2 of the contested decision) are ineffective in the context of these pleas.

54 In order to deal with the second request (relating to a set of 3 948 documents included in the file of Case COMP/39.125), and without prejudice to the handling of the first request (relating only to the table of contents in the file), the Commission was able to regard those documents as being covered by the general presumption referred to in paragraphs 46 and 52 above, irrespective of any specific considerations relating to the nature or content of the documents collected under the leniency programme (judgment in *Commission v EnBW*, cited in paragraph 12 above, EU:C:2014:112, paragraph 97).

55 Thirdly, the arguments put forward by the applicant to challenge the Commission's basing its refusal to grant the second request cumulatively on the need not to undermine the protection of the commercial interests of third parties (twelfth subparagraph of point 4.2 of the contested decision) and, as regards its internal documents, on the need not to undermine the protection of opinions for internal use (eleventh and twelfth subparagraphs of point 4.2 of the contested decision) are ineffective.

56 It is true that an EU institution may, when assessing a request for access to documents held by it, take into account more than one of the grounds for refusal set out in Article 4 of Regulation No 1049/2001 (see, to that effect, judgment in *Commission v Éditions Odile Jacob*, cited in paragraph 40 above, EU:C:2012:393, paragraphs 113 and 114), as the Commission did in the present case.

57 However, possible errors of law or of assessment committed by the Commission when applying the exceptions relating to the protection of commercial interests as well as the protection of opinions for the Commission's internal use have no bearing in the present case on the lawfulness of the contested decision, since that decision does not seem to be unlawful in so far as it presumed, in a general way, that all of the documents in

question were fully covered by the exception relating to the protection of the purpose of inspections and investigations, as held in paragraph 46 above.

58 Fourthly, the new arguments put forward in the reply, based on the Commission's proposal COM (2013) 404 final of 11 June 2013 for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, are irrelevant, on the assumption that they are admissible, which the Commission disputes. Irrespective of any considerations relating to the status and scope of this proposal when the Commission adopted the contested decision, the decision clearly states that the provisions set out in the proposal are without prejudice to the rules on the right of access to documents provided for in Regulation No 1049/2001, as the Commission correctly points out.

2. *The rebuttal of the general presumption and the overriding public interest invoked by the applicant*

59 The application of a general presumption does not rule out the possibility of demonstrating that a specific document disclosure of which has been requested is not covered by that presumption, or that there is an overriding public interest in disclosure of the document in question by virtue of Article 4(2) of Regulation No 1049/2001 (judgments in *Commission v Technische Glaswerke Ilmenau*, cited in paragraph 32 above, EU:C:2010:376, paragraph 62, and *Commission v EnBW*, cited in paragraph 12 above, EU:C:2014:112, paragraph 100). To that end, it is for the applicant to rely on specific circumstances to show that disclosure of the document concerned is justified (judgment in *LPN and Finland v Commission*, cited in paragraph 34 above, EU:C:2013:738, paragraph 94).

60 However, the requirement to ascertain whether the general presumption in question actually applies cannot be interpreted as meaning that the Commission has to examine individually all the documents to which access is requested. Such a requirement would deprive that general presumption of its proper effect, which is to permit the Commission to reply to a global request in an equally global manner (judgments in *LPN and Finland v Commission*, cited in paragraph 34 above, EU:C:2013:738, paragraph 68, and *Commission v EnBW*, cited in paragraph 12 above, EU:C:2014:112, paragraph 101).

61 In the present case, it should be noted, in the first place, that the applicant did not argue in its action, nor does it claim to have argued before the Commission, that a specific individual document, within the set of documents to which the second request related, was not covered by the general presumption described in paragraphs 46 and 52 above.

62 After essentially disputing the very principle of applying such a presumption in its application, in its reply the applicant merely contended that the presumption should be regarded as rebutted in respect of all of the documents in question for two reasons. First, the applicant asserted that it had not merely contemplated an action for damages, but had already brought such an action before the Landgericht Düsseldorf. Secondly, it submitted that the requested documents dated from more than five years before and were therefore too old to warrant protection.

63 The first of these claims is not decisive, as SGSD points out. Although the judgment in *Commission v EnBW*, cited in paragraph 12 above (EU:C:2014:112, paragraphs 103 and 106), was delivered in a case in which the person requesting access to documents intended to bring an action for damages but had not yet done so, while the applicant in this case has already brought its action, this fact in itself does not mean that the general presumption invoked by the Commission does not apply to one or other of the documents in question in this case. As regards the second claim, which is very general in nature, it should be recalled that Article 4(7) of Regulation No 1049/2001 provides that the exceptions laid down in that regulation may apply for a period of thirty years and possibly beyond that period if necessary. The fact that the documents requested by the applicant are more than five years old is not, in itself, capable of rebutting the general presumption invoked by the Commission either (see, to that effect, judgment in *Commission v Éditions Odile Jacob*, cited in paragraph 40 above, EU:C:2012:393, paragraphs 124 and 125).

64 In the absence of other evidence in the action capable of rebutting the general presumption on which the contested decision is based, the applicant cannot claim that the Commission ought to have carried out a specific and individual examination of the documents it requested (see, to that effect, judgment in *Commission v EnBW*, cited in paragraph 12 above, EU:C:2014:112, paragraph 128).

65 In the second place, the applicant none the less asserts that the Commission committed an error of law or of assessment by failing to take account of the overriding public interest in allowing the victims of anticompetitive practices to exercise their right to compensation and, after the specific balancing of interests to be carried out in the present case between this overriding public interest and the interest protected by each of the exceptions relied on in the contested decision, to disclose to the applicant the documents in the file of Case COMP/39.125 which it needed so that it could actually exercise its right. In its reply, the applicant also states, in essence, that it did everything in its power to demonstrate the need to secure the 3 948 documents identified in the second request and, at the very least, the 2 425 documents among them deemed to be ‘relevant’, in the light of the information in its possession and, in particular, the non-confidential version of the table of contents which the Commission disclosed in response to the first request.

66 It should be observed that all persons are entitled to claim compensation for the loss caused to them by a breach of the EU rules on competition. Such a right strengthens the working of those rules, since it discourages cartels and other, often covert, practices capable of restricting or distorting competition, thereby making a significant contribution to the maintenance of effective competition in the European Union (judgments of 20 September 2001 in *Courage and Crehan*, C-453/99, ECR, EU:C:2001:465, paragraphs 26 and 27, and *Commission v EnBW*, cited in paragraph 12 above, EU:C:2014:112, paragraph 104).

67 Nevertheless, such general considerations are not, as such, capable of prevailing over the reasons justifying a refusal to grant access to the documents in the file of a proceeding pursuant to the competition rules based on the fact that the documents are covered, in their entirety, by a general presumption that their disclosure would in principle undermine, in particular, the protection of the purpose of inspections and investigations (judgment in *Commission v EnBW*, cited in paragraph 12 above, EU:C:2014:112, paragraph 105).

68 In order to ensure the effective implementation of the right to compensation, there is no need for every document in the file of such a proceeding to be disclosed to the person requesting access to it under Regulation No 1049/2001 with a view to bringing an action for damages, as it is highly unlikely that the action will need to be based on all the evidence in the file relating to that proceeding (judgment in *Commission v EnBW*, cited in paragraph 12 above, EU:C:2014:112, paragraph 106; also see, to that effect, judgment of 6 June 2013 in *Donau Chemie and Others*, C-536/11, ECR, EU:C:2013:366, paragraph 33). The same is true where the person requesting access to the documents in the file has already brought an action for damages, since it remains highly unlikely that the action will need to be based on the entire file, as the Commission pointed out in its rejoinder.

69 It follows that any person seeking compensation for the loss he considers was caused to him by a breach of the EU rules on competition must establish that it is necessary for him to be granted access to documents in the Commission’s file, so that the Commission can weigh up, on a case-by-case basis, the respective interests in favour of disclosure of such documents and in favour of the protection of those documents, taking into account all the relevant factors in the case (judgments in *Commission v EnBW*, cited in paragraph 12 above, EU:C:2014:112, paragraph 107, and *Schenker v Commission*, cited in paragraph 42 above, EU:T:2014:854, paragraph 95).

70 Otherwise, the interest in obtaining compensation for the loss suffered as a result of a breach of the EU rules on competition cannot constitute an overriding public interest within the meaning of Article 4(2) of Regulation No 1049/2001 (judgments in *Commission v EnBW*, cited in paragraph 12 above, EU:C:2014:112, paragraph 108, and *Schenker v Commission*, cited in paragraph 42 above, EU:T:2014:854, paragraph 96).

71 In this case, as the applicant pointed out particularly in its reply and answers to the written questions of the Court, in its second request it identified 3 948 ‘relevant’ or ‘possibly relevant’ documents in the context of its action before the Landgericht Düsseldorf, appending the numbers ‘1’ or ‘2’ respectively beside the references to these documents included in the non-confidential version of the table of contents of the file which the Commission had disclosed to it in response to the first request. Moreover, it made specific reference in the introduction to the request to eight ‘relevant’ or ‘possibly relevant’ documents among the 3 948 documents covered by the second request.

72 However, in successive documents, it merely made general claims that these documents ‘were of interest to it’ and that it ‘had to inspect them to be able to substantiate [its] claim for damages’ since they ‘clearly contain[ed] information on the agreements and price increases agreed upon by the participants in the cartel [which was found to exist and was subject to penalties in the Carglass decision]’ and ‘it [was] necessary [for it] to have sight of that information to be able to prove and quantify the actual loss it [had] suffered’.

73 By contrast, as the Commission correctly points out, the applicant did not explain why it needed these documents, even if only by setting out the specific factual or legal arguments which securing those documents might help it substantiate before the national court required to rule on its claims.

74 None of the other arguments put forward by the applicant is capable of calling that assessment into question.

75 The contention that it was impossible for the applicant to be any more specific than it had already been, given that the Commission had granted it only partial access to the table of contents of the file at the outset, is unconvincing in this case. Except for references to the ‘leniency documents’ produced by some of the parties to the proceeding and to the internal documents of the Commission, which were deleted en bloc, the Commission merely removed from the references to other documents in the file included in the table of contents specific information which, in its opinion, constituted personal data or commercially sensitive information. The Court considers that, in view of this targeted selection, the non-confidential version of the references to the documents in the file other than the ‘leniency documents’ and the internal documents of the Commission which were in the applicant’s possession when it submitted the second request permitted the interested party to put forward more specific and detailed reasons than those it had given to the Commission (see paragraphs 40 and 71 to 72 above) and, in this case, the reasons why it thought that one or other of the documents was necessary for the exercise of its right to compensation, for example by setting out, as indicated above, the specific factual or legal arguments which securing those documents might help it substantiate before the national court required to rule on its claims.

76 Furthermore, it is indeed apparent from the contested decision that, ‘in [its] confirmatory application [, the applicant] not[ed] ... that there [were] no appropriate rules under German civil procedure law permitting the documents [in question] to be requested “*inter partes*”’ (third subparagraph of point 7 of the contested decision). However, this claim, which was last repeated at the hearing, was never expanded on, far less proven, by the applicant in the course of its action. The Court of Justice has already held that the need to access a set of documents included in the file of a proceeding pursuant to the competition rules could not be regarded as established where the requesting party stated that it was utterly dependent on the documents but did not demonstrate, at the very least, that it had no other way of obtaining that evidence (judgment in *Commission v EnBW*, cited in paragraph 12 above, EU:C:2014:112, paragraph 132; also see, to that effect, judgment in *Donau Chemie and Others*, cited in paragraph 68 above, EU:C:2013:366, paragraphs 32 and 44).

77 In those circumstances, it cannot be considered, in this instance, that the Commission committed an error of law or of assessment by finding that, first, ‘on balance, the interest in the effective implementation of the competition rules was, in the present case, better served by maintaining the confidentiality of the documents in question’; secondly, ‘there [was] no overriding public interest in their disclosure within the meaning of Regulation No 1049/2001’; and thirdly, ‘in the present case, the prevailing interest [was] the protection of the purpose of investigations, as set out in the third indent of Article 4(2)’ of that regulation (sixth and seventh subparagraphs of point 7 of the contested decision).

78 Having regard to all of the preceding considerations, the present pleas in law must be dismissed in their entirety.

B – The fourth plea in law and the fifth plea in law in so far as it concerns the applicant’s first request

79 By its fourth plea in law, the applicant contends, in essence, that the Commission wrongly refused to give it access to the complete version of the only document covered by the first request, namely the table of contents in the file of Case COMP/39.125.

80 In the first place, it claims that the very general and, in part, speculative explanations furnished by the Commission in the contested decision and in the decision of 7 March 2012 as regards the need not to jeopardise the effectiveness of its leniency programme and not to undermine the protection of the commercial interests of undertakings that have submitted an application under the programme in the context of Case COMP/39.125, as well as the protection of the purpose of inspections and investigations, do not, in themselves, justify a complete and absolute refusal to grant the applicant access to the references to the ‘leniency documents’ included in the table of contents.

81 In the second place, the applicant argues that the Commission wrongly refused access to information relating to the identity of natural persons included in the table of contents by invoking, in the abstract, the need not to

undermine the protection of personal data, instead of explaining, individually and specifically, the reasons preventing each item of information in question from being disclosed. In any event, the applicant contends that it sufficiently demonstrated why it needed access to this information in order to exercise its right to compensation, in accordance with the public interest in victims of anticompetitive practices being able to secure compensation for their loss.

82 In the third place, the Commission was wrong to refuse it access, without any individual and specific examination, to the names of third-party undertakings ‘operating in the lift and escalator sector’ mentioned in the table of contents, even though such a reference was clearly irrelevant and disclosure of that information was unlikely to undermine the commercial interests of the persons involved.

83 In the fourth and last place, the Commission was wrong to refuse it access, on general and abstract grounds, to information relating to vehicle models, the names of car manufacturers and other commercially sensitive information included in the table of contents, even though such information was absolutely essential to enable it to exercise its right to compensation and even though this interest should prevail, on balance, over the other interests at stake.

84 By its fifth plea, the applicant asserts, in essence, that the Commission failed to comply with the requirement to state reasons set out in Article 296 TFEU by refusing the first request based on general reasoning that failed to take account of the specific content of the document in question, as demonstrated by the statement of reasons used to refuse disclosure of the names of third-party undertakings included in the table of contents.

85 The Commission, supported by SGSD, disputes all of those arguments.

86 It is appropriate to examine, first of all, the applicant’s arguments relating to the different types of information included in the table of contents to which the Commission refused to give the applicant access, namely, first, references to the ‘leniency documents’ (point 5.1 of the contested decision); secondly, the names of natural persons (point 5.2 of the contested decision); thirdly, the names of third-party undertakings (point 5.3 of the contested decision); and fourthly, other commercially sensitive information (point 5.4 of the contested decision). By contrast, it is not necessary to review the merits of the contested decision in so far as it refused to disclose to the applicant the references to internal documents of the Commission since, notwithstanding the heading of its fourth plea (see paragraph 22 above), the applicant does not rely on any specific arguments in that regard. The arguments relating to the existence of an overriding public interest, which the applicant expressly relies on only in relation to some of the types of information in question, will be examined thereafter.

1. *The general presumptions and the exceptions applied by the Commission*

a) *The refusal to grant access to references to the ‘leniency documents’*

87 In point 5.1 of the contested decision, the Commission stated that ‘[i]t is not possible, at this stage, to disclose the description of the leniency documents’ included in the table of contents ‘for the same reasons as those set forth in point 4.2 above, since the references to those documents provide information on their content which has to be treated as confidential’. In doing so, it referred to the reasoning which previously led it to refuse the applicant access to the set of documents to which the second request related, on the ground that this set of documents was covered by a general presumption that its disclosure would undermine the protection of the commercial interests of third parties and the purpose of inspections and investigations (see paragraph 8 above).

88 In so far as the Commission submits, in its defence, that ‘leaving aside the applicability of [this] general presumption, [it] also explained in detail, in [the] decision [...] of 7 March 2012 and in [the contested decision], that the exceptions laid down in the first and third indents of Article 4(2) of Regulation No 1049/2001 applied’, it should be noted from the outset that this assertion is only partially correct.

89 No such examination is in any way apparent from the contested decision. On the contrary, after considering the case-law of the Court of Justice acknowledging that it was open to the Commission to apply general presumptions in order to deal with requests relating to sets of documents contained in merger or State aid files (first to fourth subparagraphs of point 4.2 of the contested decision), the Commission merely explained why, in its opinion, that case-law also applied to files involving anticompetitive practices (fifth to twelfth subparagraphs of point 4.2 of the contested decision) and, in particular, to ‘leniency documents’ contained therein (eighth to tenth

subparagraphs of point 4.2 of the contested decision) and, moreover, was capable of being applied to references to such documents included in the table of contents of those files (point 5.1 of the contested decision).

90 In those circumstances, the reasons for the decision of 7 March 2012, in which the Commission's services explained in more detail why, in their opinion and at that provisional stage of dealing with the first request, such references should not be disclosed, may only be taken into account for the purpose of assessing the lawfulness of the contested decision in so far as they clarify the reasoning actually relied on, in the end, by that institution (see, to that effect, judgment of 6 April 2000 in *Kuijjer v Council*, T-188/98, ECR, EU:T:2000:101, paragraph 44), reasoning which is based, as the Court has just pointed out, on a general presumption.

91 In view of the arguments put forward by the applicant to challenge this reasoning, it is necessary, in the first place, to decide whether the Commission was fully entitled to refuse access to the information in question by applying a general presumption, as it did in the contested decision. Only if the answer is in the affirmative will it be necessary, in the second place, to consider whether Commission was right to apply the general presumption on which it relied in this case.

The merits of applying a general presumption

92 Where an institution is asked to disclose a document, it must assess in each individual case whether that document falls within the exceptions, set out in Article 4 of Regulation No 1049/2001, to the right of public access to documents of the institutions (judgment in *Sweden and Turco v Council*, cited in paragraph 36 above, EU:C:2008:374, paragraph 35).

93 Since those exceptions must be interpreted and applied strictly, the institution to which the request is addressed must, in order to justify a refusal to grant access to the document in question, provide explanations as to how access to that document could specifically and actually undermine the interest protected by one or other of the exceptions laid down in Article 4 of Regulation No 1049/2001. Moreover, the risk of the interest being undermined must be reasonably foreseeable and must not be purely hypothetical (see the case-law cited in paragraphs 35 and 36 above).

94 In the course of such an exercise, it is open to the institution concerned to base its decision on a general presumption, even though the request at issue covers only a single document. However, in that kind of situation, where the application of a general presumption is not intended to make it possible to deal with a global request in global manner, the Court of Justice has held that it is a matter for the institution seeking to apply the presumption to establish whether the general considerations normally applicable to a particular type of document are in fact applicable to the document which it has been asked to disclose (judgment in *Sweden and Turco v Council*, cited in paragraph 36 above, EU:C:2008:374, paragraphs 50 and 57; also see, to that effect, judgment in *Council v Access Info Europe*, cited in paragraph 35 above, EU:C:2013:671, paragraphs 72 and 73).

95 In the present case, it follows that, in contrast to what the applicant submits in its application, it was open to the Commission to rely on a general presumption in order to decide, in point 5.1 of the contested decision, to refuse the first request not in its entirety, but in so far as it related to a category of information which, in its opinion, fell within the exceptions listed in the first and third indents of Article 4(2) of Regulation No 1049/2001.

96 However, the Commission is not entitled to claim, as it does in its defence, that 'the table of contents forms part of the file in the case [COMP/39.125] and is therefore covered by the general presumption' of 'inaccessibility' recognised by the judgment in *Commission v EnBW*, cited in paragraph 12 above (EU:C:2014:112).

97 The Court of Justice did not hold in that judgment that 'the entire' file of a proceeding pursuant to the competition rules is covered by a 'general presumption of inaccessibility', as the Commission itself states in its response to the applicant's first group of pleas (see paragraph 40 above), but only that an institution to which a request is addressed relating to 'a set' of documents included in such a file may apply a general presumption in order to deal with that global request appropriately. Furthermore, the case-law of the Court of Justice makes it clear that the institutions of the European Union were recognised as having the right to apply such a general presumption to enable them to deal with requests covering not just one document, but a set of documents (judgment in *LPN and Finland v Commission*, cited in paragraph 34 above, EU:C:2013:738, paragraphs 47 and 48).

98 The applicant's first request covered not a set of documents, but a single document. In addition, the Commission does not claim that this request was the result of action taken to split artificially a request covering a set of documents into as many individual requests. Moreover, it would have no grounds for doing so in the present case (see paragraphs 3 to 5 above).

The merits of applying the general presumption invoked in the present case

99 As the Court has just pointed out (see paragraph 94 above), since the Commission chose to apply a general presumption in order to refuse the applicant's first request in so far as it related to references to the 'leniency documents' included in the only document covered by the request, it was for the Commission to base its decision on general considerations capable of being regarded as normally applicable to that section of the table of contents of the file of a proceeding pursuant to the competition rules and to check that those considerations were in fact applicable in this instance.

100 This requirement does not necessarily mean that the Commission had to carry out a specific assessment of the document in question (judgment in *Council v Access Info Europe*, cited in paragraph 35 above, EU:C:2013:671, paragraph 73). Moreover, the obligation imposed on the Commission to check that the general presumption on which it intends to rely in order to deal with a request relating to a set of documents actually applies cannot be interpreted as meaning that it must examine individually all of the documents to which access is requested (see paragraph 60 above).

101 However, it was still necessary for the Commission to substantiate its refusal to give access to the requisite factual and legal standard, on the basis of a reasonably foreseeable risk of specific and actual harm to one or more of the interests protected by the exceptions laid down in Article 4(2) of Regulation No 1049/2001 (see, to that effect, judgments in *Sweden and Turco v Council*, cited in paragraph 36 above, EU:C:2008:374, paragraphs 49 and 50, and *Council v Access Info Europe*, cited in paragraph 35 above, EU:C:2013:671, paragraphs 31, 36 to 38, 54 and 74).

102 In the present case, it is appropriate, in the first place, to make five observations in this respect.

103 First, it is common ground that, in the context of the first request, as reiterated in the confirmatory application of 23 March 2012, the applicant did not seek access to the 'leniency documents' included in the file of Case COMP/39.125 in the strict sense. It only sought disclosure of the references to these documents which appeared in the complete version of the table of contents of the file, but not in the non-confidential version sent by the Commission on 7 March 2012 (see paragraphs 3, 5 and 7 above). It is apparent from reviewing the complete version of this document, which was sent in response to the measure of inquiry ordered by the Court (see paragraph 15 above), that there are essentially two types of references. The first type covers the dates on which the undertakings that submitted an application under the leniency programme sent the 'leniency documents' at issue to the Commission, while the second type covers the respective headings of the documents.

104 Secondly, the Commission refused to disclose not only all of these references as a whole, but also each reference in its entirety. The way in which it dealt with this category of references therefore differs from its handling of the references to other types of documents included in the table of contents which form the subject-matter of these pleas (see paragraph 86 above). In respect of those references, the Commission simply removed, in a targeted manner, specific information on the ground that, in its opinion, such information constituted personal data (such as the names of natural persons) or commercially sensitive information (such as the names of third-party undertakings or references to vehicle models), granting access to the remainder of the references (see paragraph 75 above).

105 Thirdly, it is apparent from reading point 5.1 of the contested decision in conjunction with point 4.2 to which it refers that the complete removal of references to the 'leniency documents' from the non-confidential version of the table of contents of the file in Case COMP/39.125, which was sent to the applicant, is driven by general considerations according to which disclosure of such references 'could jeopardise the effectiveness' of the Commission's leniency programme. In the contested decision, the Commission states that (i) undertakings which have submitted an application under its leniency programme expect the information they provide to the Commission in connection with their application to be treated as confidential; (ii) these expectations are worthy of protection; and, (iii) the effectiveness of leniency programmes, which are useful tools to detect and prevent

infringements of the competition rules, could be jeopardised if the information at issue was made public (eighth to tenth subparagraphs of point 4.2 of the contested decision).

106 Fourthly, the Commission clarifies the meaning and extent of these general considerations in its defence, referring back to the earlier analysis conducted by its services in the decision of 7 March 2012. It explains that (i) ‘because of the description of the correspondence from the leniency applicants, disclosure of the table of contents would automatically reveal the nature and extent of [their] involvement’; (ii) ‘some keywords in the table of contents already disclose the identity and cooperation of natural persons both before and during the administrative procedure’; (iii) ‘the description and dates of some of the documents mentioned in the table of contents already gives an indication of their content, particularly information concerning the commercial dealings of the leniency applicants, pricing, cost structures, market shares or other commercially sensitive information’; and (iv) ‘the interest ... of the leniency applicants in protecting the confidentiality of all information to their detriment’ is ‘particularly worthy of protection’. The Commission concludes that ‘disclosure of such information is contrary to the protection of the commercial interests of the leniency applicants’ and that the ‘serious harm’ that such disclosure is likely to ‘cause’ to those interests might ‘deter them from cooperating in future investigations’, even though ‘the level of detail in the table of contents [may not] obviously be the same as in the [leniency] documents’ in the strict sense.

107 Fifthly, it is apparent from the structure of point 4.2 of the contested decision as a whole that these general considerations led the Commission to presume, in a general way, that disclosing references to the ‘leniency documents’ included in the table of contents requested by the applicant would, in the long run, undermine both the protection of the purpose of its inspections and investigations and the protection of the commercial interests of the parties to the proceeding.

108 In order to contest the merits of these grounds, the applicant essentially claims, in paragraphs 128 to 141 of the application, that the Commission argued its case as if the first request related to the ‘leniency documents’ in the strict sense rather than mere references to such documents included in a table of contents, and that the general and speculative considerations relied on in the contested decision as to the need not to jeopardise the leniency programme did not justify the complete refusal to grant access to the references which is under challenge here.

109 It is appropriate, in the second place, to note that this line of argument is in part well founded.

110 First, it must be stated that neither the wording of point 5.1 of the contested decision, nor that of point 4.2 to which it refers, nor even that of the decision of 7 March 2012, considered in isolation or as a whole, justifies the completeness of the refusal set out in the contested decision.

111 Indeed, in point 5.1 of the contested decision, the Commission merely states that ‘the references [to the leniency] documents [included in the table of contents of the file in Case COMP/39.125] provide information on the content of these documents which must be treated as confidential’. In the eighth and ninth subparagraphs of point 4.2, the Commission sets out the considerations that led it to presume, in a general way, that disclosure of the ‘leniency documents’ included in the file of some proceedings pursuant to the competition rules ‘could jeopardise the effectiveness’ of its leniency programme and, in consequence, undermine the protection of the commercial interests of the parties to these proceedings as well as the protection of the purpose of its inspections and investigations (see paragraphs 87 and 105 above).

112 As the Commission confirms in its defence, by relying on the decision of 7 March 2012, the combination of these two sets of considerations is to be interpreted, as the applicant did in its application, as meaning that it was appropriate, in the present case, to presume, in a general way, that disclosure of the references to the ‘leniency documents’ included in the table of contents could jeopardise the effectiveness of the Commission’s leniency programme and, in consequence, undermine the commercial interests of the parties to the proceeding concerned as well as the purpose of the inspections and investigations connected to that proceeding, since — and in so far as — such disclosure would reveal to a third party ‘confidential information’ contained in the references or in the ‘leniency documents’ to which the references related. Specifically, the Commission considered information on the cooperation of undertakings which had submitted an application under the leniency programme and commercially sensitive data collected by its services in that context to be confidential (see paragraphs 106 and 107 above).

113 Even if it is conceded that the Commission could (i) treat the different types of documents in the file classified as ‘leniency documents’ in the contested decision in the same way, in the light of their nature or content, and (ii) presume, in a general way, that disclosure of these documents could jeopardise the effectiveness of its leniency programme and, in consequence, undermine the protection of the commercial interests of third parties as well as the protection of the purpose of its inspections and investigations, such reasoning only justifies, according to the very wording of the contested decision, a refusal to disclose that is limited to ‘information on the content of these documents which must be treated as confidential’.

114 However, it does not justify removing en bloc all of the references containing such confidential information, including their most neutral or insignificant aspects, in contrast to the precise selection made by the Commission as regards the other types of references included in the table of contents which form the subject-matter of these pleas (see paragraph 104 above).

115 In other words, the general considerations relied on by the Commission may not be regarded, according to the very wording of the contested decision, as normally and actually applicable to all of the references in question. Therefore, they are not capable of justifying a complete refusal to disclose, but rather, at best, a partial refusal based on Article 4(6) of Regulation No 1049/2001 limited to what is necessary and proportionate in order to protect information which is deserving of protection (see, to that effect and by analogy, judgments of 6 December 2001 in *Council v Hautala*, C-353/99 P, ECR, EU:C:2001:661, paragraphs 27 to 29, and 25 April 2007 *WWF European Policy Programme v Council*, T-264/04, ECR, EU:T:2007:114, paragraph 50).

116 This assessment is not called into question by the fact that the general presumption on which the Commission may rely in order to deal with, in a global way, requests relating to a set of documents in the file of a proceeding pursuant to the competition rules means that these documents fall outside the scope of any obligation to disclose their content, even in part (see paragraph 42 above). It is clearly apparent from the case-law that it is where an institution applies a general presumption to deal with a request relating to a set of documents, not a single document, that this is the consequence of taking such action (judgments in *Commission v EnBW*, cited in paragraph 12 above, EU:C:2014:112, paragraph 134, and *Commission v Éditions Odile Jacob*, cited in paragraph 40 above, EU:C:2012:393, paragraph 133). By contrast, it is not apparent from the case-law that, whilst attaching this consequence to the application of a general presumption in the specific case at hand, the Court of Justice sought to call into question the case-law of a more general scope considered in paragraph 115 above. Moreover, the Court of Justice has held that, even in this specific situation, the institution concerned is obliged to disclose all or part of the documents covered by the request where it finds that the characteristics of the corresponding proceeding so permit (judgment in *LPN and Finland v Commission*, cited in paragraph 34 above, EU:C:2013:738, paragraph 67). Lastly, in the light of the requirement to limit refusals to grant access to what is necessary and proportionate in order to protect information which is deserving of protection, there is even less reason to accept a general refusal to disclose in the circumstances of this case, because it makes the effective exercise of the right to compensation which the applicant enjoys under the Treaty in practice impossible or at the very least excessively difficult (see paragraphs 130 to 134 below).

117 Secondly, the absolute nature of the Commission’s refusal to disclose the references in question to the applicant does not seem to be substantiated to any higher factual and legal standard than the completeness of such refusal, in the light of the considerations on which the refusal is based.

118 It is true that the Commission was able to take the view, in essence, that disclosure of these references ‘could undermine’ the effectiveness of its leniency programme, in the same way as disclosure of the ‘leniency documents’ in the strict sense, in so far as such disclosure may result in third parties becoming aware of commercially sensitive information or confidential information relating to the cooperation of the parties contained in the documents. As the EU judiciary has already held, leniency programmes are useful tools to uncover and bring an end to infringements of the competition rules, thereby contributing to the effective application of Articles 101 and 102 TFEU. Furthermore, the effectiveness of these programmes could be compromised if documents relating to leniency proceedings were disclosed to persons wishing to bring an action for damages. The view can reasonably be taken that the prospect of such disclosure would deter persons involved in an infringement of the competition rules from having recourse to such programmes (judgments of 14 June 2011 in *Pfleiderer*, C-360/09, ECR, EU:C:2011:389, paragraph 26, and *Donau Chemie and Others*, cited in paragraph 68 above, EU:C:2013:366, paragraph 42). Although this case-law concerns leniency programmes established by national competition authorities, the same reasoning may be applied, by analogy, to the leniency programme of the Commission (see, to that effect, judgment of *Netherlands v Commission*, cited in paragraph 39 above,

EU:T:2013:480, paragraph 41, and opinion of Advocate General Villalón in *Commission v EnBW*, cited in paragraph 12 above, EU:C:2013:643, paragraphs 68 and 69), as the Commission indeed argued in its defence.

119 However, it is also apparent from the case-law that, although such considerations may justify a refusal to grant access to certain documents included in the file of a proceeding pursuant to the competition rules, they do not necessarily mean that access may be systematically refused, since any request for access to the documents at issue must be assessed on a case-by-case basis, taking into account all the relevant factors in the case (see judgment in *Donau Chemie and Others*, cited in paragraph 68 above, EU:C:2013:366, paragraph 43 and the case-law cited).

120 Given the importance of actions for damages brought before national courts in ensuring the maintenance of effective competition in the European Union, the mere argument that there is a risk that access to evidence contained in a file in competition proceedings which is necessary as a basis for those actions may undermine the effectiveness of the leniency programme in which those documents were disclosed to the competent competition authority cannot justify a refusal to grant access to that evidence (see judgment in *Donau Chemie and Others*, cited in paragraph 68 above, EU:C:2013:366, paragraph 46 and the case-law cited; also see, to that effect, opinion of Advocate General Villalón in *Commission v EnBW*, cited in paragraph 12 above, EU:C:2013:643, paragraphs 70 to 74).

121 On the contrary, the fact that such a refusal is liable to prevent those actions from being brought, by giving the undertakings concerned, who may have already benefited from immunity, at the very least partial, from pecuniary penalties, an opportunity also to circumvent their obligation to compensate for the harm resulting from the infringement of Article 101 TFEU, to the detriment of the injured parties, requires that refusal to be based on overriding reasons relating to the protection of the interest relied on and applicable to each document to which access is refused (judgment in *Donau Chemie and Others*, cited in paragraph 68 above, EU:C:2013:366, paragraph 47; also see, to that effect, opinion of Advocate General Villalón in *Commission v EnBW*, cited in paragraph 12 above, EU:C:2013:643, paragraph 78).

122 Consequently, it is only if there is a risk that a given document may actually undermine the public interest relating to the effectiveness of the leniency programme in question that non-disclosure of that document may be justified (judgment in *Donau Chemie and Others*, cited in paragraph 68 above, EU:C:2013:366, paragraph 48; also see, to that effect, opinion of Advocate General Villalón in *Commission v EnBW*, cited in paragraph 12 above, EU:C:2013:643, paragraph 77).

123 This is why it is settled case-law that, where the Commission or the national courts are called upon to take a decision, in legal and procedural frameworks that are admittedly different, on whether to grant access to documents collected in the context of the implementation of a leniency programme which are included in the file of a proceeding pursuant to the competition rules, they must refrain from taking an inflexible and absolute stance liable to undermine either the effective application of the competition rules by the public authorities entrusted with ensuring their observance or the effective exercise of individuals' rights flowing from these rules. They must therefore weigh up, on a case-by-case basis, the different interests in favour of disclosure and in favour of the protection of the documents in question. In striking that balance, they are required to take into account all the relevant factors in the case and, in particular, the interest of the requesting party in securing access to the documents he seeks to have disclosed for the purpose of supporting his action for damages, in view of the other possibilities that may be open to him and the actual harmful consequences which may result from such access having regard to the public interest or the legitimate interests of other parties (see, to that effect, judgments in *Donau Chemie and Others*, cited in paragraph 68 above, EU:C:2013:366, paragraphs 30 to 34 and 44 to 45, and *Commission v EnBW*, cited in paragraph 12 above, EU:C:2014:112, paragraph 107).

124 Such considerations are even more relevant where, as in the present case, a person who considers himself to be a victim of an infringement of the competition rules and who has already brought an action for damages before a national court asks the Commission for access not to the 'leniency documents' included in the file of the proceeding which resulted in the decision finding that such an infringement had been committed, but only to the references to those documents contained in the table of contents of the file. If the mere argument that there is a risk that the effectiveness of a leniency programme might be undermined does not constitute a sufficient basis for a general and absolute refusal to grant access to the 'leniency documents' included in the file, quite apart from the actual harmful consequences which may result from disclosure of the documents, far less can it be used to justify a complete and absolute refusal to disclose mere references to those documents to the person seeking access to them for the purpose of supporting an action for damages.

125 In the present case, the refusal is based, as the applicant correctly points out, on general and speculative considerations according to which disclosure of the references in question ‘could jeopardise’ the effectiveness of the Commission’s leniency programme and, in consequence, undermine the protection of the commercial interests of the parties to the proceeding as well as the protection of the purpose of inspections and investigations connected to that proceeding (see paragraphs 105 and 106 above).

126 However, these general and speculative considerations do not prove, in the present case, to the requisite factual and legal standard that there is a reasonably foreseeable risk of specific and actual harm to the interests invoked by the Commission, warranting an absolute refusal to disclose the dates, headings and other references to the ‘leniency documents’ included in the table of contents, quite apart from any confidential information they may contain or reveal.

127 In short, such a refusal negates the effect of the principle that the exceptions to the right of access to documents must be interpreted and applied strictly, so as to ensure that all documents or document extracts not covered by the exceptions laid down in Regulation No 1049/2001 may be disclosed to the persons seeking access to them (see, to that effect and by analogy, judgment in *Council v Access Info Europe*, cited in paragraph 35 above, EU:C:2013:671, paragraph 40), unless prevented by an overriding public interest.

128 Thirdly, in so far as both parties rely on the decision of 7 March 2012, respectively, to object to and to justify the refusal to disclose references to the ‘leniency documents’ included in the table of contents of the file in Case COMP/39.125, it should be noted that the reasoning set out in that decision and reiterated by the Commission in its defence (see paragraphs 106 and 112 above) provides no more justification for the general and absolute refusal given to the applicant in the present case than the reasoning set out in the contested decision.

129 In particular, although the Commission relies on considerations capable of forming the basis for a complete refusal to grant access to references to some types of ‘leniency documents’ listed in the table of contents, such as references to ‘statements’ received by the Commission from undertakings that have submitted an application under the leniency programme (see, to that effect, opinion of 16 December 2010 of Advocate General Mazák in *Pfleiderer*, cited in paragraph 118 above, EU:C:2010:782, paragraphs 44 and 47), the decision of 7 March 2012 does not justify a refusal covering references to all of those documents.

130 Furthermore, it is apparent from the file that when the applicant submitted the first request to the Commission (16 February 2012) and when the Commission took a final decision in that regard (29 October 2013), the applicant was only in possession of a provisional non-confidential version of the Carglass decision.

131 Although the Commission adopted that decision on 12 November 2008, it has only ever published a provisional non-confidential version of it, which the applicant annexed to its application. It was only between December 2011 and August 2012 that the ‘Competition’ Directorate-General and the Hearing Officer of the Commission respectively ruled on the content of the final non-confidential version of the decision by means of a series of measures the most recent of which went on to form the subject-matter of two actions for annulment before the General Court (Cases T-462/12, *Pilkington Group v Commission*, and T-465/12, *AGC Glass Europe and Others v Commission*) and an application for interim measures resulting in an order of the President of the General Court (order of 11 March 2013 in *Pilkington Group v Commission*, T-462/12 R, ECR, EU:T:2013:119) followed by, on appeal, an order of the Vice-President of the Court of Justice (order of 10 September 2013 in *Commission v Pilkington Group*, C-278/13 P(R), ECR, EU:C:2013:558), as the Commission recalled in its defence. However, in the light of these disputes, the final non-confidential version of the Carglass decision had not yet been published when the Commission dealt with the applicant’s two requests or, moreover, when the applicant brought the present action.

132 It is not possible for the applicant to identify specifically the ‘leniency documents’ included in the file in Case COMP/39.125 from the provisional non-confidential version of the Carglass decision. Although the applicant relies on information contained in these documents, the details enabling a link to be established between this information and the document or documents from which it was extracted and permitting the documents to be identified individually were largely deleted.

133 In those circumstances, it cannot be considered that the general and absolute refusal to disclose set out in the contested decision could be justified by the considerations relied on by the Commission’s services in the decision of 7 March 2012, according to which:

‘In order to reconcile the legitimate interest in the transparency of its administrative procedures and the interest in preserving the attractiveness of the leniency programme, the Commission publishes a non-confidential version of its final decisions, in which it identifies all of the cartel participants and sets out the constituent elements of this infringement of the competition rules.

For reasons which will be explained below, information concerning correspondence from parties that have submitted an application under the leniency programme or correspondence exchanged with them ... which is included in the table of contents and which has not yet been disclosed by way of a published decision ... is covered by [the exceptions laid down in the first and third indents of Article 4(2) of Regulation No 1049/2001].

...

In those circumstances, the provision of information on correspondence exchanged within the framework of the leniency programme other than the information contained in the public version of the [Carglass] decision ... would undermine the protection of commercial interests.

...

In the provisional public version of the [Carglass] decision, the Commission already disclosed some of the information set out in the table of contents (in particular, the identity of the undertakings that had submitted an application under the leniency programme and the date of the decision granting their application). Before doing so, it weighed up the importance of such disclosure against the possible adverse consequences of such disclosure on the effective implementation of the leniency programme (and, therefore, on the application of Article 101 TFEU). All other references concerning this kind of correspondence were, however, expunged from the annexed table of contents, because any further identification [of the] documents [in question] could undermine the “purpose of the Commission’s investigations” and the “commercial interests” of the parties to the proceeding’ (penultimate and final subparagraph of point 1.1, final subparagraph of point 1.2, and penultimate subparagraph of point 1.3 of the decision of 7 March 2012).

134 On the contrary, in so far as the contested decision and the decision of 7 March 2012, by referring to the provisional non-confidential version of the Carglass decision, made it in practice impossible or at the very least excessively difficult to identify the ‘leniency documents’ listed in the table of contents requested by the applicant, in contrast to the way in which the references to other documents included in the file were dealt with (see paragraphs 75, 104 and 114 above), they did not provide a means for the applicant either to form an opinion on the possible need to have these documents in order to support its action for damages before the Landgericht Düsseldorf or, *a fortiori*, to explain the reasons for such a need. The case-law makes compliance with this requirement a precondition not only for disclosure of such documents and their production in legal proceedings in the context of actions for damages brought before the national courts (see paragraph 69 above), but also the recognition by the Commission of an overriding public interest where it receives a request under Regulation No 1049/2001 (see paragraph 70 above). In doing so, the contested decision, in practice, prevents the applicant from actually exercising the right to compensation it enjoys under the Treaty.

135 Fourthly, moreover, in so far as the Commission relied on, at the hearing, the need to protect its leniency programme and the documents relating to it in all cases, in view of the key role played by that programme in detecting infringements of the competition rules, as acknowledged by Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (OJ 2014 L 349, p. 1), it is necessary to make two observations. The case-law recognises the value of this programme, but at the same time points out that the public interest in preserving its effectiveness cannot be considered to take precedence, in a general and absolute way, over the other public and private interests at stake, which are also worthy of protection and must be reconciled with it on a case-by-case basis (see paragraphs 118 to 123 above). In addition, recital 20 in the preamble to, and Article 6(2) of, Directive 2014/104 expressly state that this directive is without prejudice to the rules on public access to documents laid down in Regulation No 1049/2001, as the Commission moreover noted in its rejoinder (see paragraph 58 above).

136 It follows from all of the foregoing considerations that the contested decision is not substantiated to the requisite legal standard in so far as it finds that it is possible to presume, in a global, complete and absolute way, that allowing the applicant access to references to the ‘leniency documents’ in the table of contents of the file in

Case COMP/39.125 would undermine the interests protected by the exceptions laid down in the first and third indents of Article 4(2) of Regulation No 1049/2001.

b) The refusal to grant access to information relating to the identity of natural persons

137 In point 5.2 of the contested decision, the Commission stated that information relating to the identity of natural persons included in the table of contents could not be disclosed to the applicant. In order to reach that conclusion, it found, first of all, that this information constituted personal data within the meaning of Article 4(1)(b) of Regulation No 1049/2001 and Articles 2(a) and 8(b) of Regulation EC No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ 2001 L 8, p. 1). The Commission then considered that the applicant had not proven why it was necessary for the data to be transferred to it and that there was reason to believe that their disclosure could undermine the legitimate interests of the persons to whom they related.

138 Article 4(1)(b) of Regulation No 1049/2001 provides that the institutions are to refuse access to a document if its disclosure would undermine the protection of the privacy or integrity of the individual, in particular in accordance with EU legislation regarding the protection of personal data.

139 That provision, which establishes a specific and reinforced system of protection for persons whose personal data could, in certain cases, be disclosed to the public, requires that any undermining of their privacy and integrity must always be examined and assessed in conformity, in particular, with Regulation No 45/2001 (judgment of 29 June 2010 in *Commission v Bavarian Lager*, C-28/08 P, ECR, EU:C:2010:378, paragraphs 59 and 60).

140 Article 2 of Regulation No 45/2001 states that personal data is to mean any information relating to an identified or identifiable natural person and that processing of personal data is to mean any operation performed upon personal data, including retrieval and disclosure by transmission, dissemination or otherwise making available.

141 Article 8(b) of Regulation No 45/2001 provides, in particular, that personal data is only to be transferred to a recipient if the recipient establishes the necessity of such transfer and if there is no reason to assume that the data subject's legitimate interests might be prejudiced. This provision applies to all requests based on Regulation No 1049/2001 seeking to obtain access to documents including personal data (judgments in *Commission v Bavarian Lager*, cited in paragraph 139 above, EU:C:2010:378, paragraph 63, and 2 October 2014 *Strack v Commission*, C-127/13 P, ECR, EU:C:2014:2250, paragraph 101).

142 In the present case, the applicant does not call in question the Commission's finding that information relating to the identity of certain natural persons included in the table of contents constituted personal data. Nor does it deny that its request seeking disclosure of this information constituted processing of personal data. Its only criticism is of the reasoning adopted by the Commission to refuse disclosure of the information to it. In essence, the applicant complains that the Commission came to that conclusion based on general reasoning relating to the protection of privacy, instead of explaining in detail the individual reasons why each item of information could not be disclosed to it.

143 However, the Commission was, in the first place, fully entitled to require the applicant to establish the necessity for the personal data in question to be transferred, in accordance with Article 8(b) of Regulation No 45/2001. Where the person who requests access to documents containing personal data does not provide any express and legitimate justification or any convincing argument in order to demonstrate the necessity for those personal data to be transferred, the Commission is not able to weigh up the various interests at stake (see, to that effect, judgments in *Commission v Bavarian Lager*, cited in paragraph 139 above, EU:C:2010:378, paragraphs 77 and 78, and *Strack v Commission*, cited in paragraph 141 above, EU:C:2014:2250, paragraph 107).

144 In the second place, the Commission was able to find, in the light of the arguments specifically put forward by the applicant, that such necessity had not been proven in this case.

145 It is apparent from the contested decision that the applicant had justified the necessity for the data in question to be transferred to it by the fact that 'the information provided on the names of the natural persons "... [was] too limited to enable [the applicant] to exercise its rights"'. The applicant does not dispute this finding of the

Commission in its action. On the contrary, the applicant continues to maintain before the Court that, first, it ‘needs this information’; secondly, ‘if the names of the persons concerned are not included in the table of contents, too, its right of access will be considerably weakened, because this is the only way it can identify the important documents’; and thirdly, ‘[e]ven if [it] has to demonstrate the necessity of providing the names of the natural persons (*quod non* ...), this condition is in any event satisfied’ since it has ‘sufficiently demonstrated that it need[ed] this information to be able to secure compensation for the loss caused to it’.

146 Presented with general and abstract reasons in this regard, the Commission was able to confine itself to finding, in a global manner, that it ‘saw no reason justifying public disclosure of the data [in question]’ and that ‘the necessity for the personal data at issue to be transferred ... was not proven’ (see, by analogy, judgment in *Commission v EnBW*, cited in paragraph 12 above, EU:C:2014:112, paragraphs 105 and 132).

147 The arguments challenging the refusal to grant access to information relating to the identity of natural persons must therefore be rejected.

c) The refusal to grant access to the names of third-party undertakings

148 In point 5.3 of the contested decision, the Commission found that the names of different categories of undertakings ‘operating in the lift and escalator sector’ or which had business dealings with the undertakings to which the Carglass decision was addressed could not be made known to the applicant because disclosure of their identity and, therefore, their involvement in the proceeding or their business dealings with the parties to the proceeding could damage their reputation and undermine their commercial interests.

149 It is obvious that, notwithstanding the clerical mistake in the contested decision, there could be no reasonable doubt that the Commission intended to refer, as it did in its defence without being challenged in that respect, to the names of undertakings operating not only in the lift and escalator sector, but also in the carglass sector, which is the only sector mentioned in Case COMP/39.125. It is therefore not possible to find that the statement of reasons was inadequate.

150 As to the substance, it should be recalled, first of all, that the Commission was able, without committing an error of law, to refuse the applicant’s first request in so far as it related to the category of information in question by relying on a general presumption (see paragraph 94 above).

151 Next, it must be considered that, by referring to the ‘reputation’ and ‘commercial interests’ of the different categories of undertakings concerned in order to refuse to disclose their names to the applicant, the Commission essentially sought to rely, in particular, on the general presumption that disclosure of the identity of these legal persons could, in principle, undermine the protection of the commercial interests of third parties guaranteed by the first indent of Article 4(2) of Regulation No 1049/2001, as the Commission noted in its defence without being challenged in that respect.

152 Lastly, the applicant does not properly challenge the application of this general presumption.

153 It merely objects to the actual possibility for the Commission to apply such a presumption. It is apparent from the case-law cited in paragraphs 39 and 44 above that the Commission, which is required to collect, in the context of proceedings pursuant to the competition rules, commercially sensitive information relating to the strategy and activities of the parties to the proceeding as well as their business dealings with third parties, is entitled to do so.

154 Furthermore, the applicant submits that the business dealings which may come to light as a result of disclosing the identity of the legal persons mentioned in the table of contents date from more than five years ago and are therefore too ‘old’ to be regarded as covered by the exception laid down in the first indent of Article 4(2) of Regulation No 1049/2001. This argument, besides being too general to be capable of rebutting the general presumption invoked by the Commission, is not conclusive. Admittedly, it has been held that information falling within the ambit of commercial secrecy or confidential information which is five or more years old must be treated as historic unless, by way of exception, it is proven that such information still constitutes an essential element of the commercial position of the undertaking to which it relates (see order of 22 February 2005 in *Hynix Semiconductor v Council*, T-383/03, ECR, EU:T:2005:57, paragraph 60 and the case-law cited). It has also been held, more generally, that the negative effects liable to follow upon the disclosure of commercially sensitive

information become less significant the older the information is (see, to that effect, order of 19 June 1996 in *NMH Stahlwerke and Others v Commission*, T-134/94, T-136/94 to T-138/94, T-141/94, T-145/94, T-147/94, T-148/94, T-151/94, T-156/94 and T-157/94, EU:T:1996:85, paragraphs 24 and 32). However, that does not prevent such information continuing to be covered by the exception laid down in the first indent of Article 4(2) of Regulation No 1049/2001, as is apparent from the case-law cited in paragraph 63 above.

155 The arguments challenging the refusal to grant access to the names of third-party undertakings must therefore be rejected, without it being necessary to consider whether these references should also be regarded as personal data, as the Commission submits in its defence, notwithstanding the fact that there are no considerations to that effect in either the contested decision or the decision of 7 March 2012, which invokes this ground for refusal only in relation to the names of natural persons included in the table of contents.

d) The refusal to grant access to other commercially sensitive information

156 In point 5.4 of the contested decision, the Commission stated that there was commercially sensitive information in the table of contents, including the names of car manufacturers and references to vehicle models. It also observed that actions for annulment specifically relating to the question whether some of this information should continue to be treated as confidential or whether, on the contrary, it could be included in the final non-confidential version of the Carglass decision had been brought before the General Court by a number of the undertakings to which the decision was addressed. For these reasons, it concluded that it could not, 'at this stage, disclose information which might remain confidential following the judgments of the General Court'.

157 In the first place, although the statement of reasons for the contested decision is relatively concise, it is none the less sufficiently detailed to have enabled the applicant to understand its content and the General Court to review its legality.

158 In the second place, as to the substance, the applicant does not properly challenge the reasoning which led the Commission to find that the information in question was covered by the exception laid down in the first indent of Article 4(2) of Regulation No 1049/2001.

159 The applicant simply states that the actions invoked by the Commission concern whether the information in question should be made accessible to the general public, while its own action concerns whether such information should be disclosed to a person who considers himself to have been harmed by the infringement established in the Carglass decision, and that a balance must be struck between the interests at stake in different ways in these two situations. This argument is essentially tantamount to claiming that an overriding public interest should prevail over the exception relied on by the Commission to refuse disclosure of the data concerned. Consequently, it is no different from the alternative argument put forward in this regard, as the applicant moreover admits in its application. It will therefore be examined in that context (see paragraphs 162 et seq. below).

160 The applicant's argument challenging the general presumption which the Commission's services invoked, in the decision of 7 March 2012, as an additional basis for refusing to disclose the information in question is devoid of purpose. In the contested decision, the Commission did not reproduce this general presumption, according to which disclosure of the information would, in principle, undermine the protection of the commercial interests of the parties to the proceeding, in contrast to the submissions made in its defence. On the contrary, the Commission merely refused disclosure 'at this stage', in view of the actions pending before the General Court.

161 The arguments challenging the refusal to grant access to other commercially sensitive information cannot therefore succeed.

2. *The overriding public interest invoked by the applicant*

162 In its arguments challenging the refusal to grant access to information relating to the names of natural persons and to other commercially sensitive information, the applicant submits that the Commission was wrong not to take account of the overriding public interest in allowing the victims of anticompetitive practices to exercise their right to compensation and was also wrong not to give precedence to this interest over the interests protected by the exceptions relied on in the contested decision in order to refuse to disclose such information to it, even though such information was necessary for the effective exercise of its right to compensation.

163 It is apparent from the case-law cited in paragraphs 66 to 70 above that such general considerations are not, as such, capable of prevailing over the reasons justifying a refusal to grant access to the documents in the file of a proceeding pursuant to the competition rules. It follows that any person seeking compensation for the loss he considers was caused to him by a breach of the EU rules on competition must establish that it is necessary for him to be granted access to these documents, so that the Commission can weigh up, on a case-by-case basis, the respective interests at stake. Otherwise, the interest in obtaining compensation for the loss suffered as a result of a breach of the EU rules on competition cannot constitute an overriding public interest within the meaning of Article 4(2) of Regulation No 1049/2001.

164 In the present case, the applicant asserts, in a general and abstract way, that it is necessary for him to have access to all of the names of natural persons mentioned in the table of contents and all of the commercial information contained in that document so that he can exercise his right to compensation.

165 By contrast, the applicant does not put forward in the present action, nor does it claim to have adduced in the request or confirmatory application previously submitted to the Commission, specific evidence proving that it needed particular information, for example by setting out the specific factual or legal arguments which securing such information might help it substantiate before the national court required to rule on its claims.

166 Accordingly, the arguments based on the existence of an overriding public interest must be rejected, as the Commission rightly points out.

167 Having regard to all of the preceding considerations, the present pleas in law must be upheld in so far as they relate to the refusal to grant the applicant access to the references to the ‘leniency documents’ included in the table of contents of the file in Case COMP/39.125 and must be rejected as to the remainder.

168 Consequently, the contested decision must be annulled to that extent.

Costs

[...]

On those grounds,

THE GENERAL COURT (Third Chamber)

hereby:

1. **Annuls Commission Decision 2012/817 and 2012/3021 Gestdem of 29 October 2013, refusing two requests for access to documents in the file of Case COMP/39.125 (Carglass) in so far as it refuses to grant Axa Versicherung AG access to references to the ‘leniency documents’ included in the table of contents of that file;**
2. **Dismisses the remainder of the action;**
3. **Orders Axa Versicherung and the European Commission each to bear their own costs;**
4. **Orders Saint-Gobain Sekurit Deutschland GmbH & Co. KG to bear its own costs.**

LECTURE 6: FUNDAMENTAL RIGHTS PROTECTION IN POST-LISBON EU LAW

Fundamental rights have played a consistent and important part in the EU's institutional setup. Indeed, the Court of Justice has recognised their importance as unwritten general principles of EU law, inspired by national constitutional traditions and the ECHR. In 2000, this commitment was complemented by a written yet non-binding Charter of Fundamental Rights, which was declared binding by virtue of Article 6 TEU upon the entry into force of the Lisbon Treaty. The importance attached to fundamental rights did not imply, however, that their application was free from legal problems. Two parallel issues can be discerned in that regard. Firstly, the scope and applicability of different human rights instruments (national, international and supranational) to EU action or inaction has remained unclear for a long time. Is the ECHR applicable to EU legislation or decisions? Can a national constitutional court resist against EU initiatives for incompatibility with national fundamental rights? The Court of Justice has intervened quickly in this regard, maintaining that the EU legal order is an autonomous legal order, which operates in accordance with its own logic. As such, EU fundamental rights should be taken as the starting point when falling within the scope of EU law. In practice, this posture remains problematic in particular cases, as this lecture will highlight, even with a written Charter in place. Secondly, the actual streamlining of EU and ECHR fundamental rights has given rise to on-going debates on the accession of the EU to the ECHR Treaty system. Whereas the Council of Europe (the ECHR's home institution) rendered such accession possible and Article 6(2) TEU mandates it, the Court of Justice advised against it in the current format, as sufficient guarantees to maintain the autonomy of the EU legal order have to be in place. As a result, EU and ECHR fundamental rights continue to operate in parallel. The purpose of this lecture will be to outline the fundamental rights instruments in EU law and to analyse how they interact. At the same time, we will focus on how EU law enables and restrains simultaneously a better streamlining of EU and ECHR law. That will allow us critically to assess the interaction between legal rules and political realities of today's EU institutional functioning.

Materials to read:

- Charter of Fundamental Rights of the European Union, 26 October 2012, [2012] *O.J.* C 326/391 (see Lecture 1).
- Court of Justice, 26 February 2013, Case C-617/10, *Åklagaren v Hans Åkerberg Fransson*, ECLI:EU:C:2013:105.
- Court of Justice, 18 December 2014, Opinion 2/13, ECLI:EU:C:2014:2454.

Lecture 6 outline:

- a. The origins of fundamental rights protection in the European Union
 1. From nothing...
 2. To EU general principles
 3. Inspired by the ECHR and national constitutional traditions
 - i. National courts as supplementary watchdogs: *Solange*...
 - ii. The *Bosphorus* equivalence test
 4. Fundamental rights in the Court's case law
- b. The emergence of a Charter of Fundamental Rights

1. Non-binding nature
2. Relationship to the ECHR
3. Binding force in the wake of the Lisbon Treaty
- c. Scope of application problems of the Charter of Fundamental Rights
 1. The scope of the Charter coalesces with the scope of EU law: *Fransson*
 2. Stricter EU standards compared to ECHR or national standards? *Melloni*
 3. Applicability to horizontal situations (cf. lecture 2)
 4. Are all rights equal?
- d. The EU's accession to the ECHR
 1. From dream to almost reality: accession steps
 2. The Court's Opinion 2/13
 3. Future steps to be taken
- e. Future outlook on fundamental rights' protection in post-Lisbon EU law
 1. Coherence through confusion?
 2. Why does accession to the ECHR remain problematic?
 3. Safeguarding autonomy in an era of cooperation...

Questions for discussion:

- Which legal provisions or doctrines call in favour of the autonomy EU law in relation to fundamental rights? Which ones call against it? Draft a table of key features of the EU legal order that allows you to retrace the reasoning of the Court in Opinion 2/13. Do you agree with that position? On what legal grounds would you contest it?
- Give two examples of situations falling outside and two of situations falling within the scope of EU law, applying the *Fransson* analysis. Do you find those criteria to work in practice? Would you rather propose more refined and predictable legal criteria to make that assessment? If so, how would you phrase them?

Case C-617/10, *Åklagaren v Hans Åkerberg Fransson*

In Case C-617/10,

REQUEST for a preliminary ruling under Article 267 TFEU from the Haparanda tingsrätt (Sweden), made by decision of 23 December 2010, received at the Court on 27 December 2010, in the proceedings

Åklagaren

v

Hans Åkerberg Fransson,

THE COURT (Grand Chamber),

composed of V. Skouris, President, K. Lenaerts, Vice-President, A. Tizzano, M. Ilešič, G. Arestis, J. Malenovský, Presidents of Chambers, A. Borg Barthet, J.-C. Bonichot, C. Toader, J.-J. Kasel and M. Safjan (Rapporteur), Judges,

Advocate General: P. Cruz Villalón,

Registrar: C. Strömholm, Administrator,

[...]

after hearing the Opinion of the Advocate General at the sitting on 12 June 2012,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of the *ne bis in idem* principle in European Union law.

2 The request has been made in the context of a dispute between the Åklagaren (Public Prosecutor's Office) and Mr Åkerberg Fransson concerning proceedings brought by the Public Prosecutor's Office for serious tax offences.

Legal context

European Convention for the Protection of Human Rights and Fundamental Freedoms

3 In Protocol No 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, which was signed in Strasbourg on 22 November 1984 ('Protocol No 7 to the ECHR'), Article 4, headed 'Right not to be tried or punished twice', provides as follows:

1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.

2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

3. No derogation from this Article shall be made under Article 15 of the [European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950; “the ECHR”].’

European Union law

Charter of Fundamental Rights of the European Union

4 Article 50 of the Charter of Fundamental Rights of the European Union (‘the Charter’), which is headed ‘Right not to be tried or punished twice in criminal proceedings for the same criminal offence’, reads as follows:

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

5 Article 51 defines the Charter’s field of application in the following terms:

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

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

Sixth Directive 77/388/EEC

6 Article 22 of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1; ‘the Sixth Directive’), in the version resulting from Article 28h thereof, states:

‘...

4. (a) Every taxable person shall submit a return by a deadline to be determined by Member States. ...

...

8. Member States may impose other obligations which they deem necessary for the correct collection of the tax and for the prevention of evasion ...

...?’

Swedish law

7 Paragraph 2 of Law 1971:69 on tax offences (skattebrottslagen (1971:69); ‘the skattebrottslagen’) is worded as follows:

‘Any person who intentionally provides false information to the authorities, other than orally, or fails to submit to the authorities declarations, statements of income or other required information and thereby creates the risk that tax will be withheld from the community or will be wrongly credited or repaid to him or a third party shall be sentenced to a maximum of two years’ imprisonment for tax offences.’

8 Paragraph 4 of the skattebrottslagen states:

‘If an offence within the meaning of Paragraph 2 is to be regarded as serious, the sentence for such a tax offence shall be a minimum of six months’ imprisonment and a maximum of six years.

In determining whether the offence is serious, particular regard shall be had to whether it relates to very large amounts, whether the perpetrator used false documents or misleading accounts or whether the conduct formed part of a criminal activity which was committed systematically or on a large scale or was otherwise particularly grave.'

9 Law 1990:324 on tax assessment (taxeringslagen (1990:324); 'the taxeringslagen') provides, in Paragraph 1 of Chapter 5:

'If, during the procedure, the taxable person has provided false information, other than orally, for the purposes of the tax assessment, a special charge (tax surcharge) shall be levied. The same shall apply if the taxable person has provided such information in legal proceedings relating to taxation and the information has not been accepted following a substantive examination.

Information shall be regarded as false if it is clear that information provided by the taxable person is inaccurate or that the taxable person has omitted information for the purposes of the tax assessment which he was required to provide. However, information shall not be regarded as false if the information, together with other information provided, constitutes a sufficient basis for a correct decision. Information also shall not be regarded as false if the information is so unreasonable that it manifestly cannot form the basis for a decision.'

10 Paragraph 4 of Chapter 5 of the taxeringslagen states:

'If false information has been provided, the tax surcharge shall be 40% of the tax referred to in points 1 to 5 of the first subparagraph of Paragraph 1 of Chapter 1 which, if the false information had been accepted, would not have been charged to the taxable person or his spouse. With regard to value added tax, the tax surcharge shall be 20% of the tax which would have been wrongly credited to the taxable person.

The tax surcharge shall be calculated at 10% or, with regard to value added tax, 5% where the false information was corrected or could have been corrected with the aid of confirming documents which are normally available to the Skatteverket [(Tax Board)] and which were available to the Skatteverket before the end of November of the tax year.'

11 Paragraph 14 of Chapter 5 of the taxeringslagen states:

'The taxable person shall be exempted wholly or partially from special charges if errors or omissions become evident which are excusable or if it would be otherwise unreasonable to levy the charge at the full amount. If the taxable person is exempted partially from the charge, it shall be reduced to a half or a quarter.

...

In assessing whether it would be otherwise unreasonable to levy the charge at the full amount, particular regard shall be had to whether:

...

3. errors or omissions have also resulted in the taxable person becoming liable for offences under the skattebrottslagen ... or becoming the subject of forfeiture of proceeds of criminal activity within the meaning of Paragraph 1b of Chapter 36 of the Criminal Code (brottsbalken).'

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

12 Mr Åkerberg Fransson was summoned to appear before the Haparanda tingsrätt (Haparanda District Court) on 9 June 2009, in particular on charges of serious tax offences. He was accused of having provided, in his tax returns for 2004 and 2005, false information which exposed the national exchequer to a loss of revenue linked to the levying of income tax and value added tax ('VAT'), amounting to SEK 319 143 for 2004, of which SEK 60 000 was in respect of VAT, and to SEK 307 633 for 2005, of which SEK 87 550 was in respect of VAT. Mr Åkerberg Fransson was also prosecuted for failing to declare employers' contributions for the accounting periods from October 2004 and October 2005, which exposed the social security bodies to a loss of revenue

amounting to SEK 35 690 and SEK 35 862 respectively. According to the indictment, the offences were to be regarded as serious, first, because they related to very large amounts and, second, because they formed part of a criminal activity committed systematically on a large scale.

13 By decision of 24 May 2007, the Skatteverket had ordered Mr Åkerberg Fransson to pay, for the 2004 tax year, a tax surcharge of SEK 35 542 in respect of income from his economic activity, of SEK 4 872 in respect of VAT and of SEK 7 138 in respect of employers' contributions. By the same decision it had also imposed for the 2005 tax year a tax surcharge of SEK 54 240 in respect of income from his economic activity, of SEK 3 255 in respect of VAT and of SEK 7 172 in respect of employers' contributions. Interest was payable on those penalties. Proceedings challenging the penalties were not brought before the administrative courts, the period prescribed for this purpose expiring on 31 December 2010 in relation to the 2004 tax year and on 31 December 2011 in relation to the 2005 tax year. The decision imposing the penalties was based on the same acts of providing false information as those relied upon by the Public Prosecutor's Office in the criminal proceedings.

14 Before the referring court, the question arises as to whether the charges brought against Mr Åkerberg Fransson must be dismissed on the ground that he has already been punished for the same acts in other proceedings, as the prohibition on being punished twice laid down by Article 4 of Protocol No 7 to the ECHR and Article 50 of the Charter would be infringed.

15 It is in those circumstances that the Haparanda tingsrätt decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

'1. Under Swedish law there must be clear support in the [ECHR] or the case-law of the European Court of Human Rights for a national court to be able to disapply national provisions which may be suspected of infringing the *ne bis in idem* principle under Article 4 of Protocol No 7 to the ECHR and may also therefore be suspected of infringing Article 50 of the [Charter]. Is such a condition under national law for disapplying national provisions compatible with European Union law and in particular its general principles, including the primacy and direct effect of European Union law?

2. Does the admissibility of a charge of tax offences come under the *ne bis in idem* principle under Article 4 of Protocol No 7 to the ECHR and Article 50 of the Charter where a certain financial penalty (tax surcharge) was previously imposed on the defendant in administrative proceedings by reason of the same act of providing false information?

3. Is the answer to Question 2 affected by the fact that there must be coordination of these sanctions in such a way that ordinary courts are able to reduce the penalty in the criminal proceedings because a tax surcharge has also been imposed on the defendant by reason of the same act of providing false information?

4. Under certain circumstances it may be permitted, within the scope of the *ne bis in idem* principle ..., to order further sanctions in fresh proceedings in respect of the same conduct which was examined and led to a decision to impose sanctions on the individual. If Question 2 is answered in the affirmative, are the conditions under the *ne bis in idem* principle for the imposition of several sanctions in separate proceedings satisfied where in the later proceedings there is an examination of the circumstances of the case which is fresh and independent of the earlier proceedings?

5. The Swedish system of imposing tax surcharges and examining liability for tax offences in separate proceedings is motivated by a number of reasons of general interest ... If Question 2 is answered in the affirmative, is a system like the Swedish one compatible with the *ne bis in idem* principle when it would be possible to establish a system which would not come under the *ne bis in idem* principle without it being necessary to refrain from either imposing tax surcharges or ruling on liability for tax offences by, if liability for tax offences is relevant, transferring the decision on the imposition of tax surcharges from the Skatteverket and, where appropriate, administrative courts to ordinary courts in connection with their examination of the charge of tax offences?'

Jurisdiction of the Court

16 The Swedish, Czech and Danish Governments, Ireland, the Netherlands Government and the European Commission dispute the admissibility of the questions referred for a preliminary ruling. In their submission, the Court would have jurisdiction to answer them only if the tax penalties imposed on Mr Åkerberg Fransson and the

criminal proceedings brought against him that are the subject-matter of the main proceedings arose from implementation of European Union law. However, that is not so in the case of either the national legislation on whose basis the tax penalties were ordered to be paid or the national legislation upon which the criminal proceedings are founded. In accordance with Article 51(1) of the Charter, those penalties and proceedings therefore do not come under the *ne bis in idem* principle secured by Article 50 of the Charter.

17 It is to be recalled in respect of those submissions that the Charter's field of application so far as concerns action of the Member States is defined in Article 51(1) thereof, according to which the provisions of the Charter are addressed to the Member States only when they are implementing European Union law.

18 That article of the Charter thus confirms the Court's case-law relating to the extent to which actions of the Member States must comply with the requirements flowing from the fundamental rights guaranteed in the legal order of the European Union.

19 The Court's settled case-law indeed states, in essence, that the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by European Union law, but not outside such situations. In this respect the Court has already observed that it has no power to examine the compatibility with the Charter of national legislation lying outside the scope of European Union law. On the other hand, if such legislation falls within the scope of European Union law, the Court, when requested to give a preliminary ruling, must provide all the guidance as to interpretation needed in order for the national court to determine whether that legislation is compatible with the fundamental rights the observance of which the Court ensures (see inter alia, to this effect, Case C-260/89 *ERT* [1991] I-2925, paragraph 42; Case C-299/95 *Kremzow* [1997] ECR I-2629, paragraph 15; Case C-309/96 *Annibaldi* [2007] ECR I-7493, paragraph 13; Case C-94/00 *Roquette Frères* [2002] ECR I-9011, paragraph 25; Case C-349/07 *Sopropé* [2008] ECR I-10369, paragraph 34; Case C-256/11 *Dereci and Others* [2011] ECR I-11315, paragraph 72; and Case C-27/11 *Vinkov* [2012] ECR, paragraph 58).

20 That definition of the field of application of the fundamental rights of the European Union is borne out by the explanations relating to Article 51 of the Charter, which, in accordance with the third subparagraph of Article 6(1) TEU and Article 52(7) of the Charter, have to be taken into consideration for the purpose of interpreting it (see, to this effect, Case C-279/09 *DEB* [2010] ECR I-13849, paragraph 32). According to those explanations, 'the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of Union law'.

21 Since the fundamental rights guaranteed by the Charter must therefore be complied with where national legislation falls within the scope of European Union law, situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable. The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter.

22 Where, on the other hand, a legal situation does not come within the scope of European Union law, the Court does not have jurisdiction to rule on it and any provisions of the Charter relied upon cannot, of themselves, form the basis for such jurisdiction (see, to this effect, the order in Case C-466/11 *Currà and Others* [2012] ECR, paragraph 26).

23 These considerations correspond to those underlying Article 6(1) TEU, according to which the provisions of the Charter are not to extend in any way the competences of the European Union as defined in the Treaties. Likewise, the Charter, pursuant to Article 51(2) thereof, does not extend the field of application of European Union law beyond the powers of the European Union or establish any new power or task for the European Union, or modify powers and tasks as defined in the Treaties (see *Dereci and Others*, paragraph 71).

24 In the case in point, it is to be noted at the outset that the tax penalties and criminal proceedings to which Mr Åkerberg Fransson has been or is subject are connected in part to breaches of his obligations to declare VAT.

25 In relation to VAT, it follows, first, from Articles 2, 250(1) and 273 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1), which reproduce inter alia the provisions of Article 2 of the Sixth Directive and of Article 22(4) and (8) of that directive in the version resulting from Article 28h thereof, and second, from Article 4(3) TEU that every Member State is under an obligation to take all legislative and administrative measures appropriate for ensuring collection of all the VAT

due on its territory and for preventing evasion (see Case C-132/06 *Commission v Italy* [2008] ECR I-5457, paragraphs 37 and 46).

26 Furthermore, Article 325 TFEU obliges the Member States to counter illegal activities affecting the financial interests of the European Union through effective deterrent measures and, in particular, obliges them to take the same measures to counter fraud affecting the financial interests of the European Union as they take to counter fraud affecting their own interests (see, to this effect, Case C-367/09 *SGS Belgium and Others* [2010] ECR I-10761, paragraphs 40 to 42). Given that the European Union's own resources include, as provided in Article 2(1) of Council Decision 2007/436/EC, Euratom of 7 June 2007 on the system of the European Communities' own resources (OJ 2007 L 163, p. 17), revenue from application of a uniform rate to the harmonised VAT assessment bases determined according to European Union rules, there is thus a direct link between the collection of VAT revenue in compliance with the European Union law applicable and the availability to the European Union budget of the corresponding VAT resources, since any lacuna in the collection of the first potentially causes a reduction in the second (see, to this effect, Case C-539/09 *Commission v Germany* [2011] ECR I-11235, paragraph 72).

27 It follows that tax penalties and criminal proceedings for tax evasion, such as those to which the defendant in the main proceedings has been or is subject because the information concerning VAT that was provided was false, constitute implementation of Articles 2, 250(1) and 273 of Directive 2006/112 (previously Articles 2 and 22 of the Sixth Directive) and of Article 325 TFEU and, therefore, of European Union law, for the purposes of Article 51(1) of the Charter.

28 The fact that the national legislation upon which those tax penalties and criminal proceedings are founded has not been adopted to transpose Directive 2006/112 cannot call that conclusion into question, since its application is designed to penalise an infringement of that directive and is therefore intended to implement the obligation imposed on the Member States by the Treaty to impose effective penalties for conduct prejudicial to the financial interests of the European Union.

29 That said, where a court of a Member State is called upon to review whether fundamental rights are complied with by a national provision or measure which, in a situation where action of the Member States is not entirely determined by European Union law, implements the latter for the purposes of Article 51(1) of the Charter, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of European Union law are not thereby compromised (see, in relation to the latter aspect, Case C-399/11 *Melloni* [2013] ECR, paragraph 60).

30 For this purpose, where national courts find it necessary to interpret the Charter they may, and in some cases must, make a reference to the Court of Justice for a preliminary ruling under Article 267 TFEU.

31 It follows from the foregoing considerations that the Court has jurisdiction to answer the questions referred and to provide all the guidance as to interpretation needed in order for the referring court to determine whether the national legislation is compatible with the *ne bis in idem* principle laid down in Article 50 of the Charter.

Consideration of the questions referred

Questions 2, 3 and 4

32 By these questions, to which it is appropriate to give a joint reply, the Haparanda tingsrätt asks the Court, in essence, whether the *ne bis in idem* principle laid down in Article 50 of the Charter should be interpreted as precluding criminal proceedings for tax evasion from being brought against a defendant where a tax penalty has already been imposed upon him for the same acts of providing false information.

33 Application of the *ne bis in idem* principle laid down in Article 50 of the Charter to a prosecution for tax evasion such as that which is the subject of the main proceedings presupposes that the measures which have already been adopted against the defendant by means of a decision that has become final are of a criminal nature.

34 In this connection, it is to be noted first of all that Article 50 of the Charter does not preclude a Member State from imposing, for the same acts of non-compliance with declaration obligations in the field of VAT, a combination of tax penalties and criminal penalties. In order to ensure that all VAT revenue is collected and, in

so doing, that the financial interests of the European Union are protected, the Member States have freedom to choose the applicable penalties (see, to this effect, Case 68/88 *Commission v Greece* [1989] ECR 2965, paragraph 24; Case C-213/99 *de Andrade* [2000] ECR I-11083, paragraph 19; and Case C-91/02 *Hannl-Hofstetter* [2003] ECR I-12077, paragraph 17). These penalties may therefore take the form of administrative penalties, criminal penalties or a combination of the two. It is only if the tax penalty is criminal in nature for the purposes of Article 50 of the Charter and has become final that that provision precludes criminal proceedings in respect of the same acts from being brought against the same person.

35 Next, three criteria are relevant for the purpose of assessing whether tax penalties are criminal in nature. The first criterion is the legal classification of the offence under national law, the second is the very nature of the offence, and the third is the nature and degree of severity of the penalty that the person concerned is liable to incur (Case C-489/10 *Bonda* [2012] ECR, paragraph 37).

36 It is for the referring court to determine, in the light of those criteria, whether the combining of tax penalties and criminal penalties that is provided for by national law should be examined in relation to the national standards as referred to in paragraph 29 of the present judgment, which could lead it, as the case may be, to regard their combination as contrary to those standards, as long as the remaining penalties are effective, proportionate and dissuasive (see, to this effect, inter alia *Commission v Greece*, paragraph 24; Case C-326/88 *Hansen* [1990] ECR I-2911, paragraph 17; Case C-167/01 *Inspire Art* [2003] ECR I-10155, paragraph 62; Case C-230/01 *Penycoed* [2004] ECR I-937, paragraph 36; and Joined Cases C-387/02, C-391/02 and C-403/02 *Berlusconi and Others* [2005] ECR I-3565 paragraph 65).

37 It follows from the foregoing considerations that the answer to the second, third and fourth questions is that the *ne bis in idem* principle laid down in Article 50 of the Charter does not preclude a Member State from imposing successively, for the same acts of non-compliance with declaration obligations in the field of VAT, a tax penalty and a criminal penalty in so far as the first penalty is not criminal in nature, a matter which is for the national court to determine.

Question 5

38 By its fifth question, the Haparanda tingsrätt asks the Court, in essence, whether national legislation which allows the same court to impose tax penalties in combination with criminal penalties in the event of tax evasion is compatible with the *ne bis in idem* principle guaranteed by Article 50 of the Charter.

39 It should be recalled at the outset that, in proceedings under Article 267 TFEU, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of European Union law, the Court is in principle bound to give a ruling (see, inter alia, Joined Cases C-78/08 to C-80/08 *Paint Graphos and Others* [2011] ECR I-7611, paragraph 30 and the case-law cited).

40 The presumption that questions referred by national courts for a preliminary ruling are relevant may be rebutted only in exceptional cases, where it is quite obvious that the interpretation of European Union law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, to this effect, inter alia *Paint Graphos*, paragraph 31 and the case-law cited).

41 Here, it is apparent from the order for reference that the national legislation to which the Haparanda tingsrätt makes reference is not the legislation applicable to the dispute in the main proceedings and currently does not exist in Swedish law.

42 The fifth question must therefore be declared inadmissible, as the function entrusted to the Court within the framework of Article 267 TFEU is to contribute to the administration of justice in the Member States and not to deliver advisory opinions on general or hypothetical questions (see, inter alia, *Paint Graphos*, paragraph 32 and the case-law cited)

Question 1

43 By its first question, the Haparanda tingsrätt asks the Court, in essence, whether a national judicial practice is compatible with European Union law if it makes the obligation for a national court to disapply any provision contrary to a fundamental right guaranteed by the ECHR and by the Charter conditional upon that infringement being clear from the instruments concerned or the case-law relating to them.

44 As regards, first, the conclusions to be drawn by a national court from a conflict between national law and the ECHR, it is to be remembered that whilst, as Article 6(3) TEU confirms, fundamental rights recognised by the ECHR constitute general principles of the European Union's law and whilst Article 52(3) of the Charter requires rights contained in the Charter which correspond to rights guaranteed by the ECHR to be given the same meaning and scope as those laid down by the ECHR, the latter does not constitute, as long as the European Union has not acceded to it, a legal instrument which has been formally incorporated into European Union law. Consequently, European Union law does not govern the relations between the ECHR and the legal systems of the Member States, nor does it determine the conclusions to be drawn by a national court in the event of conflict between the rights guaranteed by that convention and a rule of national law (see, to this effect, Case C-571/10 *Kamberaj* [2012] ECR, paragraph 62).

45 As regards, next, the conclusions to be drawn by a national court from a conflict between provisions of domestic law and rights guaranteed by the Charter, it is settled case-law that a national court which is called upon, within the exercise of its jurisdiction, to apply provisions of European Union law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such a provision by legislative or other constitutional means (Case 106/77 *Simmenthal* [1978] ECR 629, paragraphs 21 and 24; Case C-314/08 *Filipiak* [2009] ECR I-11049, paragraph 81; and Joined Cases C-188/10 and C-189/10 *Melki and Abdeli* [2010] ECR I-5667, paragraph 43).

46 Any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of European Union law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent European Union rules from having full force and effect are incompatible with those requirements, which are the very essence of European Union law (*Melki and Abdeli*, paragraph 44 and the case-law cited).

47 Furthermore, in accordance with Article 267 TFEU, a national court hearing a case concerning European Union law the meaning or scope of which is not clear to it may or, in certain circumstances, must refer to the Court questions on the interpretation of the provision of European Union law at issue (see, to this effect, Case 283/81 *Cilfit and Others* [1982] ECR 3415).

48 It follows that European Union law precludes a judicial practice which makes the obligation for a national court to disapply any provision contrary to a fundamental right guaranteed by the Charter conditional upon that infringement being clear from the text of the Charter or the case-law relating to it, since it withholds from the national court the power to assess fully, with, as the case may be, the cooperation of the Court of Justice, whether that provision is compatible with the Charter.

49 In the light of the foregoing considerations, the answer to the first question is:

- European Union law does not govern the relations between the ECHR and the legal systems of the Member States, nor does it determine the conclusions to be drawn by a national court in the event of conflict between the rights guaranteed by that convention and a rule of national law;
- European Union law precludes a judicial practice which makes the obligation for a national court to disapply any provision contrary to a fundamental right guaranteed by the Charter conditional upon that infringement being clear from the text of the Charter or the case-law relating to it, since it withholds from the national court the power to assess fully, with, as the case may be, the cooperation of the Court of Justice, whether that provision is compatible with the Charter.

Costs

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

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

1. **The *ne bis in idem* principle laid down in Article 50 of the Charter of Fundamental Rights of the European Union does not preclude a Member State from imposing successively, for the same acts of non-compliance with declaration obligations in the field of value added tax, a tax penalty and a criminal penalty in so far as the first penalty is not criminal in nature, a matter which is for the national court to determine.**

2. **European Union law does not govern the relations between the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and the legal systems of the Member States, nor does it determine the conclusions to be drawn by a national court in the event of conflict between the rights guaranteed by that convention and a rule of national law.**

European Union law precludes a judicial practice which makes the obligation for a national court to disapply any provision contrary to a fundamental right guaranteed by the Charter of Fundamental Rights of the European Union conditional upon that infringement being clear from the text of the Charter or the case-law relating to it, since it withholds from the national court the power to assess fully, with, as the case may be, the cooperation of the Court of Justice of the European Union, whether that provision is compatible with the Charter.

Opinion 2/13

I – The request for an Opinion

1. The request for an Opinion submitted to the Court of Justice of the European Union by the European Commission is worded as follows:

‘Is the draft agreement providing for the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms[, signed in Rome on 4 November 1950 (“the ECHR”),] compatible with the Treaties?’

2. The following documents were sent by the Commission to the Court as annexes to its request:

– the draft revised agreement on the accession of the European Union (‘EU’) to the Convention for the Protection of Human Rights and Fundamental Freedoms (‘the draft agreement’);

– the draft declaration by the EU to be made at the time of signature of the Accession Agreement (‘the draft declaration’);

– the draft rule to be added to the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements in cases to which the EU is a party (‘draft Rule 18’);

– the draft model of memorandum of understanding between the EU and X [State which is not a member of the EU]; and

– the draft explanatory report to the Agreement on the Accession of the EU to the Convention for the Protection of Human Rights and Fundamental Freedoms (‘the draft explanatory report’, and, together with the other instruments referred to above, ‘the draft accession instruments’ or ‘the agreement envisaged’).

II – The institutional framework and the European Convention for the Protection of Human Rights and Fundamental Freedoms

A – *The Council of Europe*

3. By an international agreement signed in London on 5 May 1949, which entered into force on 3 August 1949 (‘the Statute of the Council of Europe’), a group of 10 European States created the Council of Europe in order to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles of their common heritage and facilitating economic and social progress in Europe. At present, 47 European States are members of the Council of Europe, including the 28 Member States of the EU (‘the Member States’).

4. According to that statute, the organs of the Council of Europe are the Committee of representatives of governments (‘the Committee of Ministers’) and the Parliamentary Assembly (‘the Assembly’), which are served by the Secretariat of the Council of Europe.

5. In accordance with Article 14 of the Statute of the Council of Europe, the Committee of Ministers is composed of one representative for each member, each representative being entitled to one vote.

6. Under Article 15.a of the Statute of the Council of Europe, ‘[o]n the recommendation of the [Assembly] or on its own initiative, the Committee of Ministers shall consider the action required to further the aim of the Council of Europe, including the conclusion of conventions or agreements and the adoption by governments of a common policy with regard to particular matters. ...’. The same article states, in the first part of paragraph b, that, ‘[i]n appropriate cases, the conclusions of the Committee [of Ministers] may take the form of recommendations to the governments of members’.

7. Article 20 of the Statute of the Council of Europe governs the quorums required for the adoption of decisions by the Committee of Ministers. It is worded as follows:

- ‘a. Resolutions of the Committee of Ministers relating to the following important matters, namely:
 - i. recommendations under Article 15.b;
 - ...
 - v. recommendations for the amendment of Articles ... 15 [and] 20 ...; and
 - vi. any other question which the Committee may, by a resolution passed under d below, decide should be subject to a unanimous vote on account of its importance,

require the unanimous vote of the representatives casting a vote, and of a majority of the representatives entitled to sit on the Committee.

...

- d. All other resolutions of the Committee ... require a two-thirds majority of the representatives casting a vote and of a majority of the representatives entitled to sit on the Committee.’

8. According to Article 25 of the Statute of the Council of Europe, the Assembly is to consist of representatives of each member of the Council of Europe, elected by its parliament from among the members thereof, or appointed from among the members of that national parliament, in such manner as it shall decide. Each member is to be entitled to a number of representatives determined by Article 26 of that statute. The highest number of representatives is 18.

B – The European Convention for the Protection of Human Rights and Fundamental Freedoms

9. The ECHR is a multilateral international agreement concluded in the Council of Europe, which entered into force on 3 September 1953. All the members of the Council of Europe are among the High Contracting Parties to that Convention (‘the Contracting Parties’).

10. The ECHR is in three sections.

1. Section I of the ECHR, entitled ‘Rights and freedoms’, and the substantive provisions thereof

11. Section I of the ECHR defines the rights and freedoms which the Contracting Parties, in accordance with Article 1 of the ECHR, ‘shall secure to everyone within their jurisdiction’. There is no provision for any derogation from that commitment other than that contained in Article 15 of the ECHR, ‘[i]n time of war or other public emergency threatening the life of the nation’. In particular, in no circumstances can any derogation be made from the obligations set out in Article 2 (right to life, save in the case of deprivation of life resulting from the necessary use of force), Article 3 (prohibition of torture), Article 4(1) (prohibition of slavery) and Article 7 (no punishment without law).

12. Article 6 of the ECHR, headed ‘Right to a fair trial’, states:

‘1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

- (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
- (b) to have adequate time and facilities for the preparation of his defence;
- (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
- (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.’

13. Article 13 of the ECHR, headed ‘Right to an effective remedy’, is worded as follows:

‘Everyone whose rights and freedoms as set forth in [the ECHR] are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.’

2. Section II of the ECHR and the control mechanisms

14. Section II of the ECHR governs the mechanisms for controlling the Contracting Parties’ compliance with their commitments in accordance with Article 1 thereof. That section includes, in particular, Article 19 of the ECHR, which establishes the European Court of Human Rights (‘the ECtHR’), and Article 46, which confers on the Committee of Ministers powers of supervision of the execution of judgments of the ECtHR.

a) The ECtHR

15. In accordance with Articles 20 and 22 of the ECHR, the Judges of the ECtHR, the number of which is equal to that of the Contracting Parties, are to be elected by the Assembly with respect to each Contracting Party from a list of three candidates nominated by that contracting party.

16. Article 32 of the ECHR confers on the ECtHR jurisdiction to interpret and apply the ECHR as provided, inter alia, in Articles 33 and 34 thereof.

17. Under Article 33 of the ECHR (Inter-State cases), the ECtHR may receive an application from a Contracting Party alleging breach of the provisions of the ECHR and of the protocols thereto by one (or more) other Contracting Parties.

18. In accordance with the first sentence of Article 34 of the ECHR, the ECtHR ‘may receive applications from any person, nongovernmental organisation or group of individuals claiming to be the victim of a violation by one of the [Contracting Parties] of the rights set forth in the Convention or the Protocols thereto’.

19. The ECHR makes the admissibility of an individual application subject, in particular, to the following four criteria: First, under Article 34 of the ECHR, the applicant must be able to claim to be the victim of a violation of the rights set forth in the ECHR or the protocols thereto. Secondly, in accordance with Article 35(1) of the ECHR, the applicant must have exhausted all ‘domestic’ remedies, that is to say, those that exist in the legal order of the Contracting Party against which the application is brought. That admissibility criterion reflects the principle that the control mechanism established by the ECHR is subsidiary to the machinery of human rights protection that exists within the Contracting Parties (judgments of the ECtHR in *Akdivar and Others v. Turkey*, 16 September 1996, §§ 65 and 66, *Reports of Judgments and Decisions* 1996-IV, and in *Burden v. the United Kingdom* [GC], no. 13378/05, § 42, ECHR 2008). Thirdly, under the same provision, the application must be brought within a period of six months from the date on which the final decision was taken. Fourthly, under Article 35(2)(b) of the ECHR, the admissibility of an application is subject to the application not being ‘substantially the same as a matter that has already been examined by the [ECtHR] or has already been submitted to another procedure of international investigation or settlement’, unless it contains relevant new information.

20. Proceedings before the ECtHR culminate either in a decision or judgment by which the ECtHR finds that the application is inadmissible or that the ECHR has not been violated, or in a judgment finding a violation of the ECHR. That judgment is declaratory and does not affect the validity of the relevant acts of the Contracting Party.

21. A judgment of the ECtHR delivered by the Grand Chamber is final, in accordance with Article 44(1) of the ECHR. It follows from Article 43, read in conjunction with Article 44(2) of the ECHR, that a judgment delivered by a Chamber of the ECtHR becomes final when the parties declare that they will not request that the case be referred to the Grand Chamber, or when such a request has been rejected by the panel of the Grand Chamber, or three months after the date of the judgment if no request has been made for the case to be referred to the Grand Chamber.

22. Under Article 46(1) of the ECHR, the Contracting Parties are obliged to abide by the final judgment of the ECtHR in any case to which they are parties. In accordance with that provision, a Contracting Party is obliged to take, so far as concerns the applicant, all individual measures applicable under domestic law in order to eliminate the consequences of the violation established in the judgment of the ECtHR (*restitutio in integrum*). If the domestic law of the Contracting Party concerned allows only partial reparation to be made, Article 41 of the ECHR provides that the ECtHR is to afford 'just satisfaction' to the applicant. Moreover, a Contracting Party is obliged to adopt general measures, such as the amendment of domestic law, changes in interpretation by the courts or other types of measures, in order to prevent further violations similar to those found by the ECtHR, or to put an end to the violations subsisting in domestic law.

b) The functioning of the Committee of Ministers in the exercise of its powers to supervise the execution of the judgments of the ECtHR

23. Article 46(2) of the ECHR confers on the Committee of Ministers responsibility for supervising the execution of the final judgments of the ECtHR. Similarly, under Article 39(4) of the ECHR, the Committee of Ministers is to supervise the execution of the terms of a friendly settlement of a case, as provided for in paragraph 1 of that article.

24. Pursuant to those powers, the Committee of Ministers examines, in essence, whether the Contracting Party has taken all the necessary measures to abide by the final judgment of the ECtHR or, where appropriate, to execute the terms of a friendly settlement. The exercise of those powers is governed by the 'Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements' ('the Rules for the supervision of execution').

25. According to Rule 17 of the Rules for the supervision of execution, the Committee of Ministers is to adopt a 'final resolution' if it establishes that the Contracting Party has taken all the necessary measures to abide by the final judgment of the ECtHR or, where appropriate, that the terms of a friendly settlement have been executed. In accordance with Rule 16 of those rules, the Committee of Ministers may adopt 'interim resolutions', notably in order to 'provide information on the state of progress of the execution or, where appropriate, to express concern and/or to make suggestions with respect to the execution'. In order for both types of resolution to be adopted, the quorum laid down in Article 20.d of the Statute of the Council of Europe must be satisfied.

26. According to Article 46(3) and (4) of the ECHR, the Committee of Ministers may, by a majority vote of two thirds of the representatives entitled to sit on that committee, if it considers that the supervision of the execution of a final judgment is hindered by a problem of interpretation of that judgment, submit a request for interpretation to the ECtHR. Moreover, if that committee considers that a Contracting Party is refusing to abide by a final judgment in a case to which it is a party, it may refer to the ECtHR the question whether that party has failed to fulfil its obligation under Article 46(1). If the ECtHR finds that that obligation has been violated, it is to refer the case to the Committee of Ministers for consideration of the measures to be taken. If no violation is found, the case is to be referred to the Committee of Ministers, which is to close its examination of the case, in accordance with Article 46(5).

27. The ECHR also confers certain other powers on the Committee of Ministers. Thus, in accordance with Article 26(2) thereof, it may, at the request of the plenary Court of the ECtHR, by a unanimous decision and for a fixed period reduce from seven to five the number of Judges of the Chambers, and, on the basis of Article 47 of the ECHR, request an advisory opinion of the ECtHR on legal questions concerning the interpretation of the ECHR and the protocols thereto.

28. Lastly, under Article 50 of the ECHR, the expenditure on the ECtHR is to be borne by the Council of Europe.

3. Section III of the ECHR, entitled ‘Miscellaneous provisions’

29. In accordance with Article 53 of the ECHR, nothing in the ECHR is to be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any Contracting Party or under any other agreement to which it is a party.

30. Under Article 55 of the ECHR, the Contracting Parties agree that, except by special agreement, they will not submit a dispute arising out of the interpretation or application of the ECHR to a means of settlement other than those provided for in the ECHR.

31. Article 57(1) of the ECHR allows the Contracting Parties, when signing that Convention or when depositing the instrument of ratification, to ‘make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision’, but prohibits ‘[r]eservations of a general character’.

4. The Protocols to the ECHR

32. The ECHR is supplemented by a series of 14 protocols.

33. A first group of protocols, comprising the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (‘the Protocol’) and Protocols No 4, No 6, No 7, No 12 and No 13, supplements the content of the ECHR by establishing additional fundamental rights. All the Member States are Contracting Parties to the Protocol and to Protocol No 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty (‘Protocol No 6’). By contrast, each of the other protocols has only a limited number of Member States among its Contracting Parties.

34. A second group of protocols, including Protocols No 2, No 3, No 5, Nos 8 to 11 and No 14, merely amends the ECHR and these protocols have no autonomous content. Moreover, most of them have been repealed or have become devoid of purpose.

35. Of the protocols in the second group, the most relevant for the purposes of the present request for an Opinion is Protocol No 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, which was adopted on 13 May 2004 and entered into force on 1 June 2010. By Article 17 of that protocol, Article 59(2) of the ECHR was amended to lay down the very principle of the EU’s accession to that Convention. That provision now reads as follows:

‘The [EU] may accede to [the ECHR].’

36. Lastly, two additional protocols are open for signature and are not yet in force. These are Protocol No 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms, which amends the ECHR in relatively minor respects, and Protocol No 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms, signed on 2 October 2013 (‘Protocol No 16’), which provides, in Article 1(1), for the highest courts and tribunals of the Contracting Parties to be able to request the ECtHR to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the ECHR or the protocols thereto.

III – The relationship between the EU and the ECHR

37. According to well-established case-law of the Court of Justice, fundamental rights form an integral part of the general principles of EU law. For that purpose, the Court of Justice draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories (judgments in *Internationale Handelsgesellschaft*, 11/70, EU:C:1970:114, paragraph 4, and *Nold v Commission*, 4/73, EU:C:1974:51, paragraph 13). In that context, the Court of Justice has stated that the ECHR has special significance (see, in particular, judgments in *ERT*, C-260/89, EU:C:1991:254, paragraph 41, and *Kadi and Al*

Barakaat International Foundation v Council and Commission, C-402/05 P and C-415/05 P, EU:C:2008:461, paragraph 283). Article F(2) of the Treaty on European Union (which became, after amendment, Article 6(2) EU) codified that case-law.

38. In paragraphs 34 and 35 of its Opinion 2/94 (EU:C:1996:140), the Court of Justice considered that, as Community law stood at the time, the European Community had no competence to accede to the ECHR. Such accession would have entailed a substantial change in the existing Community system for the protection of human rights in that it would have entailed the entry of the Community into a distinct international institutional system as well as integration of all the provisions of that Convention into the Community legal order. Such a modification of the system for the protection of human rights in the Community, with equally fundamental institutional implications for the Community and for the Member States, would have been of constitutional significance and would therefore have been such as to go beyond the scope of Article 235 of the EC Treaty (which became Article 308 EC), a provision now contained in Article 352(1) TFEU, which could have been brought about only by way of amendment of that Treaty.

39. Subsequently, on 7 December 2000, the European Parliament, the Council of the European Union and the Commission proclaimed the Charter of Fundamental Rights of the European Union in Nice (OJ 2000 C 364, p. 1; ‘the Charter’). The Charter, which at that time was not a legally binding instrument, has the principal aim, as is apparent from the preamble thereto, of reaffirming ‘the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the [ECHR], the Social Charters adopted by the Community and by the Council of Europe and the case-law of the [Court of Justice] and of the [ECtHR]’ (see, to that effect, judgment in *Parliament v Council*, C-540/03, EU:C:2006:429, paragraph 38).

40. The Treaty of Lisbon, which entered into force on 1 December 2009, amended Article 6 EU. As amended, that provision, which is now Article 6 TEU, is worded as follows:

‘1. The Union recognises the rights, freedoms and principles set out in the [Charter], which shall have the same legal value as the Treaties.

The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.

The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

2. The Union shall accede to the [ECHR]. Such accession shall not affect the Union’s competences as defined in the Treaties.

3. Fundamental rights, as guaranteed by the [ECHR] and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law.’

41. In that regard, Article 218(6)(a)(ii) TFEU provides that the Council is to adopt the decision concluding the agreement on EU accession to the ECHR (‘the accession agreement’) after obtaining the consent of the Parliament. In addition, Article 218(8) states that, for that purpose, the Council is to act unanimously and that its decision is to enter into force after it has been approved by the Member States in accordance with their respective constitutional requirements.

42. The protocols to the EU and FEU Treaties, which, according to Article 51 TEU, form an integral part of those Treaties, include Protocol (No 8) relating to Article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms (‘Protocol No 8 EU’). This protocol consists of three articles, which are worded as follows:

‘Article 1

The [accession agreement] provided for in Article 6(2) [TEU] shall make provision for preserving the specific characteristics of the Union and Union law, in particular with regard to:

- (a) the specific arrangements for the Union's possible participation in the control bodies of the [ECHR];
- (b) the mechanisms necessary to ensure that proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the Union as appropriate.

Article 2

The agreement referred to in Article 1 shall ensure that accession of the Union shall not affect the competences of the Union or the powers of its institutions. It shall ensure that nothing therein affects the situation of Member States in relation to the [ECHR], in particular in relation to the Protocols thereto, measures taken by Member States derogating from the [ECHR] in accordance with Article 15 thereof and reservations to the [ECHR] made by Member States in accordance with Article 57 thereof.

Article 3

Nothing in the agreement referred to in Article 1 shall affect [Article 344 TFEU].'

43. The Declaration on Article 6(2) of the Treaty on European Union, annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, is worded as follows:

'The Conference agrees that the Union's accession to the [ECHR] should be arranged in such a way as to preserve the specific features of Union law. In this connection, the Conference notes the existence of a regular dialogue between the [Court of Justice] and the [ECtHR]; such dialogue could be reinforced when the Union accedes to that Convention.'

44. Article 52(3) of the Charter states:

'In so far as this Charter contains rights which correspond to rights guaranteed by the [ECHR], the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.'

45. Lastly, according to Article 53 of the Charter:

'Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the [ECHR], and by the Member States' constitutions.'

IV – The process of accession

46. Upon the recommendation of the Commission of 17 March 2010, the Council adopted a decision on 4 June 2010 authorising the opening of negotiations in relation to the accession agreement, and designated the Commission as negotiator.

47. A supplementary annex to the Council's mandate for the negotiation of 26 and 27 April 2012 sets out the principles which will have to be covered by the EU's internal rules, the adoption of which is necessary in order to make the EU's accession to the ECHR effective ('the internal rules'). According to that document, the internal rules will deal in particular with the representation of the EU before the ECtHR, the triggering of the co-respondent mechanism before the ECtHR and coordination rules for the purpose of the conduct of the procedure before the ECtHR by the respondent and the co-respondent, the selection of three candidates for the office of Judge in the ECtHR, the prior involvement of the Court of Justice, and the circumstances in which the EU will agree a position and those in which the Member States will remain free to speak and act as they choose, both in the ECtHR and in the Committee of Ministers.

48. On 5 April 2013, the negotiations resulted in agreement among the negotiators on the draft accession instruments. The negotiators agreed that all those instruments constitute a package and that they are all equally necessary for the accession of the EU to the ECHR.

V – The draft agreement

49. The draft agreement contains the provisions considered necessary to allow for the EU's accession to the ECHR. A first group of these provisions relates to accession proper and introduces the procedural mechanisms necessary in order for such accession to be effective. A second group of those provisions, of a purely technical nature, sets out, first, the amendments to the ECHR that are required having regard to the fact that the ECHR was drawn up to apply to the member States of the Council of Europe, whereas the EU is neither a State nor a member of that international organisation. Secondly, provisions are laid down relating to other instruments linked to the ECHR and the final clauses concerning entry into force and the notification of instruments of ratification or accession.

A – *The provisions governing accession*

50. Taking account of Article 59(2) of the ECHR, Article 1(1) of the draft agreement provides that, by that agreement, the EU accedes to the ECHR, to the Protocol and to Protocol No 6, that is to say, to the two protocols to which all the Member States are already parties.

51. Article 1(2) of the draft agreement amends Article 59(2) of the ECHR so as, first, to enable the EU to accede to other protocols at a later stage, such accession continuing to be governed, *mutatis mutandis*, by the relevant provisions of each protocol, and, secondly, to make clear that the accession agreement 'constitutes an integral part of [the ECHR]'.

52. According to Article 2(1) of the draft agreement, the EU may, when signing or expressing its consent to be bound by the provisions of the accession agreement in accordance with Article 10 thereof, make reservations to the ECHR and to the Protocol in accordance with Article 57 of the ECHR. Article 4 of Protocol No 6 provides, however, that no reservation may be made in respect of that protocol. In addition, Article 2(2) of the draft agreement inserts a new sentence into Article 57 of the ECHR, according to which the EU 'may, when acceding to [the ECHR], make a reservation in respect of any particular provision of the Convention to the extent that any law of the [EU] then in force is not in conformity with the provision'. Article 11 of the draft agreement states, moreover, that no reservation may be made in respect of the provisions of that agreement.

53. According to Article 1(3) of the draft agreement, accession to the ECHR and the protocols thereto is to impose on the EU obligations with regard only to acts, measures or omissions of its institutions, bodies, offices or agencies, or of persons acting on their behalf. Moreover, nothing in the ECHR or the protocols thereto is to require the EU to perform an act or adopt a measure for which it has no competence under EU law.

54. Conversely, the first sentence of Article 1(4) of the draft agreement makes clear that, for the purposes of the ECHR, of the protocols thereto and of the accession agreement itself, an act, measure or omission of organs of a Member State of the EU or of persons acting on its behalf is to be attributed to that State, even if such act, measure or omission occurs when the State implements the law of the EU, including decisions taken under the EU and FEU Treaties. The second sentence in the same paragraph makes clear that this is not to preclude the EU from being responsible as a co-respondent for a violation resulting from such an act, measure or omission, in accordance with, in particular, Article 3 of the draft agreement.

55. The aforementioned Article 3 introduces the co-respondent mechanism. Article 3(1) amends Article 36 of the ECHR by adding a paragraph 4 which provides that the EU or a Member State may become a co-respondent to proceedings before the ECtHR in the circumstances set out, in essence, in Article 3(2) to (8), and, moreover, that the co-respondent is a party to the case.

56. Article 3(2) to (8) of the draft agreement is worded as follows:

'2. Where an application is directed against one or more member States of the [EU], the [EU] may become a co-respondent to the proceedings in respect of an alleged violation notified by the [ECtHR] if it appears that such allegation calls into question the compatibility with the rights at issue defined in the [ECHR] or in the protocols to which the [EU] has acceded of a provision of [EU] law, including decisions taken under the [EU Treaty] and under the [FEU Treaty], notably where that violation could have been avoided only by disregarding an obligation under [EU] law.

3. Where an application is directed against the [EU], the [Member States] may become co-respondents to the proceedings in respect of an alleged violation notified by the [ECtHR] if it appears that such allegation calls into question the compatibility with the rights at issue defined in the [ECHR] or in the protocols to which the [EU] has acceded of a provision of the [EU Treaty], the [FEU Treaty] or any other provision having the same legal value pursuant to those instruments, notably where that violation could have been avoided only by disregarding an obligation under those instruments.

4. Where an application is directed against and notified to both the [EU] and one or more of [the] Member States, the status of any respondent may be changed to that of a co-respondent if the conditions in paragraph 2 or paragraph 3 of this article are met.

5. A [Contracting Party] shall become a co-respondent either by accepting an invitation from the [ECtHR] or by decision of the [ECtHR] upon the request of that [Contracting Party]. When inviting a [Contracting Party] to become co-respondent, and when deciding upon a request to that effect, the [ECtHR] shall seek the views of all parties to the proceedings. When deciding upon such a request, the [ECtHR] shall assess whether, in the light of the reasons given by the [Contracting Party] concerned, it is plausible that the conditions in paragraph 2 or paragraph 3 of this article are met.

6. In proceedings to which the [EU] is a co-respondent, if the [Court of Justice] has not yet assessed the compatibility with the rights at issue defined in the [ECHR] or in the protocols to which the [EU] has acceded of the provision of [EU] law as under paragraph 2 of this article, sufficient time shall be afforded for the [Court of Justice] to make such an assessment, and thereafter for the parties to make observations to the [ECtHR]. The [EU] shall ensure that such assessment is made quickly so that the proceedings before the [ECtHR] are not unduly delayed. The provisions of this paragraph shall not affect the powers of the [ECtHR].

7. If the violation in respect of which a [Contracting Party] is a co-respondent to the proceedings is established, the respondent and the co-respondent shall be jointly responsible for that violation, unless the [ECtHR], on the basis of the reasons given by the respondent and the co-respondent, and having sought the views of the applicant, decides that only one of them be held responsible.

8. This article shall apply to applications submitted from the date of entry into force of [the accession agreement].’

57. Lastly, Article 5 of the draft agreement states that proceedings before the Court of Justice are to be understood as constituting neither procedures of international investigation or settlement within the meaning of Article 35, paragraph 2.b, of the ECHR, nor means of dispute settlement within the meaning of Article 55 of the ECHR.

B – *The other provisions*

58. In the first place, one set of provisions is intended, first of all, to modify the provisions of the ECHR or of the protocols thereto which refer to the Contracting Parties as ‘States’ or to matters covered by the concept of ‘State’.

59. Accordingly, Article 1(5) of the draft agreement contains an interpretation clause according to which any of the terms ‘State’, ‘States’, ‘States Parties’, ‘national law’, ‘administration of the State’, ‘national laws’, ‘national authority’, ‘domestic’, ‘national security’, ‘economic well-being of the country’, ‘territorial integrity’, ‘life of the nation’, which appear in various provisions of the ECHR and in some of the protocols thereto, are to be understood after accession as referring also, *mutatis mutandis*, to the EU as a Contracting Party.

60. As regards the territorial aspects more specifically, as provided in Article 1(6) of the draft agreement, the expression ‘everyone within their jurisdiction’ appearing in Article 1 of the ECHR is to be understood, with regard to the EU, as referring to persons within the territories of the Member States to which the EU and FEU Treaties apply. In so far as that expression refers to persons outside the territory of a Contracting Party, it is to be understood as referring to persons who, if the alleged violation had been attributable to a Contracting Party which is a State, would have been within the jurisdiction of that Contracting Party. In addition, Article 1(7) provides that, with regard to the EU, the terms ‘country’ and ‘territory of a State’ appearing in various provisions of the ECHR and in some of the protocols thereto are to mean each of the territories of the Member States to which the EU and FEU Treaties apply.

61. Next, Article 1(8) of the draft agreement amends Article 59(5) of the ECHR so as to provide that the Secretary-General of the Council of Europe is henceforth to notify the EU also of the entry into force of the ECHR, the names of the Contracting Parties who have ratified it or acceded to it, and the deposit of all instruments of ratification or accession which may be effected subsequently.

62. Lastly, Article 4 of the draft agreement amends the first sentence of Article 29(2) of the ECHR and the heading of Article 33 thereof by replacing the terms ‘inter-State applications’ and ‘inter-State cases’ with the terms ‘inter-Party applications’ and ‘inter-Party cases’, respectively.

63. In the second place, certain amendments of the ECHR were considered necessary on account of the fact that the EU is not a member of the Council of Europe.

64. Article 6(1) of the draft agreement provides that a delegation of the European Parliament is to be entitled to participate, with the right to vote, in the sittings of the Assembly whenever the Assembly exercises its functions related to the election of Judges to the ECtHR. The delegation is to have the same number of representatives as the delegation of the member State of the Council of Europe which is entitled to the highest number of representatives. According to Article 6(2), ‘[t]he modalities of the participation of representatives of the European Parliament in the sittings of the [Assembly] and its relevant bodies shall be defined by the [Assembly], in co-operation with the European Parliament’.

65. As regards the Committee of Ministers, first of all, Article 7(1) of the draft agreement is to amend Article 54 of the ECHR by adding a new paragraph 1, according to which ‘[p]rotocols to [the] Convention are adopted by the Committee of Ministers’. Next, according to Article 7(2), the EU is to be entitled to participate in the meetings of the Committee of Ministers, with the right to vote, when the latter takes decisions under certain provisions of the ECHR, namely Articles 26(2) (reduction of the number of Judges of the Chambers), 39(4) (supervision of the execution of a friendly settlement), 46(2) to (5) (execution of the judgments of the ECtHR), 47 (requests for advisory opinions) and 54(1) (powers of the Committee of Ministers). In addition, Article 7(3) provides that, before the adoption of any text relating to the ECHR or to any protocol to the ECHR to which the EU has become a party, to decisions by the Committee of Ministers under the provisions mentioned in paragraph 2 of that article, or to the selection of candidates for election of Judges by the Assembly, the EU is to be consulted within that Committee, which must take due account of the position expressed by the EU. Lastly, the first sentence of Article 7(4) of the draft agreement sets out the principle that the exercise of the right to vote by the EU and its Member States is not to prejudice the effective exercise by the Committee of Ministers of its supervisory functions under Articles 39 and 46 of the ECHR (execution of friendly settlements and of the judgments of the ECtHR). More specifically, Article 7(4)(a) states that, ‘in relation to cases where the Committee of Ministers supervises the fulfilment of obligations either by the [EU] alone, or by the [EU] and one or more of its [M]ember States jointly, it derives from the [EU Treaties] that the [EU] and its [M]ember States express positions and vote in a co-ordinated manner’, before going on to provide that the rules for the supervision of the execution of judgments and of the terms of friendly settlements ‘shall be adapted to ensure that the Committee of Ministers effectively exercises its functions in those circumstances’. By contrast, in the words of Article 7(4)(b), ‘where the Committee of Ministers otherwise [than in the cases referred to in subparagraph (a)] supervises the fulfilment of obligations by a [Contracting Party] other than the [EU], the [Member States] are free under the [EU Treaties] to express their own position and exercise their right to vote’.

66. It was precisely in response to the abovementioned Article 7(4)(a) that the negotiators agreed to add to the Rules for the supervision of execution a Rule 18, headed ‘Judgments and friendly settlements in cases to which the [EU] is a party’. The wording of that new Rule 18 is as follows:

‘1. Decisions by the Committee of Ministers under Rule 17 (Final Resolution) of the present rules shall be considered as adopted if a majority of four fifths of the representatives casting a vote and a majority of two thirds of the representatives entitled to sit on the Committee of Ministers are in favour.

2. Decisions by the Committee of Ministers under Rule 10 (Referral to the [ECtHR] for interpretation of a judgment) and under Rule 11 (Infringement proceedings) of the present rules shall be considered as adopted if one fourth of the representatives entitled to sit on the Committee of Ministers is in favour.

3. Decisions on procedural issues or merely requesting information shall be considered as adopted if one fifth of the representatives entitled to sit on the Committee of Ministers is in favour.

4. Amendments to the provisions of this rule shall require consensus by all [Contracting Parties] to the [ECHR].’

67. As regards participation in the expenditure related to the ECHR, Article 8 of the draft agreement provides that the EU is to pay into the budget of the Council of Europe an annual contribution dedicated to the expenditure related to the functioning of the ECHR, and that that contribution is to be in addition to contributions made by the other Contracting Parties.

68. In the third place, the draft agreement includes a provision concerning relations between the ECHR and other agreements concluded in the Council of Europe that are related to the ECHR. Thus, under Article 9(1) of the draft agreement, the EU is, within the limits of its competences, to respect Articles 1 to 6 of the European Agreement relating to Persons Participating in Proceedings of the European Court of Human Rights, concluded in Strasbourg on 5 March 1996; Articles 1 to 19 of the General Agreement on Privileges and Immunities of the Council of Europe, concluded in Paris on 2 September 1949; Articles 2 to 6 of the Protocol to the General Agreement on Privileges and Immunities of the Council of Europe, concluded in Strasbourg on 6 November 1952; and Articles 1 to 6 of the Sixth Protocol to the General Agreement on Privileges and Immunities of the Council of Europe, signed in Strasbourg on 5 March 1996. In addition, Article 9(2) of the draft agreement provides that, for the purpose of the application of those instruments, the Contracting Parties to each of them are to treat the EU as if it were a Contracting Party. Paragraphs 3 and 4 of the same article provide, respectively, for the EU to be consulted when those instruments are amended and for it to be notified of events such as signature, deposit, date of entry into force or any other act relating to them.

69. Lastly, Articles 10 and 12 of the draft agreement, headed ‘Signature and entry into force’ and ‘Notifications’, respectively, contain the final clauses.

70. It should also be noted that, in accordance with the terms of the draft declaration, at paragraph (a), ‘[u]pon its accession to the [ECHR], the [EU] will ensure that ... it will request to become a co-respondent to the proceedings before the [ECtHR] or accept an invitation by the [ECtHR] to that effect, where the conditions set out in Article 3, paragraph 2, of the Accession Agreement are met ...’.

VI – The Commission’s assessment in its request for an Opinion

A – Admissibility

71. According to the Commission, its request for an Opinion is admissible, given that the information available to the Court of Justice is sufficient for it to consider whether the draft agreement is compatible with the Treaties and that, moreover, the draft accession instruments agreed by the negotiators are sufficiently advanced to be regarded as an ‘agreement envisaged’ within the meaning of Article 218(11) TFEU. Furthermore, the fact that internal rules have yet to be adopted should not have any bearing on the admissibility of the request for an Opinion, given that those rules cannot be adopted until the accession agreement has been concluded.

B – Substance

72. As regards the substance, the Commission analyses the conformity of the draft agreement with the various requirements set out in Article 6(2) TEU and Protocol No 8 EU. Furthermore, it also puts forward arguments to establish that the agreement envisaged respects the autonomy of the legal order of the EU in pursuing its own particular objectives. According to the Commission, it is necessary to avoid a situation in which the ECtHR or the Committee of Ministers could, when a dispute relating to the interpretation or application of one or more provisions of the ECHR or of the accession agreement is brought before them, be called upon, in the exercise of their powers under the ECHR, to interpret concepts in those instruments in a manner that might require them to rule on the respective competences of the EU and its Member States.

73. At the end of its analysis, the Commission concludes that the accession agreement is compatible with the Treaties.

1. Article 1(a) of Protocol No 8 EU

74. According to the Commission, the purpose of the requirement in Article 1(a) of Protocol No 8 EU to preserve the specific characteristics of the EU and EU law with regard to the specific arrangements for the EU’s possible

participation in the control bodies of the ECHR is to ensure that the EU participates on the same footing as any other Contracting Party in the control bodies of the ECHR, that is to say, the ECtHR, the Assembly and the Committee of Ministers.

75. The Commission submits that the draft agreement ensures such participation in those control bodies.

76. As regards the ECtHR, there is, it is argued, no need to amend the ECHR in order to allow the presence of a Judge elected in respect of the EU, since Article 22 of the ECHR provides that a Judge is to be elected in respect of each Contracting Party. As regards the election of Judges to the ECtHR by the Assembly, Article 6(1) of the draft agreement provides that a delegation of the European Parliament is to participate, with the right to vote, in the relevant sittings of the Assembly. As to the Committee of Ministers, Article 7(2) of the draft agreement provides that the EU is to be entitled to participate, with the right to vote, in the meetings of that Committee when it takes decisions in the exercise of the powers conferred on it by the ECHR. The EU is to have one vote, like the 47 other Contracting Parties.

77. The Commission notes that the obligation of sincere cooperation requires the EU and the Member States to act in a coordinated manner when they express their views or cast their votes on the execution of a judgment of the ECtHR delivered against the EU or against a Member State establishing a violation of the ECHR in proceedings to which the EU was a co-respondent. According to the Commission, it follows from this that, after accession, the EU and the Member States will together hold 29 votes out of a total number of 48 in the Committee of Ministers, and will, by themselves, hold a large majority within that Committee. Accordingly, in order to preserve both the effectiveness of the control machinery and the substantive equality of the Contracting Parties, the second sentence of Article 7(4)(a) of the draft agreement provides that the Rules for the supervision of execution are to be adapted to enable the Committee of Ministers to exercise its functions effectively. To that end, special voting rules are laid down in draft Rule 18. According to paragraph 4 of that draft rule, any amendment of those rules is to require consensus by all Contracting Parties.

78. Lastly, when the Committee of Ministers adopts instruments or texts without binding legal effect on the basis of its general competence under Article 15 of the Statute of the Council of Europe, it would not be possible for the EU, not being a member of that international organisation, to participate, with the right to vote, in the adoption of such decisions. Article 7(3) of the draft agreement therefore requires the EU to be consulted before the adoption of such texts or instruments and makes clear that the Committee of Ministers is to take due account of the position expressed by the EU.

2. Article 1(b) of Protocol No 8 EU

79. As regards the requirement in Article 1(b) of Protocol No 8 EU to preserve the specific characteristics of the EU and EU law with regard to the mechanisms necessary to ensure that proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the EU as appropriate, the Commission notes that, where a violation of the ECHR alleged before the ECtHR in relation to an act or omission on the part of a Contracting Party is linked to another legal provision, the compatibility of that provision with the ECHR is called into question, with the result that the review exercised by the ECHR bodies will necessarily be concerned with that provision. However, unlike the position in the case of any other Contracting Party which is simultaneously responsible for the act and for the provision on which that act is based, where a violation alleged before the ECtHR — in relation to an act of a Member State — is linked to a provision of EU law, the EU, as the Contracting Party to which that provision pertains, would not be a party to the proceedings before the ECtHR. The same applies to the Member States, taken together, where a violation alleged before the ECtHR in relation to an act or omission on the part of an institution, body, office or agency of the EU is linked to a provision of the Treaties, for which the Member States alone are responsible.

80. In the Commission's submission, in order to ensure that, in both situations, the Contracting Party that adopted the provision in question is not prevented either from taking part in the proceedings before the ECtHR or from being bound, as the case may be, by the obligations under Article 46(1) of the ECHR regarding the possible amendment or repeal of that provision, the draft agreement lays down specific procedural rules introducing the co-respondent mechanism. In particular, Article 3 of the draft agreement would, on the one hand, allow the EU to become a co-respondent in the case of an allegation of a violation calling into question the compatibility with the ECHR of a provision of EU law, and, on the other, allow Member States to become co-respondents in the case of an allegation of a violation calling into question the compatibility with the ECHR of a provision laid down in the Treaties.

81. The Commission points out that the new Article 36(4) of the ECHR, added by Article 3(1) of the draft agreement, states in the second sentence that '[a] co-respondent is a party to the case'. Thus, the co-respondent would enjoy all the procedural rights available to the parties and would not, therefore, be regarded merely as a third-party intervener. In addition, if a judgment of the ECtHR should find a violation of the ECHR, thus also calling into question a provision of EU law, the co-respondent would be obliged to remedy that violation so as to abide by the judgment, either by amending that provision or by repealing it.

82. According to the Commission, the provisions mentioned in the three preceding paragraphs of this Opinion preserve the autonomy of the EU legal order with regard to the decisions which the ECtHR may be called upon to take in respect of the EU and the Member States. In the first place, in accordance with Article 3(5) of the draft agreement, the status of co-respondent would be acquired either by accepting an invitation to that effect from the ECtHR, or by a decision of the ECtHR on the basis of the plausibility of the reasons given in the request from the Contracting Party concerned. Thus, the ECtHR would not be called upon to interpret EU law incidentally in order to establish whether an allegation of a violation of the ECHR called into question the compatibility with the ECHR of a provision of EU law. In the second place, Article 3(7) lays down the rule that the respondent and co-respondent are to be jointly responsible for any violation of the ECHR in proceedings to which a Contracting Party is a co-respondent. Consequently, in such cases, the ECtHR would confine itself to finding that the violation had taken place. By contrast, it would not be required to rule directly on the nature of the parts played in the violation by the EU and the Member State concerned, or their shares in it, or, therefore, to rule indirectly on their respective obligations with regard to the execution of the judgment and in particular any individual or general measures to be taken in that respect. Furthermore, in accordance with the second part of Article 3(7), only on the basis of any reasons given jointly by the respondent and the co-respondent could the ECtHR decide that only one of them should be held responsible.

83. The Commission further takes the view that the draft agreement also ensures that a judgment of the ECtHR delivered in proceedings to which the EU is a co-respondent cannot affect the competences of the EU. Such a judgment cannot impose on the EU obligations that go beyond those it is required to fulfil under the competences conferred on it in the Treaties.

84. Specifically, according to the Commission, the EU ought to join the proceedings as a co-respondent automatically whenever it is alleged that the ECHR has been violated by an act on the part of a Member State that is applying a provision of EU law in such a way that the allegation calls into question the compatibility of that provision with the ECHR. The Commission argues that the draft agreement makes it possible to achieve that result. It submits that, under Article 3(5) of the draft agreement, when the ECtHR is ruling on a request by a Contracting Party asking to become a co-respondent, the ECtHR is to assess whether, in the light of the reasons given by that party, it is plausible that the conditions in Article 3(2) or (3) of the ECHR are met. Those considerations also apply, *mutatis mutandis*, to the Member States when a violation of the ECHR by an act on the part of the EU calls into question the compatibility of the Treaties with the ECHR. The Commission adds, however, that in such cases fulfilment of the obligation of sincere cooperation requires that the Member States be represented before the ECtHR by a single agent, a requirement which should be included in the internal rules.

3. The second sentence of Article 6(2) TEU and the first sentence of Article 2 of Protocol No 8 EU

85. As regards the requirement set out in the second sentence of Article 6(2) TEU and the first sentence of Article 2 of Protocol No 8 EU, according to which accession must not affect the EU's competences as defined in the Treaties, the Commission notes that accession will impose an obligation on the EU to respect the rights guaranteed by the ECHR. In so far as that obligation entails an obligation to refrain from adopting any measure that might violate those rights, the EU, in acceding to the ECHR, would merely be accepting limits on the exercise of the competences conferred on it by the Member States in the Treaties. Moreover, in so far as that obligation on the part of the EU entails an obligation to adopt specific measures, the second sentence of Article 1(3) of the draft agreement provides that nothing in the ECHR or the protocols thereto is to require the EU to perform an act or adopt a measure for which it has no competence under EU law. Consequently, the commitments made by the EU when acceding to the ECHR would not in any way affect its competences.

86. Similarly, the competences of the EU would not be affected by the draft agreement's providing for the EU to accede not only to the ECHR but also to the Protocol and to Protocol No 6 and, moreover, for the possibility of acceding to the other existing protocols. Principally, the Commission takes the view that Article 6(2) TEU confers a competence on the EU to accede to all the existing protocols, irrespective of whether or not all the Member States are parties to them. If it were otherwise, the rule in the second sentence of Article 2 of Protocol No 8 EU,

according to which the accession agreement is to ensure that the situation of the Member States in relation to the protocols is not affected by the accession of the EU, would be meaningless. Furthermore, those protocols are merely accessory to the ECHR. Thus, the EU would have the competence, if necessary, to enter into any new protocols or to accede to them at a later stage, provided they too are accessory to the ECHR.

4. Article 1(b) and the first sentence of Article 2 of Protocol No 8 EU

87. According to the Commission, the powers of the EU institutions other than the Court of Justice are not affected by accession. Those institutions would have to exercise their powers with regard to the ECHR and its control bodies in the same way as they are required to do with regard to any other international agreement and the bodies set up or given decision-making powers by such an agreement. In particular, it follows, both from Article 335 TFEU and from paragraph 94 of the judgment in *Reynolds Tobacco and Others v Commission* (C-131/03 P, EU:C:2006:541) that the Commission represents the EU before courts other than those of the Member States. In the present case, the Commission would be required to represent the EU before the ECtHR, but, in accordance with the principle of sincere cooperation between institutions, if a provision of EU law laid down in an act of an institution other than the Commission were called into question in proceedings before the ECtHR, the powers of that other institution would be preserved if that institution were involved in the preparation of the procedural acts to be addressed to the ECtHR. In addition, when the Committee of Ministers is called upon to adopt acts having legal effects, the procedure provided for in Article 218(9) TFEU will apply *ipso jure*.

88. As regards the Court of Justice and, more generally, the preservation of the specific characteristics of the EU and of EU law with regard to the system of judicial protection, the Commission's assessment in that regard relates, in essence, to three issues: the exhaustion of domestic remedies, the effectiveness of judicial protection, particularly having regard to the common foreign and security policy ('the CFSP'), and the powers of the Court of Justice under Articles 258 TFEU, 260 TFEU and 263 TFEU. The first two issues arise in the light of Articles 6, 13 and 35(1) of the ECHR, according to which there must be an effective remedy before a domestic authority against any act on the part of a Contracting Party, and, moreover, an individual application brought before the ECtHR is admissible only after all domestic remedies have been exhausted.

89. With regard, first of all, to the prior exhaustion of domestic remedies, the Commission maintains that the draft agreement guarantees that remedies before the Courts of the EU must be exhausted before an application against an act on the part of the EU can be validly brought before the ECtHR. In the Commission's submission, the second indent in Article 1(5) of the draft agreement states that the term 'domestic' in Article 35(1) of the ECHR is to be understood as relating also, *mutatis mutandis*, to the internal legal order of the EU. Moreover, Article 5 of the draft agreement clearly states that proceedings before the Courts of the EU are not to be understood as constituting procedures of international investigation or settlement. Therefore, the fact that a matter had been submitted to those Courts would not make an application before the ECtHR inadmissible under Article 35(2)(b) of the ECHR.

90. Furthermore, in introducing the procedure for the prior involvement of the Court of Justice, the Commission emphasises that there is a possibility that a court of a Member State may find that an act or omission on the part of that Member State infringes a fundamental right that is guaranteed at EU level and which corresponds to a right guaranteed by the ECHR, and that that violation is linked to a provision of EU secondary law. In such a case, the national court is not itself entitled to find, incidentally, that the EU act containing that provision is invalid and to decline to apply it, since the Court of Justice alone, on a request for a preliminary ruling, can declare that act invalid (judgment in *Foto-Frost*, 314/85, EU:C:1987:452, paragraphs 11 to 20). If it were subsequently alleged before the ECtHR that the same act or omission violated the same fundamental right as guaranteed by the ECHR, and if, therefore, that allegation called into question the compatibility with the ECHR of the provision of EU law in question, the EU would become co-respondent and its institutions, including the Court of Justice, would be bound by the judgment of the ECtHR finding a violation of the ECHR. That situation could arise even though the Court of Justice would not yet have had the opportunity to consider the validity of the EU act at issue in the light of the fundamental right in question the violation of which was being alleged before the ECtHR. In that context, a reference to the Court of Justice for a preliminary ruling under point (b) in the first paragraph of Article 267 TFEU could not be regarded as a 'domestic remedy' which the applicant should have exhausted before bringing an application before the ECtHR, since the parties have no control over whether or not such a reference is made and, therefore, the omission of such a reference would not mean that an application to the ECtHR was inadmissible. That conclusion is all the more compelling given that the powers of the Court of Justice include the jurisdiction to declare an EU act invalid. According to the Commission, in order to preserve those powers, it is necessary to provide for the Court of Justice to be able to consider the compatibility of a provision of EU law with

the ECHR in connection with proceedings in the ECtHR to which the EU is a co-respondent. That opportunity should, moreover, arise before the ECtHR rules on the merits of the allegation raised before it and, therefore, indirectly, on the compatibility of that provision with the fundamental right in question. Furthermore, the necessity of prior consideration by the Court of Justice of the provision in question follows also from the fact that the control machinery established by the ECHR is subsidiary to the mechanisms that safeguard human rights at the level of the Contracting Parties.

91. It is, the Commission submits, to meet those needs that the first sentence of Article 3(6) of the draft agreement provides that, in such circumstances, sufficient time is to be afforded for the Court of Justice to make an assessment of the provision at issue in the context of the procedure for the prior involvement of that court. The second sentence of Article 3(6) states that that assessment must be made quickly so that the proceedings before the ECtHR are not unduly delayed. The ECtHR would not be bound by the assessment of the Court of Justice, as is apparent from the last sentence of that provision.

92. The Commission does add that Article 3(6) of the draft agreement must be accompanied by internal EU rules governing the procedure for the prior involvement of the Court of Justice. The draft agreement does not contain such rules. However, they should not be included in an international agreement, but should be laid down independently at EU level, since their purpose is to regulate an internal EU procedure. Nor would it be necessary or indeed appropriate to insert those procedural rules in the Treaties. The Treaties already impose an obligation on the EU institutions and on the Member States to ensure that the EU accedes to the ECHR and provide, moreover, that the powers of the Court of Justice are not to be affected by that accession. In that regard, the Commission takes the view that it is more appropriate for the rules laying down the principle of a procedure for the prior involvement of the Court of Justice, designating the bodies having the authority to initiate it, and defining the standards governing the examination of compatibility, to be included within the Council decision concluding the accession agreement pursuant to Article 218(6)(a)(ii) TFEU. As regards the content of the internal rules governing the procedure for the prior involvement of the Court of Justice, first of all, the power to make applications to the Court of Justice initiating that procedure should be exercised by the Commission and by the Member State to which the application to the ECtHR is addressed. Furthermore, the Court of Justice should be able to give its ruling before the EU and the Member State concerned present their views to the ECtHR. Next, since the prior involvement procedure has certain structural similarities with the preliminary ruling procedure, the rules concerning the entitlement to participate in it should be similar to those in Article 23 of the Statute of the Court of Justice of the European Union. Lastly, the requirements for speed could be met by applying the expedited procedure referred to in Article 23a of that statute.

93. As regards, secondly, the effectiveness of judicial protection, according to the Commission it is important that, when an act has to be attributed to the EU or indeed to a Member State in order to determine responsibility under the ECHR, this be done in accordance with the same criteria as those that apply within the EU. It is submitted that this requirement is met by the first sentence of Article 1(4) of the draft agreement, which provides that, for the purposes of the ECHR, a measure of a Member State is to be attributed to that State, even if that measure occurs when the State implements the law of the EU, including decisions taken under the EU and FEU Treaties. The effectiveness of the remedy would therefore be assured, given that, in accordance with the second subparagraph of Article 19(1) TEU, it is for the courts of that Member State to guarantee legal protection with regard to acts on the part of that State.

94. However, it is submitted that particular questions with regard to effective judicial protection arise in relation to the area of the CFSP, EU law having two specific characteristics in that respect.

95. In the first place, as regards the attributability of acts, military operations in application of the CFSP are conducted by the Member States, in accordance with the fourth sentence of the second subparagraph of Article 24(1) TEU and Articles 28(1) TEU, 29 TEU and 42(3) TEU. The Commission states that, in order to take account of that characteristic, Article 1(4) of the draft agreement provides that, even with respect to operations conducted in the framework of the CFSP, the acts of the Member States are to be attributed to the Member State in question and not to the EU. That clarification should preclude the possibility that the case-law of the ECtHR — whereby the ECtHR has ruled on the responsibility of an international organisation in relation to acts performed by a Contracting Party for the purpose of implementing a resolution of that organisation (decision of the ECtHR in *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*, nos 71412/01 and 78166/01, § 122, 2 May 2007, and judgment of the ECtHR in *Al-Jedda v. the United Kingdom* [GC], no. 27021/08, ECHR 2011) — might be applied to relations between the EU and its Member States. As stated, moreover, in

paragraph 24 of the draft explanatory report, in the cases giving rise to that case-law there was no specific rule on the attribution of acts, such as that provided for by Article 1(4) of the draft agreement.

96. In the second place, as regards the effectiveness of review by the EU judicature in the area of the CFSP, that review is limited, according to the Commission, both by the last sentence of the second subparagraph of Article 24(1) TEU and by the second paragraph of Article 275 TFEU. It follows, in essence, from those provisions that the Court of Justice is not to have jurisdiction with respect to the provisions relating to the CFSP or with respect to acts adopted on the basis of those provisions. It is to have jurisdiction only to monitor compliance with Article 40 TEU and to rule on actions, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 TFEU, for a review of the legality of decisions providing for ‘restrictive measures’ against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the EU Treaty. The question could therefore arise as to whether the EU provides effective internal remedies in relation to the CFSP.

97. The Commission points out in that regard that, in order for an application to the ECtHR to be admissible, the applicant must be able to claim to be a victim of a violation of the rights set forth in the ECHR or the protocols thereto, and must therefore be directly affected by the act or omission at issue.

98. On the one hand, when a CFSP act on the part of a Member State affects a person directly and may therefore be the subject of an application to the ECtHR, judicial protection with regard to the act is a matter for the courts of the Member States. Where, in exceptional cases, such an act is based on a provision of a Council decision adopted pursuant to Article 28(1) TEU, the compatibility of that provision with the ECHR could be called into question. According to the Commission, in such a case, the Council decision itself constitutes a ‘restrictive measure’ within the meaning of the second paragraph of Article 275 TFEU, with the result that, although that provision expressly recognises the jurisdiction of the Court of Justice only in respect of actions for annulment ‘brought in accordance with the conditions laid down in the fourth paragraph of Article 263 [TFEU]’, such provisions could nevertheless be the subject of a reference for a preliminary ruling, including as regards their validity. The Commission relies in that regard in particular on the judgment in *Segi and Others v Council* (C-355/04 P, EU:C:2007:116), in which, despite the fact that Article 35(1) of the EU Treaty, as amended by the Treaty of Nice, excluded ‘common positions’ from the jurisdiction of the Court of Justice to give preliminary rulings, the Court of Justice held that national courts could ask it to deliver preliminary rulings on questions relating to a common position which, owing to its content, did of itself produce legal effects in relation to third parties, and consequently had a scope going beyond that assigned by the EU Treaty to that kind of act. In such circumstances, moreover, the procedure for the prior involvement of the Court of Justice should also apply.

99. On the other hand, where CFSP acts are performed by EU institutions, a distinction should be made between acts that have binding legal effects and those that do not. Acts that have binding legal effects are, in so far as they are capable of violating fundamental rights, ‘restrictive measures’ within the meaning of the second paragraph of Article 275 TFEU and could, therefore, be the subject of an action for annulment before the EU judicature. By contrast, acts that do not produce such effects could not by their nature be the subject of an action for annulment or of a reference for a preliminary ruling. The only remedy available within the EU against such acts would be an action for damages pursuant to Article 340 TFEU, since such an action is not, in the Commission’s submission, excluded by the first paragraph of Article 275 TFEU.

100. Thus, in the Commission’s view, the combined effect of Article 1(4) of the draft agreement, the first subparagraph of Article 19(1) TEU and Articles 275 TFEU and 340 TFEU is that all acts and measures on the part of the EU and of the Member States in the area of the CFSP, in respect of which a person may claim to be a victim of a violation of the rights set forth in the ECHR, have an effective remedy before the EU judicature or the courts of the Member States.

101. Thirdly, according to the Commission, the draft agreement does not affect the powers of the Court of Justice under Articles 258 TFEU, 260 TFEU and 263 TFEU either. Article 5 of the draft agreement contains an interpretation clause according to which ‘[p]roceedings before the [Court of Justice] shall [not] be understood as constituting means of dispute settlement within the meaning of Article 55 of the [ECHR]’. Thus, the possibility is expressly preserved that disputes regarding the interpretation and application of the ECHR, or indeed of fundamental rights as defined at EU level and, in particular, in the Charter, may be brought before the Court of Justice.

102. With regard, in particular, to actions for failure to fulfil obligations, the Commission notes that it follows from Article 1(3) of the draft agreement that no obligation is imposed on the Member States, under EU law, with

regard to the ECHR and the protocols thereto. Consequently, an action for failure to fulfil obligations could not, by definition, concern the failure of a Member State to fulfil its obligations under the ECHR. Nevertheless, the reference to Article 55 of the ECHR in Article 5 of the draft agreement serves a purpose as regards the requirement that accession should have no effect on the powers of the Court of Justice. The Member States are, under Article 51(1) of the Charter, bound by the fundamental rights defined at EU level when they are implementing EU law. In so far as the prohibition in Article 55 of the ECHR might be understood to refer also to disputes between Contracting Parties regarding the interpretation or application of provisions of an international instrument (such as, in the case of the Member States, the Treaties and the Charter) that has the same content as the provisions of the ECHR, Article 5 of the draft agreement has the effect that that interpretation cannot be relied upon against the EU.

103. Moreover, the ECtHR has specified that the exercise by the Commission of its powers under Article 258 TFEU does not correspond to resorting to procedures of international investigation or settlement within the meaning of Article 35(2)(b) of the ECHR (judgment of the ECtHR in *Karoussiotis v. Portugal*, no. 23205/08, §§ 75 and 76, ECHR 2011 (extracts)).

104. The Commission states that it is not necessary for the draft agreement to make provision for a specific objection of inadmissibility in the case of applications brought before the ECtHR, under Article 33 of the ECHR, by the EU against a Member State or, conversely, by a Member State against the EU in a dispute regarding the interpretation or application of the ECHR, given that such applications would be manifestly contrary to EU law. Not only would they constitute a circumvention of Article 258 TFEU, but the decision to make such an application could be challenged by an action for annulment under Article 263 TFEU. In addition, an application brought by a Member State against the EU would constitute a circumvention of Article 263 TFEU or, as the case may be, of Article 265 TFEU, which would be subject under EU law to the infringement procedure.

5. The second sentence of Article 2 of Protocol No 8 EU

105. As regards the requirement, set out in the second sentence of Article 2 of Protocol No 8 EU, that accession must not affect the situation of Member States in relation to the ECHR, in particular in relation to the protocols thereto, measures taken by Member States derogating from the ECHR in accordance with Article 15 thereof and reservations to the ECHR made by Member States in accordance with Article 57 thereof, the Commission submits that, in accordance with the first sentence of Article 1(3) of the draft agreement, the scope of the EU's commitments is limited *ratione personae* to the EU alone, as a party governed by public international law which is distinct from the Member States. Therefore, the accession of the EU to the ECHR does not affect the legal situation of a Member State which, under Article 57 of the ECHR, has made a reservation in respect of a provision of the ECHR or of one of the protocols to which the EU is acceding, or which has taken measures derogating from the ECHR under Article 15 thereof, or which is not a party to one of the protocols to which the EU might accede in the future. It also follows from this that, even though under Article 216(2) TFEU agreements concluded by the EU are binding upon the institutions of the EU and on the Member States, the draft agreement does not impose any obligation on them, under EU law, in respect of the ECHR and the protocols thereto.

6. Article 3 of Protocol No 8 EU

106. As regards, lastly, the requirement, set out in Article 3 of Protocol No 8 EU, that accession must not affect Article 344 TFEU, the Commission submits that another consequence of the fact that, in accordance with Article 1(3) of the draft agreement, the accession of the EU to the ECHR does not impose any obligation on the Member States, under EU law, in respect of the ECHR and the protocols thereto is that a dispute between Member States regarding the interpretation or application of the ECHR is not strictly speaking a dispute regarding the interpretation or application of the Treaties, of the kind referred to in Article 344 TFEU.

107. However, the reference to Article 55 of the ECHR in Article 5 of the draft agreement serves a purpose as regards that requirement also. In so far as the prohibition in Article 55 might be understood to refer also to disputes between Contracting Parties regarding the interpretation or application of provisions of an international instrument (such as, in the case of the Member States, the Treaties and the Charter) that has the same content as the provisions of the ECHR, Article 5 of the draft agreement has the effect that that interpretation cannot be relied upon against the Member States. The Commission adds that there is no need for a rule that an application brought before the ECtHR by one Member State against another in a dispute regarding the interpretation or application of provisions of EU law that have the same content as those of the ECHR, in particular provisions of the Charter, is to be

inadmissible. The bringing of such an application would itself constitute an infringement of Article 344 TFEU and would be subject, at EU level, to the proceedings referred to in Articles 258 TFEU to 260 TFEU.

VII – Summary of the main observations submitted to the Court of Justice

108. In the context of the present request for an Opinion, observations were submitted to the Court in writing or orally at the hearing by the Belgian, Bulgarian, Czech, Danish, German and Estonian Governments, Ireland, the Greek, Spanish, French, Italian, Cypriot, Latvian, Lithuanian, Hungarian, Netherlands, Austrian, Polish, Portuguese, Romanian, Slovak, Finnish, Swedish and United Kingdom Governments, and by the Parliament and the Council.

109. All the Member States and institutions mentioned above conclude, in essence, that the draft agreement is compatible with the Treaties, and largely endorse the Commission's assessment. However, their assessments differ from that of the Commission in a number of respects.

A – *Admissibility of the request for an Opinion*

110. As regards the admissibility of the request for an Opinion, it is essentially common ground that the subject-matter of the request is indeed an 'agreement envisaged' within the meaning of Article 218(11) TFEU, and that the Court of Justice has all the information necessary to assess the compatibility of that agreement with the Treaties, as the Court of Justice requires (Opinion 2/94, EU:C:1996:140, paragraphs 20 and 21).

111. By contrast, the Commission's assessment regarding the internal rules has given rise to very different positions.

112. According to the Bulgarian and Danish Governments, Ireland, the French, Hungarian, Portuguese, Finnish, Swedish and United Kingdom Governments, as well as the Parliament and the Council, the fact that those rules have not yet been adopted does indeed not affect the admissibility of the request. That is particularly so since, as the Estonian and Latvian Governments note, such rules would have consequences only for the EU and could not affect the international aspects of the draft agreement and, moreover, as the Polish and Swedish Governments essentially emphasise, those rules must also be compatible with the Treaties, such compatibility being subject to review, if necessary, according to the Cypriot, Swedish and United Kingdom Governments, by the Court of Justice in accordance with Article 263 TFEU.

113. However, it is submitted that the Commission ought not to have initiated a discussion of such rules before the Court of Justice in the present Opinion procedure. It is impossible for the Court of Justice to express a view on such internal rules either, according to the Greek and Netherlands Governments, because of their hypothetical nature or, according to the French, Cypriot and Lithuanian Governments and the Council, because there is insufficient information regarding their content, or indeed, in the opinion of the Czech, Estonian, French, Cypriot, Lithuanian, Netherlands, Portuguese, Slovak and Swedish Governments, in the light of the fact that they are extraneous to the international agreement at issue, that agreement alone being capable of forming the subject-matter of a request for an Opinion within the meaning of Article 218(11) TFEU. Furthermore, for the Court of Justice to be required to express a view on the content of rules that have not yet been adopted by the EU legislature would, according to the Estonian and United Kingdom Governments and the Council, be to encroach upon the competences of the EU legislature, contrary to Article 13 TEU, or, according to the Estonian Government, be in breach of the principle of the division of powers set out in Article 5(1) and (2) TEU.

114. It is argued that it follows from this that the request for an Opinion is admissible only in so far as it concerns the agreement envisaged, whereas, so far as concerns the internal rules, either, according to the French and Cypriot Governments, the Court of Justice has no jurisdiction, or, according to the Czech, Estonian and French Governments, the request is inadmissible, or, according to the Lithuanian Government, it is not necessary for the Court of Justice to express a view.

115. Should, however, an analysis of the internal rules be necessary for the purposes of assessing whether the draft agreement is consistent with the Treaties — a point which, according to the Greek Government, is for the Court of Justice to determine — then either, according to the Polish Government, the Court of Justice must make its Opinion regarding the compatibility of that draft with the Treaties conditional on the internal rules also being compatible with the Treaties or, in the view of the Romanian Government, with the draft declaration; or, according

to the Estonian Government and the Council, the procedure must be stayed until those rules become available; or, according to the Greek Government and the Council, the request must be declared inadmissible in its entirety or, in the Spanish Government's view, be declared inadmissible in respect of those aspects of the draft agreement which have yet to be detailed in those internal rules, namely those concerning the issues of the EU's representation before the ECtHR, the prior involvement of the Court of Justice, the procedures to be followed in drawing up the list of three candidates for the position of Judge and the EU's participation in the Assembly or in the Committee of Ministers, and the new voting rules set out in draft Rule 18.

116. In the alternative, in the event that the Court of Justice should decide to express a view on the internal rules, observations were submitted with regard to the main rules.

B – *Substance*

1. Article 1(a) of Protocol No 8 EU

117. All the Member States and institutions which submitted observations agree on the essence of the Commission's assessment in concluding that the draft agreement preserves the specific characteristics of the EU and EU law with regard to the specific arrangements for the EU's participation in the control bodies of the ECHR.

2. Article 1(b) of Protocol No 8 EU

118. Those Member States and institutions also consider that the co-respondent mechanism broadly enables the specific characteristics of the EU and EU law to be preserved by ensuring that proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the EU as appropriate.

119. Nevertheless, certain Member States take the view that the Commission's assessment requires adjustment or clarification.

120. First of all, according to the Austrian Government, the co-respondent mechanism must be capable of being triggered not only where the violation of the ECHR 'could have been avoided only by disregarding an obligation under EU law', but also where such a violation is attributable to a Member State in the context of the implementation of EU law, and even though EU law accords that Member State a certain degree of autonomy. If the alleged violation is linked to an act transposing a directive, it might be in the EU's interest to defend the legality of that directive before the ECtHR, even if the directive does not compel the Member State concerned to adopt the act but merely authorises it to do so. Furthermore, it might be difficult to know in advance the extent of the margin of discretion to be given to the Member States in connection with the transposition of a directive.

121. Next, the Bulgarian Government takes the view that the fact that the co-respondent mechanism is optional means that it is open to potential co-respondents to escape their responsibilities under Article 46 of the ECHR. In that regard, the Austrian Government adds that the compatibility of that mechanism with the requirements of Article 1(b) of Protocol No 8 EU depends on there being an internal provision in EU law compelling the institutions of the EU, in proceedings against one or more Member States, to request that the EU be admitted as a co-respondent where it is alleged that the ECHR has been violated and the allegation calls into question the compatibility of EU law with the ECHR. Even though such an internal obligation is already envisaged in paragraph (a) of the draft declaration, it is none the less necessary for that obligation to be regulated in a binding manner, so that a failure to make such a request or a refusal to participate in proceedings upon being invited to do so by the ECtHR pursuant to Article 3(5) of the draft agreement constitutes a failure to act for the purposes of Article 265 TFEU. Furthermore, according to the Romanian Government, it follows from that draft declaration that although the EU's intervention as co-respondent is envisaged as a possibility by the draft agreement, the EU undertakes to establish rules internally that will make it possible to determine which alleged violation of the provisions of the ECHR are related to EU law and the amount of leeway available to the Member State concerned.

122. In addition, according to the French Government, in order to avoid the ECtHR ruling on issues relating to EU law, such as the division of responsibilities in the context of a violation established following proceedings to which a Contracting Party is a co-respondent, Article 3(7) of the draft agreement would certainly have to be interpreted as meaning that the ECtHR can decide on the sharing of responsibility between respondent and co-respondent only on the basis of the reasons they give in their joint request.

123. Lastly, the United Kingdom Government states that, contrary to the Commission's suggestion that the co-respondent will have an obligation under Article 46(1) of the ECHR to remedy a violation of the ECHR so as to abide by a judgment of the ECtHR, in fact that obligation must be shared. If such a judgment were to be given jointly against the EU and one or more of its Member States, it would not in itself give rise to a power for any of the EU institutions, in particular the Commission, to act in order to ensure its proper execution, which would have to be effected through the normal legislative processes of the EU.

3. Article 6(2) TEU and the first sentence of Article 2 of Protocol No 8 EU

124. The Commission's assessment with regard to the requirement that accession to the ECHR does not affect the EU's competences is largely shared by the Member States that submitted observations to the Court of Justice, save as regards the question of the competence of the EU to accede to protocols other than those to which the EU is to accede pursuant to Article 1 of the draft agreement, that is the Protocol and Protocol No 6.

125. In particular, according to the German Government, the considerations included in the request for an Opinion regarding possible accession to protocols other than the Protocol and Protocol No 6 are inadmissible, since there is no 'agreement envisaged' in that respect.

126. As to the substance, the Slovak Government maintains that the EU currently has competence to accede only to the two protocols mentioned in the preceding paragraph, while, in the Danish Government's view, the EU does not have competence to accede to existing protocols to which the Member States are not already parties.

127. By contrast, the Latvian, Netherlands and Polish Governments take the view that the EU could, in theory, have competence to accede to the latter protocols also. However, it is submitted that that is not a decisive factor. According to the Netherlands Government, in the light of the procedure laid down in Article 218(6)(a)(ii) and the second subparagraph of Article 218(8) TFEU, which prescribes unanimity for the conclusion of an agreement within the meaning of that article and its approval by all the Member States in accordance with their respective constitutional requirements, it is unlikely that the EU would be able to obtain Member States' approval for accession to protocols to which they are not parties. In any event, at present, the EU would not be able to accede to protocols other than those mentioned in Article 1 of the draft agreement without, according to the Latvian Government, the Council having approved a specific mandate in that regard, or, according to the Polish Government, without regard to the will of the Member States. Lastly, the German Government adds that that competence must be exercised in accordance with the second sentence of Article 2 of Protocol No 8 EU, which states that the accession agreement must not affect the situation of Member States in relation to the ECHR, in particular in relation to the protocols thereto. Immediate accession to the protocols to which not all the Member States are parties would infringe that provision or, according to the Greek Government, would be in breach of the principle of sincere cooperation.

4. Article 1(b) and the first sentence of Article 2 of Protocol No 8 EU

128. As regards the question of the effectiveness of the remedies provided for by the Treaties in the area of the CFSP, and as regards in particular the Commission's assessment in relation to the attributability of acts adopted under that policy, that assessment was considered unnecessary by the United Kingdom Government on the ground that the ECtHR has never applied to the EU its case-law concerning the attributability to international organisations of acts of the Contracting Parties. In any event, according to the German Government, the rule laid down in Article 1(4) of the draft agreement, as explained in paragraphs 22 to 26 of the draft explanatory report, is to apply only for the purposes of the EU's accession to the ECHR and must not affect the general principles of international law in relation to the attributability of acts to international organisations.

129. The positions of the Member States on the limitations which the Treaties impose on the jurisdiction of the Court of Justice in the area of the CFSP are more nuanced.

130. First of all, according to the Greek and United Kingdom Governments, it is not necessary for the Court of Justice to interpret Article 275 TFEU and to express a view on its possible jurisdiction in respect of, inter alia, references for preliminary rulings in that area.

131. In any event, the United Kingdom Government adds that the broad interpretation of that article advocated by the Commission, according to which the jurisdiction of the Court of Justice under Article 267 TFEU extends also

to acts falling within the CFSP, is incorrect and is based on the judgments in *Gestoras Pro Amnistía and Others v Council* (C-354/04 P, EU:C:2007:115) and *Segi and Others v Council* (EU:C:2007:116), that is to say, on case-law that predates the Treaty of Lisbon. However, as the Spanish and Finnish Governments also note, that Treaty, through Article 275 TFEU, specifically limited reviews of the validity of acts covered by the CFSP to actions for annulment only, thereby excluding references for preliminary rulings on validity. According to those two governments, Article 275 TFEU must be interpreted narrowly, not only because of the fact that, in this area, the lack of jurisdiction of the Court of Justice is the rule, and its jurisdiction merely the exception, as the French and Polish Governments and the Council submit, but also because of the fact, highlighted by the Spanish and Polish Governments, that a broad interpretation expanding the jurisdiction of the Court of Justice in CFSP matters does not accord with the requirements of Article 2 of Protocol No 8 EU. The Netherlands Government submits, moreover, that such a broad interpretation creates uncertainty as to the criteria for the admissibility of actions for annulment of such acts. The Courts of the EU have jurisdiction only to rule, on the basis of the fourth paragraph of Article 263 TFEU, on decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the EU Treaty. According to the French Government, a broad interpretation of ‘restrictive measure’ has consequences as regards the interpretation of the criteria for the admissibility of actions for annulment and of actions based on a plea of illegality provided for in Article 277 TFEU. Lastly, according to the French Government and the Council, such an expansion is, moreover, likely to extend also to the procedure for the prior involvement of the Court of Justice. That procedure could in fact be triggered only where the allegation before the ECtHR is that there has been a violation of the ECHR linked to a restrictive measure; if it were otherwise the jurisdiction of the Court of Justice would be extended.

132. Next, in the submission of the French Government and of the Council, the distinction made by the Commission between measures that have binding effect and those that do not is unfounded, since what matters is only whether it is a ‘restrictive measure’ within the meaning of Article 275 TFEU. The meaning of ‘restrictive measure’ cannot depend simply on the fact that a measure is capable of infringing the fundamental rights of individuals, since such a definition goes beyond the letter of Article 215(2) TFEU and renders the first paragraph of Article 275 TFEU redundant.

133. Consequently, according to the Council, while the Court of Justice continues to have jurisdiction over pleas of illegality in accordance with Article 277 TFEU, it does not, according to the Polish Government, have jurisdiction over the validity of measures other than restrictive measures by means of a reference for a preliminary ruling, nor, according to the French Government and the Council, does it have jurisdiction to rule on claims in non-contractual liability in which compensation is sought for damage resulting from a CFSP act or measure. According to the French and Netherlands Governments and the Council, the concept of restrictive measures includes only ‘decisions imposing sanctions’ on natural or legal persons which are intended to limit their entry into the territory of the Member States and to freeze their funds and economic resources, which thus concerns both basic acts under Article 31(1) TEU and implementing acts adopted on the basis of Article 31(2) TEU.

134. In that regard, the French Government states that the judgment in *Segi and Others v Council* (EU:C:2007:116) concerning the admissibility of references for a preliminary ruling in the context of the former ‘third pillar’ cannot be applied to the present case, since, unlike Article 35(1) EU, Article 275 TFEU does not confer on the Court of Justice any jurisdiction to give preliminary rulings.

135. Lastly, according to the French Government, the fact that that interpretation of Article 275 TFEU is likely to deprive individuals of effective judicial protection against certain acts falling within the CFSP cannot be sufficient to confer on the Court of Justice a jurisdiction not provided for by the Treaties. According to the French, Polish, Finnish and Swedish Governments, it is precisely in order to avoid the EU being systematically censured for violation of Articles 6 and 13 of the ECHR that Article 1(4) of the draft agreement and paragraphs 23 and 24 of the draft explanatory report make clear that it is for the Member States to guarantee protection of the right to obtain a judicial determination and of the right to an effective judicial remedy, particularly as, according to the Council, the EU does not enjoy any immunity from legal proceedings, in accordance with Protocol (No 7) on the privileges and immunities of the European Union annexed to the EU, FEU and EAEC Treaties, and can therefore be sued for compensation in the national courts. Moreover, according to the Council, the question whether the system of judicial protection in relation to the CFSP is in conformity with Articles 6 and 13 of the ECHR is relevant only in respect of CFSP acts attributable to the EU, as regards both military and civilian operations, given that it is for the courts of the Member States to guarantee the effectiveness of such protection in respect of any such acts attributable to the Member States.

136. As regards the procedure for the prior involvement of the Court of Justice, it is, first of all, maintained by the United Kingdom Government that that procedure is not necessary in order for the draft agreement to be considered compatible with the Treaties: given their declaratory nature, decisions of the ECtHR have no effect on the validity of EU law. In any event, according to the Bulgarian Government, it is not necessary to initiate that procedure where the Court of Justice has already ruled on the validity of the act concerned in the light of the corresponding fundamental right in the Charter, in view of Article 52(3) of the Charter and of the presumption, according to the case-law of the ECtHR, that EU law offers equivalent protection (judgment of the ECtHR in *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, § 155, ECHR 2005-VI).

137. Next, according to the Czech Government, Ireland and the Greek, Spanish and United Kingdom Governments, although the prior involvement procedure confers additional functions on the Court of Justice over and above those already given to it by the Treaties, that none the less does not mean that the powers of the Court of Justice are being extended by the draft agreement, since those additional functions do not alter the essential character of the Court's present powers (Opinions 1/92, EU:C:1992:189, paragraph 32; 1/00, EU:C:2002:231, paragraphs 21, 23 and 26; and 1/09, EU:C:2011:123, paragraph 75). In addition, according to the Danish and Hungarian Governments, the ability of the Court of Justice to adjudicate in the context of the prior involvement procedure flows naturally and necessarily from the Treaties themselves and, in particular, from Article 6(2) TEU. Thus, while no amendment of the Treaties is necessary, according to the French and Austrian Governments, a Council decision pursuant to Article 218(8) TFEU is, according to the Danish, German and Austrian Governments, sufficient to confer that new function on the Court of Justice, since such a decision requires approval by all the Member States in accordance with their respective constitutional requirements. In that regard, however, the Parliament also submits that, since the Council's decisions on the conclusion of international agreements in principle merely give legal force to an agreement concluded by the EU, it is doubtful whether such decisions can have a normative content of their own, particularly as they are not 'subject to amendment by the Parliament'.

138. In the light of respect for the powers of the institutions, but without coming to the conclusion that the procedure for the prior involvement of the Court of Justice is contrary to the requirements of Protocol No 8 EU, the Polish Government argues that to acknowledge that the Commission is entitled to bring before the Court of Justice requests for decisions regarding the validity and interpretation of provisions of EU legal acts outwith Articles 263 TFEU and 267 TFEU could ultimately alter the essential character of the powers of the institutions, both of the Commission and of the Court of Justice itself, and result in circumvention of the admissibility criteria laid down by those provisions. For example, in accordance with the sixth paragraph of Article 263 TFEU, an action for annulment of an EU act could be brought by an institution within two months of the publication of the measure or of its notification to the plaintiff. However, where the Commission had not brought an action for annulment within that period, it could obtain the annulment of a measure by means of the prior involvement procedure, and thus circumvent compliance with that time-limit. Similarly, the powers of the Court of Justice would be likely to undergo significant changes, given that, while Article 267 TFEU currently reserves to the courts or tribunals of Member States alone the possibility of submitting a request for a preliminary ruling, after accession, the Court of Justice would be interpreting EU law at the request also of the Commission. Yet, just like the other EU institutions, the Court of Justice does not have general powers, and its jurisdiction is limited to the cases brought before it. Consequently, the possibility of the Court of Justice ruling on issues submitted by the Commission would have to have a specific basis in the Treaty, which is not the case at present.

139. Furthermore, according to the Netherlands and Austrian Governments, even though the procedure for the prior involvement of the Court of Justice has to take account of the imperatives of speed, that procedure must be more comprehensive than the present urgent preliminary ruling procedure provided for in Article 23a of the Statute of the Court of Justice and allow all the Member States to submit written observations. In any event, according to the Netherlands Government, that procedure must be governed not by particular provisions of the Council decision concluding the accession agreement, but directly by the Statute of the Court of Justice and its rules of procedure.

140. Lastly, the Council argues that the scope of the jurisdiction of the Court of Justice to adjudicate, prior to the ECtHR, on whether acts directly or indirectly attributable to the EU in the area of the CFSP comply with fundamental rights must be the same as its internal jurisdiction in that area. Thus, the Court of Justice would be called upon to give a prior ruling in a case that is brought against one or more Member States and in which the EU is co-respondent concerning an act of a Member State implementing an EU act adopted in the area of the CFSP where the criteria laid down in Article 275 TFEU are met. Should the Court of Justice decide that the limits set out in Article 40 TEU have not in fact been observed and the act at issue ought not to have been adopted on the basis of the chapter of the EU Treaty relating to the CFSP, it would then have jurisdiction to rule both on the interpretation and the validity of the act in question, as it would not be an act falling within the CFSP. The fact

that EU acts in the area of the CFSP which do not affect persons directly cannot be annulled by a judicial body within the EU's system of judicial protection would not mean that that system violates the ECHR.

5. Second sentence of Article 2 of Protocol No 8 EU

141. Some Member States contend that the accession of the EU to the ECHR and, possibly, to protocols thereto which have not yet been ratified by all the Member States does, contrary to what the Commission maintains, involve obligations on the part of the Member States under Article 216 TFEU. While, in the view of the German Government, that means that accession to those protocols infringes the second sentence of Article 2 of Protocol No 8 EU, the Czech Government comes to the opposite conclusion, given that the source of those obligations is Article 216(2) TFEU and not the ECHR itself. In any event, according to the Czech Government, accession to those protocols could proceed only in accordance with the procedure laid down in Article 218 TFEU, which means that the Opinion of the Court of Justice can be obtained if necessary.

142. In addition, according to the Polish Government, on the assumption that the EU has the competence to conclude protocols which have not yet been ratified by all the Member States, it is not inconceivable that, in the event of accession to one of those protocols, a Member State which had not ratified that protocol could, within the Council, express its agreement to be bound through the EU and accordingly 'approve' the decision to be bound by that protocol in that way. That State would then be bound by that protocol only in the field of the EU's competence. That solution would raise doubts, however, particularly in the light of the need to apply the law in a consistent, transparent and uniform manner. Those doubts would be particularly significant as regards the protocols relating to matters covered by shared competences.

6. Article 3 of Protocol No 8 EU

143. As regards compliance with Article 344 TFEU, the Greek Government takes the view that it is pointless to provide that an action between Member States before the ECtHR is to be inadmissible, given that such an action is already prohibited by Article 344 TFEU; nevertheless the French Government states that it must still remain possible for a Member State to appear as a third-party intervener in support of one or more of its nationals in a case against another Member State that is brought before the ECtHR, even where that other Member State is acting in the context of the implementation of EU law.

VIII – Position of the Court of Justice

A – Admissibility

144. Certain Member States that participated in the present procedure have expressed doubts as to the admissibility of the Commission's request for an Opinion in so far as it contains an assessment relating to the internal rules.

145. It must be borne in mind in that regard that, under Article 218(11) TFEU, the Parliament, the Council, the Commission or a Member State may obtain the Opinion of the Court of Justice as to whether an envisaged agreement is compatible with the provisions of the Treaties. That provision has the aim of forestalling complications which would result from legal disputes concerning the compatibility with the Treaties of international agreements binding upon the EU (see Opinions 2/94, EU:C:1996:140, paragraph 3; 1/08, EU:C:2009:739, paragraph 107; and 1/09, EU:C:2011:123, paragraph 47).

146. A possible decision of the Court of Justice, after the conclusion of an international agreement binding upon the EU, to the effect that such an agreement is, by reason either of its content or of the procedure adopted for its conclusion, incompatible with the provisions of the Treaties could not fail to provoke, not only in the internal EU context, but also in that of international relations, serious difficulties and might give rise to adverse consequences for all interested parties, including third countries (see Opinions 3/94, EU:C:1995:436, paragraph 17, and 1/09, EU:C:2011:123, paragraph 48).

147. In order to enable the Court of Justice to rule on the compatibility of the provisions of an envisaged agreement with the rules of the Treaties, the Court must have sufficient information on the actual content of that agreement (see Opinions 2/94, EU:C:1996:140, paragraphs 20 to 22, and 1/09, EU:C:2011:123, paragraph 49).

148. In this instance, the Commission has submitted to the Court of Justice the draft accession instruments on which the negotiators have already reached agreement in principle. All those instruments together constitute a sufficiently comprehensive and precise framework for the arrangements in accordance with which the envisaged accession should take place, and thus enable the Court to assess the compatibility of those drafts with the Treaties.

149. By contrast, since the internal rules have not yet been adopted, their content is merely hypothetical, and, in any event, the fact that they constitute internal EU law precludes them from forming the subject-matter of the present Opinion procedure, which can only relate to international agreements which the EU is proposing to conclude.

150. Moreover, the review which the Court of Justice is called upon to carry out in the context of the Opinion procedure, and which can take place regardless of the future content of the internal rules that will have to be adopted, is closely circumscribed by the Treaties; therefore, if it is not to encroach on the competences of the other institutions responsible for drawing up the internal rules necessary in order to make the accession agreement operational, the Court must confine itself to examining the compatibility of that agreement with the Treaties and satisfy itself not only that it does not infringe any provision of primary law but also that it contains every provision that primary law may require.

151. It follows from this that the assessments relating to those internal rules put forward both by the Commission and by the Member States and the other institutions that have submitted observations to the Court are irrelevant to the examination of the present request for an Opinion and, consequently, do not call into question the admissibility of that request.

152. Accordingly, the present request for an Opinion is admissible.

B – *Substance*

1. Preliminary considerations

153. Before any analysis of the Commission's request can be undertaken, it must be noted as a preliminary point that, unlike the position under Community law in force when the Court delivered Opinion 2/94 (EU:C:1996:140), the accession of the EU to the ECHR has, since the entry into force of the Treaty of Lisbon, had a specific legal basis in the form of Article 6 TEU.

154. That accession would, however, still be characterised by significant distinctive features.

155. Ever since the adoption of the ECHR, it has only been possible for State entities to be parties to it, which explains why, to date, it has been binding only on States. This is also confirmed by the fact that, to enable the accession of the EU to proceed, not only has Article 59 of the ECHR been amended, but the agreement envisaged itself contains a series of amendments of the ECHR that are to make accession operational within the system established by the ECHR itself.

156. Those amendments are warranted precisely because, unlike any other Contracting Party, the EU is, under international law, precluded by its very nature from being considered a State.

157. As the Court of Justice has repeatedly held, the founding treaties of the EU, unlike ordinary international treaties, established a new legal order, possessing its own institutions, for the benefit of which the Member States thereof have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only those States but also their nationals (see, in particular, judgments in *van Gend & Loos*, 26/62, EU:C:1963:1, p. 12, and *Costa*, 6/64, EU:C:1964:66, p. 593, and Opinion 1/09, EU:C:2011:123, paragraph 65).

158. The fact that the EU has a new kind of legal order, the nature of which is peculiar to the EU, its own constitutional framework and founding principles, a particularly sophisticated institutional structure and a full set of legal rules to ensure its operation, has consequences as regards the procedure for and conditions of accession to the ECHR.

159. It is precisely in order to ensure that that situation is taken into account that the Treaties make accession subject to compliance with various conditions.

160. Thus, first of all, having provided that the EU is to accede to the ECHR, Article 6(2) TEU makes clear at the outset, in the second sentence, that '[s]uch accession shall not affect the Union's competences as defined in the Treaties'.

161. Next, Protocol No 8 EU, which has the same legal value as the Treaties, provides in particular that the accession agreement is to make provision for preserving the specific characteristics of the EU and EU law and ensure that accession does not affect the competences of the EU or the powers of its institutions, or the situation of Member States in relation to the ECHR, or indeed Article 344 TFEU.

162. Lastly, by the Declaration on Article 6(2) of the Treaty on European Union, the Intergovernmental Conference which adopted the Treaty of Lisbon agreed that accession must be arranged in such a way as to preserve the specific features of EU law.

163. In performing the task conferred on it by the first subparagraph of Article 19(1) TEU, the Court of Justice must review, in the light, in particular, of those provisions, whether the legal arrangements proposed in respect of the EU's accession to the ECHR are in conformity with the requirements laid down and, more generally, with the basic constitutional charter, the Treaties (judgment in *Les Verts v Parliament*, 294/83, EU:C:1986:166, paragraph 23).

164. For the purposes of that review, it must be noted that, as is apparent from paragraphs 160 to 162 above, the conditions to which accession is subject under the Treaties are intended, particularly, to ensure that accession does not affect the specific characteristics of the EU and EU law.

165. It should be borne in mind that these characteristics include those relating to the constitutional structure of the EU, which is seen in the principle of conferral of powers referred to in Articles 4(1) TEU and 5(1) and (2) TEU, and in the institutional framework established in Articles 13 TEU to 19 TEU.

166. To these must be added the specific characteristics arising from the very nature of EU law. In particular, as the Court of Justice has noted many times, EU law is characterised by the fact that it stems from an independent source of law, the Treaties, by its primacy over the laws of the Member States (see, to that effect, judgments in *Costa*, EU:C:1964:66, p. 594, and *Internationale Handelsgesellschaft*, EU:C:1970:114, paragraph 3; Opinions 1/91, EU:C:1991:490, paragraph 21, and 1/09, EU:C:2011:123, paragraph 65; and judgment in *Melloni*, C-399/11, EU:C:2013:107, paragraph 59), and by the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves (judgment in *van Gend & Loos*, EU:C:1963:1, p. 12, and Opinion 1/09, EU:C:2011:123, paragraph 65).

167. These essential characteristics of EU law have given rise to a structured network of principles, rules and mutually interdependent legal relations linking the EU and its Member States, and its Member States with each other, which are now engaged, as is recalled in the second paragraph of Article 1 TEU, in a 'process of creating an ever closer union among the peoples of Europe'.

168. This legal structure is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the law of the EU that implements them will be respected.

169. Also at the heart of that legal structure are the fundamental rights recognised by the Charter (which, under Article 6(1) TEU, has the same legal value as the Treaties), respect for those rights being a condition of the lawfulness of EU acts, so that measures incompatible with those rights are not acceptable in the EU (see judgments in *ERT*, C-260/89, EU:C:1991:254, paragraph 41; *Kremzow*, C-299/95, EU:C:1997:254, paragraph 14; *Schmidberger*, C-112/00, EU:C:2003:333, paragraph 73; and *Kadi and Al Barakaat International Foundation v Council and Commission*, EU:C:2008:461, paragraphs 283 and 284).

170. The autonomy enjoyed by EU law in relation to the laws of the Member States and in relation to international law requires that the interpretation of those fundamental rights be ensured within the framework of the structure and objectives of the EU (see, to that effect, judgments in *Internationale Handelsgesellschaft*, EU:C:1970:114, paragraph 4, and *Kadi and Al Barakaat International Foundation v Council and Commission*, EU:C:2008:461, paragraphs 281 to 285).

171. As regards the structure of the EU, it must be emphasised that not only are the institutions, bodies, offices and agencies of the EU required to respect the Charter but so too are the Member States when they are implementing EU law (see, to that effect, judgment in *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraphs 17 to 21).

172. The pursuit of the EU's objectives, as set out in Article 3 TEU, is entrusted to a series of fundamental provisions, such as those providing for the free movement of goods, services, capital and persons, citizenship of the Union, the area of freedom, security and justice, and competition policy. Those provisions, which are part of the framework of a system that is specific to the EU, are structured in such a way as to contribute — each within its specific field and with its own particular characteristics — to the implementation of the process of integration that is the *raison d'être* of the EU itself.

173. Similarly, the Member States are obliged, by reason, inter alia, of the principle of sincere cooperation set out in the first subparagraph of Article 4(3) TEU, to ensure, in their respective territories, the application of and respect for EU law. In addition, pursuant to the second subparagraph of Article 4(3) TEU, the Member States are to take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the EU (Opinion 1/09, EU:C:2011:123, paragraph 68 and the case-law cited).

174. In order to ensure that the specific characteristics and the autonomy of that legal order are preserved, the Treaties have established a judicial system intended to ensure consistency and uniformity in the interpretation of EU law.

175. In that context, it is for the national courts and tribunals and for the Court of Justice to ensure the full application of EU law in all Member States and to ensure judicial protection of an individual's rights under that law (Opinion 1/09, EU:C:2011:123, paragraph 68 and the case-law cited).

176. In particular, the judicial system as thus conceived has as its keystone the preliminary ruling procedure provided for in Article 267 TFEU, which, by setting up a dialogue between one court and another, specifically between the Court of Justice and the courts and tribunals of the Member States, has the object of securing uniform interpretation of EU law (see, to that effect, judgment in *van Gend & Loos*, EU:C:1963:1, p. 12), thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties (see, to that effect, Opinion 1/09, EU:C:2011:123, paragraphs 67 and 83).

177. Fundamental rights, as recognised in particular by the Charter, must therefore be interpreted and applied within the EU in accordance with the constitutional framework referred to in paragraphs 155 to 176 above.

2. The compatibility of the agreement envisaged with EU primary law

178. In order to take a position on the Commission's request for an Opinion, it is important (i) to ascertain whether the agreement envisaged is liable adversely to affect the specific characteristics of EU law just outlined and, as the Commission itself has emphasised, the autonomy of EU law in the interpretation and application of fundamental rights, as recognised by EU law and notably by the Charter, and (ii) to consider whether the institutional and procedural machinery envisaged by that agreement ensures that the conditions in the Treaties for the EU's accession to the ECHR are complied with.

a) The specific characteristics and the autonomy of EU law

179. It must be borne in mind that, in accordance with Article 6(3) TEU, fundamental rights, as guaranteed by the ECHR, constitute general principles of the EU's law. However, as the EU has not acceded to the ECHR, the latter does not constitute a legal instrument which has been formally incorporated into the legal order of the EU (see, to

that effect, judgments in *Kamberaj*, C-571/10, EU:C:2012:233, paragraph 60, and *Åkerberg Fransson*, EU:C:2013:105, paragraph 44).

180. By contrast, as a result of the EU's accession the ECHR, like any other international agreement concluded by the EU, would, by virtue of Article 216(2) TFEU, be binding upon the institutions of the EU and on its Member States, and would therefore form an integral part of EU law (judgment in *Haegeman*, 181/73, EU:C:1974:41, paragraph 5; Opinion 1/91, EU:C:1991:490, paragraph 37; judgments in *LATA and ELFAA*, C-344/04, EU:C:2006:10, paragraph 36, and *Air Transport Association of America and Others*, C-366/10, EU:C:2011:864, paragraph 73).

181. Accordingly, the EU, like any other Contracting Party, would be subject to external control to ensure the observance of the rights and freedoms the EU would undertake to respect in accordance with Article 1 of the ECHR. In that context, the EU and its institutions, including the Court of Justice, would be subject to the control mechanisms provided for by the ECHR and, in particular, to the decisions and the judgments of the ECtHR.

182. The Court of Justice has admittedly already stated in that regard that an international agreement providing for the creation of a court responsible for the interpretation of its provisions and whose decisions are binding on the institutions, including the Court of Justice, is not, in principle, incompatible with EU law; that is particularly the case where, as in this instance, the conclusion of such an agreement is provided for by the Treaties themselves. The competence of the EU in the field of international relations and its capacity to conclude international agreements necessarily entail the power to submit to the decisions of a court which is created or designated by such agreements as regards the interpretation and application of their provisions (see Opinions 1/91, EU:C:1991:490, paragraphs 40 and 70, and 1/09, EU:C:2011:123, paragraph 74).

183. Nevertheless, the Court of Justice has also declared that an international agreement may affect its own powers only if the indispensable conditions for safeguarding the essential character of those powers are satisfied and, consequently, there is no adverse effect on the autonomy of the EU legal order (see Opinions 1/00, EU:C:2002:231, paragraphs 21, 23 and 26, and 1/09, EU:C:2011:123, paragraph 76; see also, to that effect, judgment in *Kadi and Al Barakat International Foundation v Council and Commission*, EU:C:2008:461, paragraph 282).

184. In particular, any action by the bodies given decision-making powers by the ECHR, as provided for in the agreement envisaged, must not have the effect of binding the EU and its institutions, in the exercise of their internal powers, to a particular interpretation of the rules of EU law (see Opinions 1/91, EU:C:1991:490, paragraphs 30 to 35, and 1/00, EU:C:2002:231, paragraph 13).

185. It is admittedly inherent in the very concept of external control that, on the one hand, the interpretation of the ECHR provided by the ECtHR would, under international law, be binding on the EU and its institutions, including the Court of Justice, and that, on the other, the interpretation by the Court of Justice of a right recognised by the ECHR would not be binding on the control mechanisms provided for by the ECHR, particularly the ECtHR, as Article 3(6) of the draft agreement provides and as is stated in paragraph 68 of the draft explanatory report.

186. The same would not apply, however, with regard to the interpretation by the Court of Justice of EU law, including the Charter. In particular, it should not be possible for the ECtHR to call into question the Court's findings in relation to the scope *ratione materiae* of EU law, for the purposes, in particular, of determining whether a Member State is bound by fundamental rights of the EU.

187. In that regard, it must be borne in mind, in the first place, that Article 53 of the Charter provides that nothing therein is to be interpreted as restricting or adversely affecting fundamental rights as recognised, in their respective fields of application, by EU law and international law and by international agreements to which the EU or all the Member States are party, including the ECHR, and by the Member States' constitutions.

188. The Court of Justice has interpreted that provision as meaning that the application of national standards of protection of fundamental rights must not compromise the level of protection provided for by the Charter or the primacy, unity and effectiveness of EU law (judgment in *Melloni*, EU:C:2013:107, paragraph 60).

189. In so far as Article 53 of the ECHR essentially reserves the power of the Contracting Parties to lay down higher standards of protection of fundamental rights than those guaranteed by the ECHR, that provision should

be coordinated with Article 53 of the Charter, as interpreted by the Court of Justice, so that the power granted to Member States by Article 53 of the ECHR is limited — with respect to the rights recognised by the Charter that correspond to those guaranteed by the ECHR — to that which is necessary to ensure that the level of protection provided for by the Charter and the primacy, unity and effectiveness of EU law are not compromised.

190. However, there is no provision in the agreement envisaged to ensure such coordination.

191. In the second place, it should be noted that the principle of mutual trust between the Member States is of fundamental importance in EU law, given that it allows an area without internal borders to be created and maintained. That principle requires, particularly with regard to the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law (see, to that effect, judgments in *N. S. and Others*, C-411/10 and C-493/10, EU:C:2011:865, paragraphs 78 to 80, and *Melloni*, EU:C:2013:107, paragraphs 37 and 63).

192. Thus, when implementing EU law, the Member States may, under EU law, be required to presume that fundamental rights have been observed by the other Member States, so that not only may they not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law, but, save in exceptional cases, they may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU.

193. The approach adopted in the agreement envisaged, which is to treat the EU as a State and to give it a role identical in every respect to that of any other Contracting Party, specifically disregards the intrinsic nature of the EU and, in particular, fails to take into consideration the fact that the Member States have, by reason of their membership of the EU, accepted that relations between them as regards the matters covered by the transfer of powers from the Member States to the EU are governed by EU law to the exclusion, if EU law so requires, of any other law.

194. In so far as the ECHR would, in requiring the EU and the Member States to be considered Contracting Parties not only in their relations with Contracting Parties which are not Member States of the EU but also in their relations with each other, including where such relations are governed by EU law, require a Member State to check that another Member State has observed fundamental rights, even though EU law imposes an obligation of mutual trust between those Member States, accession is liable to upset the underlying balance of the EU and undermine the autonomy of EU law.

195. However, the agreement envisaged contains no provision to prevent such a development.

196. In the third place, it must be pointed out that Protocol No 16 permits the highest courts and tribunals of the Member States to request the ECtHR to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms guaranteed by the ECHR or the protocols thereto, even though EU law requires those same courts or tribunals to submit a request to that end to the Court of Justice for a preliminary ruling under Article 267 TFEU.

197. It is indeed the case that the agreement envisaged does not provide for the accession of the EU as such to Protocol No 16 and that the latter was signed on 2 October 2013, that is to say, after the agreement reached by the negotiators in relation to the draft accession instruments, namely on 5 April 2013; nevertheless, since the ECHR would form an integral part of EU law, the mechanism established by that protocol could — notably where the issue concerns rights guaranteed by the Charter corresponding to those secured by the ECHR — affect the autonomy and effectiveness of the preliminary ruling procedure provided for in Article 267 TFEU.

198. In particular, it cannot be ruled out that a request for an advisory opinion made pursuant to Protocol No 16 by a court or tribunal of a Member State that has acceded to that protocol could trigger the procedure for the prior involvement of the Court of Justice, thus creating a risk that the preliminary ruling procedure provided for in Article 267 TFEU might be circumvented, a procedure which, as has been noted in paragraph 176 of this Opinion, is the keystone of the judicial system established by the Treaties.

199. By failing to make any provision in respect of the relationship between the mechanism established by Protocol No 16 and the preliminary ruling procedure provided for in Article 267 TFEU, the agreement envisaged is liable adversely to affect the autonomy and effectiveness of the latter procedure.

200. Having regard to the foregoing, it must be held that the accession of the EU to the ECHR as envisaged by the draft agreement is liable adversely to affect the specific characteristics of EU law and its autonomy.

b) Article 344 TFEU

201. The Court has consistently held that an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the EU legal system, observance of which is ensured by the Court. That principle is notably enshrined in Article 344 TFEU, according to which Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein (see, to that effect, Opinions 1/91, EU:C:1991:490, paragraph 35, and 1/00, EU:C:2002:231, paragraphs 11 and 12; judgments in *Commission v Ireland*, C-459/03, EU:C:2006:345, paragraphs 123 and 136, and *Kadi and Al Barakaat International Foundation v Council and Commission*, EU:C:2008:461, paragraph 282).

202. Furthermore, the obligation of Member States to have recourse to the procedures for settling disputes established by EU law — and, in particular, to respect the jurisdiction of the Court of Justice, which is a fundamental feature of the EU system — must be understood as a specific expression of Member States' more general duty of loyalty resulting from Article 4(3) TEU (see, to that effect, judgment in *Commission v Ireland*, EU:C:2006:345, paragraph 169), it being understood that, under that provision, the obligation is equally applicable to relations between Member States and the EU.

203. It is precisely in view of these considerations that Article 3 of Protocol No 8 EU expressly provides that the accession agreement must not affect Article 344 TFEU.

204. However, as explained in paragraph 180 of this Opinion, as a result of accession, the ECHR would form an integral part of EU law. Consequently, where EU law is at issue, the Court of Justice has exclusive jurisdiction in any dispute between the Member States and between those Member States and the EU regarding compliance with the ECHR.

205. Unlike the international convention at issue in the case giving rise to the judgment in *Commission v Ireland* (EU:C:2006:345, paragraphs 124 and 125), which expressly provided that the system for the resolution of disputes set out in EU law must in principle take precedence over that established by that convention, the procedure for the resolution of disputes provided for in Article 33 of the ECHR could apply to any Contracting Party and, therefore, also to disputes between the Member States, or between those Member States and the EU, even though it is EU law that is in issue.

206. In that regard, contrary to what is maintained in some of the observations submitted to the Court of Justice in the present procedure, the fact that Article 5 of the draft agreement provides that proceedings before the Court of Justice are not to be regarded as a means of dispute settlement which the Contracting Parties have agreed to forgo in accordance with Article 55 of the ECHR is not sufficient to preserve the exclusive jurisdiction of the Court of Justice.

207. Article 5 of the draft agreement merely reduces the scope of the obligation laid down by Article 55 of the ECHR, but still allows for the possibility that the EU or Member States might submit an application to the ECtHR, under Article 33 of the ECHR, concerning an alleged violation thereof by a Member State or the EU, respectively, in conjunction with EU law.

208. The very existence of such a possibility undermines the requirement set out in Article 344 TFEU.

209. This is particularly so since, if the EU or Member States did in fact have to bring a dispute between them before the ECtHR, the latter would, pursuant to Article 33 of the ECHR, find itself seized of such a dispute.

210. Contrary to the provisions of the Treaties governing the EU's various internal judicial procedures, which have objectives peculiar to them, Article 344 TFEU is specifically intended to preserve the exclusive nature of

the procedure for settling those disputes within the EU, and in particular of the jurisdiction of the Court of Justice in that respect, and thus precludes any prior or subsequent external control.

211. Moreover, Article 1(b) of Protocol No 8 EU itself refers only to the mechanisms necessary to ensure that proceedings brought before the ECtHR by non-Member States are correctly addressed to Member States and/or to the EU as appropriate.

212. Consequently, the fact that Member States or the EU are able to submit an application to the ECtHR is liable in itself to undermine the objective of Article 344 TFEU and, moreover, goes against the very nature of EU law, which, as noted in paragraph 193 of this Opinion, requires that relations between the Member States be governed by EU law to the exclusion, if EU law so requires, of any other law.

213. In those circumstances, only the express exclusion of the ECtHR's jurisdiction under Article 33 of the ECHR over disputes between Member States or between Member States and the EU in relation to the application of the ECHR within the scope *ratione materiae* of EU law would be compatible with Article 344 TFEU.

214. In the light of the foregoing, it must be held that the agreement envisaged is liable to affect Article 344 TFEU.

c) The co-respondent mechanism

215. The co-respondent mechanism has been introduced, as is apparent from paragraph 39 of the draft explanatory report, in order to 'avoid gaps in participation, accountability and enforceability in the [ECHR] system', gaps which, owing to the specific characteristics of the EU, might result from its accession to the ECHR.

216. In addition, that mechanism also has the aim of ensuring that, in accordance with the requirements of Article 1(b) of Protocol No 8 EU, proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the EU as appropriate.

217. However, those objectives must be pursued in such a way as to be compatible with the requirement of ensuring that the specific characteristics of EU law are preserved, as required by Article 1 of that protocol.

218. Yet, first, Article 3(5) of the draft agreement provides that a Contracting Party is to become a co-respondent either by accepting an invitation from the ECtHR or by decision of the ECtHR upon the request of that Contracting Party.

219. When the ECtHR invites a Contracting Party to become co-respondent, that invitation is not binding, as is expressly stated in paragraph 53 of the draft explanatory report.

220. This lack of compulsion reflects not only, as paragraph 53 of the draft explanatory report indicates, the fact that the initial application has not been brought against the potential co-respondent and that no Contracting Party can be forced to become a party to a case where it was not named in the application initiating proceedings, but also, above all, the fact that the EU and Member States must remain free to assess whether the material conditions for applying the co-respondent mechanism are met.

221. Given that those conditions result, in essence, from the rules of EU law concerning the division of powers between the EU and its Member States and the criteria governing the attributability of an act or omission that may constitute a violation of the ECHR, the decision as to whether those conditions are met in a particular case necessarily presupposes an assessment of EU law.

222. While the draft agreement duly takes those considerations into account as regards the procedure in accordance with which the ECHR may invite a Contracting Party to become co-respondent, the same cannot be said in the case of a request to that effect from a Contracting Party.

223. As Article 3(5) of the draft agreement provides, if the EU or Member States request leave to intervene as co-respondents in a case before the ECtHR, they must give reasons from which it can be established that the conditions for their participation in the procedure are met, and the ECtHR is to decide on that request in the light of the plausibility of those reasons.

224. Admittedly, in carrying out such a review, the ECtHR is to ascertain whether, in the light of those reasons, it is plausible that the conditions set out in paragraphs 2 and 3 of Article 3 are met, and that review does not relate to the merits of those reasons. However, the fact remains that, in carrying out that review, the ECtHR would be required to assess the rules of EU law governing the division of powers between the EU and its Member States as well as the criteria for the attribution of their acts or omissions, in order to adopt a final decision in that regard which would be binding both on the Member States and on the EU.

225. Such a review would be liable to interfere with the division of powers between the EU and its Member States.

226. Secondly, Article 3(7) of the draft agreement provides that if the violation in respect of which a Contracting Party is a co-respondent to the proceedings is established, the respondent and the co-respondent are to be jointly responsible for that violation.

227. That provision does not preclude a Member State from being held responsible, together with the EU, for the violation of a provision of the ECHR in respect of which that Member State may have made a reservation in accordance with Article 57 of the ECHR.

228. Such a consequence of Article 3(7) of the draft agreement is at odds with Article 2 of Protocol No 8 EU, according to which the accession agreement is to ensure that nothing therein affects the situation of Member States in relation to the ECHR, in particular in relation to reservations thereto.

229. Thirdly, there is provision at the end of Article 3(7) of the draft agreement for an exception to the general rule that the respondent and co-respondent are to be jointly responsible for a violation established. The ECtHR may decide, on the basis of the reasons given by the respondent and the co-respondent, and having sought the views of the applicant, that only one of them is to be held responsible for that violation.

230. A decision on the apportionment as between the EU and its Member States of responsibility for an act or omission constituting a violation of the ECHR established by the ECtHR is also one that is based on an assessment of the rules of EU law governing the division of powers between the EU and its Member States and the attributability of that act or omission.

231. Accordingly, to permit the ECtHR to adopt such a decision would also risk adversely affecting the division of powers between the EU and its Member States.

232. That conclusion is not affected by the fact that the ECtHR would have to give its decision solely on the basis of the reasons given by the respondent and the co-respondent.

233. Contrary to the submissions of some of the Member States that participated in the present procedure and of the Commission, it is not clear from reading Article 3(7) of the draft agreement and paragraph 62 of the draft explanatory report that the reasons to be given by the respondent and co-respondent must be given by them jointly.

234. In any event, even it is assumed that a request for the apportionment of responsibility is based on an agreement between the co-respondent and the respondent, that in itself would not be sufficient to rule out any adverse effect on the autonomy of EU law. The question of the apportionment of responsibility must be resolved solely in accordance with the relevant rules of EU law and be subject to review, if necessary, by the Court of Justice, which has exclusive jurisdiction to ensure that any agreement between co-respondent and respondent respects those rules. To permit the ECtHR to confirm any agreement that may exist between the EU and its Member States on the sharing of responsibility would be tantamount to allowing it to take the place of the Court of Justice in order to settle a question that falls within the latter's exclusive jurisdiction.

235. Having regard to the foregoing, it must be held that the arrangements for the operation of the co-respondent mechanism laid down by the agreement envisaged do not ensure that the specific characteristics of the EU and EU law are preserved.

d) The procedure for the prior involvement of the Court of Justice

236. It is true that the necessity for the procedure for the prior involvement of the Court of Justice is, as paragraph 65 of the draft explanatory report shows, linked to respect for the subsidiary nature of the control mechanism established by the ECHR, as referred to in paragraph 19 of this Opinion. Nevertheless, it should equally be noted that that procedure is also necessary for the purpose of ensuring the proper functioning of the judicial system of the EU.

237. In that context, the necessity for the prior involvement of the Court of Justice in a case brought before the ECtHR in which EU law is at issue satisfies the requirement that the competences of the EU and the powers of its institutions, notably the Court of Justice, be preserved, as required by Article 2 of Protocol No 8 EU.

238. Accordingly, to that end it is necessary, in the first place, for the question whether the Court of Justice has already given a ruling on the same question of law as that at issue in the proceedings before the ECtHR to be resolved only by the competent EU institution, whose decision should bind the ECtHR.

239. To permit the ECtHR to rule on such a question would be tantamount to conferring on it jurisdiction to interpret the case-law of the Court of Justice.

240. Yet neither Article 3(6) of the draft agreement nor paragraphs 65 and 66 of the draft explanatory report contain anything to suggest that that possibility is excluded.

241. Consequently, the prior involvement procedure should be set up in such a way as to ensure that, in any case pending before the ECtHR, the EU is fully and systematically informed, so that the competent EU institution is able to assess whether the Court of Justice has already given a ruling on the question at issue in that case and, if it has not, to arrange for the prior involvement procedure to be initiated.

242. In the second place, it should be noted that the procedure described in Article 3(6) of the draft agreement is intended to enable the Court of Justice to examine the compatibility of the provision of EU law concerned with the relevant rights guaranteed by the ECHR or by the protocols to which the EU may have acceded. Paragraph 66 of the draft explanatory report explains that the words '[a]ssessing the compatibility of the provision' mean, in essence, to rule on the validity of a legal provision contained in secondary law or on the interpretation of a provision of primary law.

243. It follows from this that the agreement envisaged excludes the possibility of bringing a matter before the Court of Justice in order for it to rule on a question of interpretation of secondary law by means of the prior involvement procedure.

244. However, it must be noted that, just as the prior interpretation of primary law is necessary in order for the Court of Justice to be able to rule on whether that law is consistent with the EU's commitments resulting from its accession to the ECHR, it should be possible for secondary law to be subject to such interpretation for the same purpose.

245. The interpretation of a provision of EU law, including of secondary law, requires, in principle, a decision of the Court of Justice where that provision is open to more than one plausible interpretation.

246. If the Court of Justice were not allowed to provide the definitive interpretation of secondary law, and if the ECtHR, in considering whether that law is consistent with the ECHR, had itself to provide a particular interpretation from among the plausible options, there would most certainly be a breach of the principle that the Court of Justice has exclusive jurisdiction over the definitive interpretation of EU law.

247. Accordingly, limiting the scope of the prior involvement procedure, in the case of secondary law, solely to questions of validity adversely affects the competences of the EU and the powers of the Court of Justice in that it does not allow the Court to provide a definitive interpretation of secondary law in the light of the rights guaranteed by the ECHR.

248. Having regard to the foregoing, it must be held that the arrangements for the operation of the procedure for the prior involvement of the Court of Justice provided for by the agreement envisaged do not enable the specific characteristics of the EU and EU law to be preserved.

e) The specific characteristics of EU law as regards judicial review in CFSP matters

249. It is evident from the second subparagraph of Article 24(1) TEU that, as regards the provisions of the Treaties that govern the CFSP, the Court of Justice has jurisdiction only to monitor compliance with Article 40 TEU and to review the legality of certain decisions as provided for by the second paragraph of Article 275 TFEU.

250. According to the latter provision, the Court of Justice is to have jurisdiction, in particular, to rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 TFEU, reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the EU Treaty.

251. Notwithstanding the Commission's systematic interpretation of those provisions in its request for an Opinion — with which some of the Member States that submitted observations to the Court have taken issue — essentially seeking to define the scope of the Court's judicial review in this area as being sufficiently broad to encompass any situation that could be covered by an application to the ECtHR, it must be noted that the Court has not yet had the opportunity to define the extent to which its jurisdiction is limited in CFSP matters as a result of those provisions.

252. However, for the purpose of adopting a position on the present request for an Opinion, it is sufficient to declare that, as EU law now stands, certain acts adopted in the context of the CFSP fall outside the ambit of judicial review by the Court of Justice.

253. That situation is inherent to the way in which the Court's powers are structured by the Treaties, and, as such, can only be explained by reference to EU law alone.

254. Nevertheless, on the basis of accession as provided for by the agreement envisaged, the ECtHR would be empowered to rule on the compatibility with the ECHR of certain acts, actions or omissions performed in the context of the CFSP, and notably of those whose legality the Court of Justice cannot, for want of jurisdiction, review in the light of fundamental rights.

255. Such a situation would effectively entrust the judicial review of those acts, actions or omissions on the part of the EU exclusively to a non-EU body, albeit that any such review would be limited to compliance with the rights guaranteed by the ECHR.

256. The Court has already had occasion to find that jurisdiction to carry out a judicial review of acts, actions or omissions on the part of the EU, including in the light of fundamental rights, cannot be conferred exclusively on an international court which is outside the institutional and judicial framework of the EU (see, to that effect, Opinion 1/09, EU:C:2011:123, paragraphs 78, 80 and 89).

257. Therefore, although that is a consequence of the way in which the Court's powers are structured at present, the fact remains that the agreement envisaged fails to have regard to the specific characteristics of EU law with regard to the judicial review of acts, actions or omissions on the part of the EU in CFSP matters.

258. In the light of all the foregoing considerations, it must be held that the agreement envisaged is not compatible with Article 6(2) TEU or with Protocol No 8 EU in that:

– it is liable adversely to affect the specific characteristics and the autonomy of EU law in so far it does not ensure coordination between Article 53 of the ECHR and Article 53 of the Charter, does not avert the risk that the principle of Member States' mutual trust under EU law may be undermined, and makes no provision in respect of the relationship between the mechanism established by Protocol No 16 and the preliminary ruling procedure provided for in Article 267 TFEU;

– it is liable to affect Article 344 TFEU in so far as it does not preclude the possibility of disputes between Member States or between Member States and the EU concerning the application of the ECHR within the scope *ratione materiae* of EU law being brought before the ECtHR;

- it does not lay down arrangements for the operation of the co-respondent mechanism and the procedure for the prior involvement of the Court of Justice that enable the specific characteristics of the EU and EU law to be preserved; and
- it fails to have regard to the specific characteristics of EU law with regard to the judicial review of acts, actions or omissions on the part of the EU in CFSP matters in that it entrusts the judicial review of some of those acts, actions or omissions exclusively to a non-EU body.

Consequently, the Court (Full Court) gives the following Opinion:

The agreement on the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms is not compatible with Article 6(2) TEU or with Protocol (No 8) relating to Article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms.

LECTURE 7: ENHANCED COOPERATION: A NEW INSTITUTIONAL WAY FORWARD?

One of the most peculiar features of the EU Treaty framework has been the introduction of enhanced cooperation by means of the Treaty of Amsterdam. Enhanced cooperation implies that some Member States decide to fast track EU integration by adopting regulatory measures which will not be joined by all Member States. The establishment of an enhanced cooperation framework occurs in accordance with a specific procedure, resulting in a Council decision granting a mandate to take enhanced cooperation action. On the basis of that mandate, the cooperating Member States can use the EU decision-making procedures and legal instruments to make their cooperation a reality. As such, the cooperation instruments adopted are structured as EU Regulations or other binding decisions. In recent years, harmonisation initiatives in the field of cross-border divorce procedures and a unitary patent have been achieved; proposals for a financial transaction tax and a harmonised patrimonial regime are currently in preparation. In this lecture, we will analyse the features of the enhanced cooperation procedure before framing it in the wider context of EU institutional law. Questions to be raised include how a fast-track EU can be reconciled with the need for overall legal coherence, how the application of enhanced cooperation measures may frustrate such coherence and the role of the Court of Justice in embedding enhanced cooperation initiatives clearly into the EU institutional law framework.

Materials to read:

- Part VI, Title III, TFEU.
- Council Decision 2011/167/EU of 10 March 2011 authorising enhanced cooperation in the area of the creation of unitary patent protection, [2011] O.J. L76/53 (via eCampus).
- Council decision 2013/52/EU of 22 January 2013 authorising enhanced cooperation in the area of financial transaction tax, [2013] O.J. L22/11 (via eCampus).
- Proposal for a Council Directive implementing enhanced cooperation in the area of financial transaction tax /* COM/2013/071 final - 2013/0045 (CNS) (via eCampus)
- Court of Justice, 16 October 2013, Joined Cases C-274/11 and C-295/11, *Spain and Italy v Council*, ECLI:EU:C:2013:240.
- Court of Justice, 30 April 2014, Case C-209/13, *United Kingdom v Council*, ECLI:EU:C:2014:283.

Lecture 7 outline:

- a. Enhanced cooperation as a new EU institutional mechanism
 1. Rationale
 2. Legal setup
 3. Use in the early years
- b. Taking enhanced cooperation more seriously: unitary patent proceedings
 1. The need for a unitary patent
 2. Steps taken – authorisation and regulatory framework
 3. Enhanced cooperation before the Court – *Spain and Italy v Council*
 4. The future of the Unitary Patent in EU law

- c. Completing the internal market through enhanced cooperation – the proposed financial transaction tax
 1. Taxing the financial sector at EU level
 2. Proposed legislation and extraterritorial effects
 3. U.K. objections: *U.K. v Council*
 4. The fate of the financial transaction tax
- d. The future of enhanced cooperation in the EU regulatory framework
 1. Coherence objections
 2. Intra-EU extraterritoriality difficulties
 3. How much diversity within the EU legal environment?

Questions for discussion:

- Enhanced cooperation not only creates political tensions, but is also capable of resulting in widening regulatory disharmony between Member States' legislation. Do you agree with that hypothesis? How can EU law better integrate enhanced cooperation instruments?
- Can enhanced cooperation in the realm of tax harmonisation be used as an instrument implicitly to impose new rules on non-participating Member States? What are the legal and political limits of this approach?

Part VI, Title III TFEU

ENHANCED COOPERATION

Article 326

(ex Articles 27a to 27e, 40 to 40b and 43 to 45 TEU and ex Articles 11 and 11a TEC)

Any enhanced cooperation shall comply with the Treaties and Union law.

Such cooperation shall not undermine the internal market or economic, social and territorial cohesion. It shall not constitute a barrier to or discrimination in trade between Member States, nor shall it distort competition between them.

Article 327

(ex Articles 27a to 27e, 40 to 40b and 43 to 45 TEU and ex Articles 11 and 11a TEC)

Any enhanced cooperation shall respect the competences, rights and obligations of those Member States which do not participate in it. Those Member States shall not impede its implementation by the participating Member States.

Article 328

(ex Articles 27a to 27e, 40 to 40b and 43 to 45 TEU and ex Articles 11 and 11a TEC)

1. When enhanced cooperation is being established, it shall be open to all Member States, subject to compliance with any conditions of participation laid down by the authorising decision. It shall also be open to them at any other time, subject to compliance with the acts already adopted within that framework, in addition to those conditions.

The Commission and the Member States participating in enhanced cooperation shall ensure that they promote participation by as many Member States as possible.

2. The Commission and, where appropriate, the High Representative of the Union for Foreign Affairs and Security Policy shall keep the European Parliament and the Council regularly informed regarding developments in enhanced cooperation.

Article 329

(ex Articles 27a to 27e, 40 to 40b and 43 to 45 TEU and ex Articles 11 and 11a TEC)

1. Member States which wish to establish enhanced cooperation between themselves in one of the areas covered by the Treaties, with the exception of fields of exclusive competence and the common foreign and security policy, shall address a request to the Commission, specifying the scope and objectives of the enhanced cooperation proposed. The Commission may submit a proposal to the Council to that effect. In the event of the Commission not submitting a proposal, it shall inform the Member States concerned of the reasons for not doing so.

Authorisation to proceed with the enhanced cooperation referred to in the first subparagraph shall be granted by the Council, on a proposal from the Commission and after obtaining the consent of the European Parliament.

2. The request of the Member States which wish to establish enhanced cooperation between themselves within the framework of the common foreign and security policy shall be addressed to the Council. It shall be forwarded to the High Representative of the Union for Foreign Affairs and Security Policy, who shall give an opinion on whether the enhanced cooperation proposed is consistent with the Union's common foreign and security policy,

and to the Commission, which shall give its opinion in particular on whether the enhanced cooperation proposed is consistent with other Union policies. It shall also be forwarded to the European Parliament for information.

Authorisation to proceed with enhanced cooperation shall be granted by a decision of the Council acting unanimously.

Article 330

(ex Articles 27a to 27e, 40 to 40b and 43 to 45 TEU and ex Articles 11 and 11a TEC)

All members of the Council may participate in its deliberations, but only members of the Council representing the Member States participating in enhanced cooperation shall take part in the vote.

Unanimity shall be constituted by the votes of the representatives of the participating Member States only.

A qualified majority shall be defined in accordance with Article 238(3).

Article 331

(ex Articles 27a to 27e, 40 to 40b and 43 to 45 TEU and ex Articles 11 and 11a TEC)

1. Any Member State which wishes to participate in enhanced cooperation in progress in one of the areas referred to in Article 329(1) shall notify its intention to the Council and the Commission.

The Commission shall, within four months of the date of receipt of the notification, confirm the participation of the Member State concerned. It shall note where necessary that the conditions of participation have been fulfilled and shall adopt any transitional measures necessary with regard to the application of the acts already adopted within the framework of enhanced cooperation.

However, if the Commission considers that the conditions of participation have not been fulfilled, it shall indicate the arrangements to be adopted to fulfil those conditions and shall set a deadline for re-examining the request. On the expiry of that deadline, it shall re-examine the request, in accordance with the procedure set out in the second subparagraph. If the Commission considers that the conditions of participation have still not been met, the Member State concerned may refer the matter to the Council, which shall decide on the request. The Council shall act in accordance with Article 330. It may also adopt the transitional measures referred to in the second subparagraph on a proposal from the Commission.

2. Any Member State which wishes to participate in enhanced cooperation in progress in the framework of the common foreign and security policy shall notify its intention to the Council, the High Representative of the Union for Foreign Affairs and Security Policy and the Commission.

The Council shall confirm the participation of the Member State concerned, after consulting the High Representative of the Union for Foreign Affairs and Security Policy and after noting, where necessary, that the conditions of participation have been fulfilled. The Council, on a proposal from the High Representative, may also adopt any transitional measures necessary with regard to the application of the acts already adopted within the framework of enhanced cooperation. However, if the Council considers that the conditions of participation have not been fulfilled, it shall indicate the arrangements to be adopted to fulfil those conditions and shall set a deadline for re-examining the request for participation.

For the purposes of this paragraph, the Council shall act unanimously and in accordance with Article 330.

Article 332

(ex Articles 27a to 27e, 40 to 40b and 43 to 45 TEU and ex Articles 11 and 11a TEC)

Expenditure resulting from implementation of enhanced cooperation, other than administrative costs entailed for the institutions, shall be borne by the participating Member States, unless all members of the Council, acting unanimously after consulting the European Parliament, decide otherwise.

Article 333

(ex Articles 27a to 27e, 40 to 40b and 43 to 45 TEU and ex Articles 11 and 11a TEC)

1. Where a provision of the Treaties which may be applied in the context of enhanced cooperation stipulates that the Council shall act unanimously, the Council, acting unanimously in accordance with the arrangements laid down in Article 330, may adopt a decision stipulating that it will act by a qualified majority.

2. Where a provision of the Treaties which may be applied in the context of enhanced cooperation stipulates that the Council shall adopt acts under a special legislative procedure, the Council, acting unanimously in accordance with the arrangements laid down in Article 330, may adopt a decision stipulating that it will act under the ordinary legislative procedure. The Council shall act after consulting the European Parliament.

3. Paragraphs 1 and 2 shall not apply to decisions having military or defence implications.

Article 334

(ex Articles 27a to 27e, 40 to 40b and 43 to 45 TEU and ex Articles 11 and 11a TEC)

The Council and the Commission shall ensure the consistency of activities undertaken in the context of enhanced cooperation and the consistency of such activities with the policies of the Union, and shall cooperate to that end.

Joined Cases C-274/11 and C-295/11, *Spain and Italy v Council*

In Joined Cases C-274/11 and C-295/11,

APPLICATIONS for annulment under Article 263 TFEU, lodged on 30 and 31 May 2011, respectively,

Kingdom of Spain, represented by N. Díaz Abad, acting as Agent,

applicant,

supported by:

Italian Republic, represented by G. Palmieri, acting as Agent, assisted by S. Fiorentino, avvocato dello Stato,

intervener,

and

Italian Republic, represented by G. Palmieri, acting as Agent, assisted by S. Fiorentino, avvocato dello Stato, with an address for service in Luxembourg,

applicant,

supported by:

Kingdom of Spain, represented by N. Díaz Abad, acting as Agent,

intervener,

v

Council of the European Union, represented initially by T. Middleton, F. Florindo Gijón and A. Lo Monaco, and subsequently by T. Middleton, F. Florindo Gijón, M. Balta and K. Pellinghelli, acting as Agents,

defendant,

supported by:

Kingdom of Belgium, represented by C. Pochet, J.-C. Halleux and T. Materne, acting as Agents,

Czech Republic, represented by M. Smolek, D. Hadroušek and J. Vláčil, acting as Agents,

Federal Republic of Germany, represented by T. Henze and J. Kemper, acting as Agents,

Ireland, represented by D. O'Hagan, acting as Agent, assisted by N. J. Travers, BL,

French Republic, represented by E. Belliard, G. de Bergues and A. Adam, acting as Agents,

Hungary, represented by M. Z. Fehér and K. Molnár, acting as Agents,

Kingdom of the Netherlands, represented by C. Wissels and M. de Ree, acting as Agents,

Republic of Poland, represented by B. Majczyna, E. Gromnicka and M. Laszuk, acting as Agents,

Kingdom of Sweden, represented by A. Falk and C. Meyer-Seitz, acting as Agents,

United Kingdom of Great Britain and Northern Ireland, represented by L. Seeboruth, acting as Agent, assisted by T. Mitcheson, Barrister,

European Parliament, represented by I. Díez Parra, G. Ricci and M. Dean, acting as Agents,

European Commission, represented by I. Martínez del Peral, T. van Rijn, B. Smulders, F. Bulst and L. Prete, acting as Agents,

interveners,

THE COURT (Grand Chamber),

composed of V. Skouris, President, K. Lenaerts, Vice-President, A. Tizzano, M. Ilešič (Rapporteur), T. von Danwitz, J. Malenovský, Presidents of Chambers, U. Løhmus, A. Ó Caoimh, J.-C. Bonichot, A. Arabadjiev and C. Toader, Judges,

Advocate General: Y. Bot,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 25 September 2012,

after hearing the Opinion of the Advocate General at the sitting on 11 December 2012

gives the following

Judgment

1 By their applications, the Kingdom of Spain and the Republic of Italy seek annulment of Council Decision 2011/167/EU of 10 March 2011 authorising enhanced cooperation in the area of the creation of unitary patent protection (OJ 2011 L 76, p. 53) ('the contested decision').

The contested decision

2 The contested decision is worded as follows:

'Having regard to the Treaty on the Functioning of the European Union, and in particular Article 329(1) thereof,

...

Whereas:

1. In accordance with Article 3(3) of the Treaty on European Union (TEU), the Union shall establish an internal market, shall work for the sustainable development of Europe based on balanced economic growth and shall promote scientific and technological advance. The creation of the legal conditions enabling undertakings to adapt their activities in manufacturing and distributing products across national borders and providing companies with more choice and opportunities contributes to attaining this objective. A unitary patent which provides uniform effects throughout the Union should feature amongst the legal instruments which undertakings have at their disposal.

...

(3) On 5 July 2000, the Commission adopted a proposal for a Council Regulation on the Community patent for the creation of a unitary patent providing uniform protection throughout the Union. On 30 June 2010, the

Commission adopted a proposal for a Council Regulation on the translation arrangements for the European Union patent (hereinafter “the proposed Regulation on the translation arrangements”) providing for the translation arrangements applicable to the European Union patent.

(4) At the Council meeting on 10 November 2010, it was recorded that there was no unanimity to go ahead with the proposed Regulation on the translation arrangements. It was confirmed on 10 December 2010 that insurmountable difficulties existed, making unanimity impossible at the time and in the foreseeable future. Since the agreement on the proposed Regulation on the translation arrangements is necessary for a final agreement on unitary patent protection in the Union, it is established that the objective to [sic] create unitary patent protection for the Union could not be attained within a reasonable period by applying the relevant provisions of the Treaties.

(5) In these circumstances, 12 Member States, namely, Denmark, Germany, Estonia, France, Lithuania, Luxembourg, the Netherlands, Poland, Slovenia, Finland, Sweden and the United Kingdom, addressed requests to the Commission by letters dated 7, 8 and 13 December 2010 indicating that they wished to establish enhanced cooperation between themselves in the area of the creation of unitary patent protection on the basis of the existing proposals supported by these Member States during the negotiations and that the Commission should submit a proposal to the Council to that end. The requests were confirmed at the meeting of the Council on 10 December 2010. In the meantime, 13 more Member States, namely, Belgium, Bulgaria, the Czech Republic, Ireland, Greece, Cyprus, Latvia, Hungary, Malta, Austria, Portugal, Romania and Slovakia have written to the Commission indicating that they also wish to participate in the envisaged enhanced cooperation. In total, 25 Member States have requested enhanced cooperation.

(6) Enhanced cooperation should provide the necessary legal framework for the creation of unitary patent protection in participating Member States and ensure the possibility for undertakings throughout the Union to improve their competitiveness by having the choice of seeking uniform patent protection in participating Member States ...

(7) Enhanced cooperation should aim at creating a unitary patent, providing uniform protection throughout the territories of the participating Member States, which would be granted in respect of all those Member States by the European Patent Office (EPO). As a necessary part of the unitary patent, the applicable translation arrangements should be simple and cost-effective and correspond to those provided for in the proposal for a Council Regulation on the translation arrangements for the European Union patent, presented by the Commission on 30 June 2010, combined with the elements of compromise proposed by the Presidency in November 2010 that had wide support in Council. The translation arrangements would maintain the possibility of filing patent applications in any language of the Union at the EPO, and would ensure compensation of the costs related to the translation of applications filed in languages other than an official language of the EPO. The patent having unitary effect should be granted only in one of the official languages of the EPO ... No further translations would be required without prejudice to transitional arrangements ...

...

(9) The area within which enhanced cooperation would take place, the establishment of measures for the creation of a unitary patent providing protection throughout the Union and the setting-up of centralised Union-wide authorisation, coordination and supervision arrangements, is identified by Article 118 TFEU as one of the areas covered by the Treaties.

(10) It was recorded at the Council meeting on 10 November 2010 and confirmed on 10 December 2010 that the objective to [sic] establish unitary patent protection within the Union cannot be attained within a reasonable period by the Union as a whole, thus fulfilling the requirement in Article 20(2) TEU that enhanced cooperation be adopted only as a last resort.

(11) Enhanced cooperation in the area of the creation of unitary patent protection aims at fostering scientific and technological advance and the functioning of the internal market. The creation of unitary patent protection for a group of Member States would improve the level of patent protection by providing the possibility to obtain uniform patent protection throughout the territories of the participating Member States and eliminate the costs and complexity for those territories. Thus, it furthers the objectives of the Union, protects its interests and reinforces its integration process in accordance with Article 20(1) TEU.

...

(14) Enhanced cooperation in the area of the creation of unitary patent protection respects the competences, rights and obligations of non-participating Member States. The possibility of obtaining unitary patent protection on the territories of the Member States participating does not affect the availability or the conditions of patent protection on the territories of non-participating Member States. Moreover, undertakings from non-participating Member States should have the possibility to obtain unitary patent protection on the territories of the participating Member States under the same conditions as undertakings from participating Member States. Existing rules of non-participating Member States determining the conditions of obtaining patent protection on their territory remain unaffected.

...

(16) Subject to compliance with any conditions of participation laid down in this Decision, enhanced cooperation in the area of the creation of unitary patent protection is open at any time to all Member States willing to comply with the acts already adopted within this framework in accordance with Article 328 TFEU.

...

Article 1

The Kingdom of Belgium, the Republic of Bulgaria, the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the French Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, the Republic of Hungary, Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, Romania, the Republic of Slovenia, the Slovak Republic, the Republic of Finland, the Kingdom of Sweden and the United Kingdom of Great Britain and Northern Ireland are hereby authorised to establish enhanced cooperation between themselves in the area of the creation of unitary patent protection, by applying the relevant provisions of the Treaties.

Article 2

This Decision shall enter into force on the day of its adoption.’

Procedure before the Court

3 By orders of the President of the Court of 27 October 2011, the Italian Republic was granted leave to intervene in Case C-274/11 in support of the form of order sought by the Kingdom of Spain and, in the same case, the Kingdom of Belgium, the Czech Republic, the Federal Republic of Germany, Ireland, the French Republic, the Republic of Latvia, Hungary, the Kingdom of the Netherlands, the Polish Republic, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland, the European Parliament and the Commission were granted leave to intervene in support of the form of order sought by the Council.

4 By order of the President of the Court of 13 October 2011, the Kingdom of Spain was granted leave to intervene in Case C-295/11 in support of the form of order sought by the Italian Republic and, in the same case, the Kingdom of Belgium, the Czech Republic, the Federal Republic of Germany, Ireland, the French Republic, the Republic of Latvia, Hungary, the Kingdom of the Netherlands, the Polish Republic, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland, the European Parliament and the Commission were granted leave to intervene in support of the form of order sought by the Council.

5 Written observations were submitted by all the Member States but the Republic of Latvia and by all the institutions intervening in the proceedings (‘the interveners’).

6 By order of the President of the Court of 10 July 2012, Cases C-274/11 and C-295/11 were joined for the purposes of the oral procedure and of the judgment.

The actions

7 In support of its action, the Kingdom of Spain claims, principally, that the contested decision is vitiated by misuse of powers and failure to have due regard for the judicial system of the Union. In the alternative, it alleges breach of the conditions set forth in Article 20 TEU and in Articles 326 TFEU and 327 TFEU, especially those relating to the non-exclusiveness of those competences whose exercise is authorised in respect of enhanced cooperation, to the requirement that recourse be had to the latter only as a last resort and to not undermining the internal market.

8 In support of its action, the Italian Republic maintains that the contested decision is marred, first of all, by the fact that the Council has no competence to establish enhanced cooperation in order to create protection by a unitary patent ('the enhanced cooperation in question'), next, by misuse of powers and breach of essential procedural requirements, namely, and in particular, failure to give reasons and breach of the condition laid down in Article 20(2) TEU, that the decision authorising enhanced cooperation must be adopted as a last resort and, last, various infringements of Article 20 TEU and of Articles 118 TFEU and 326 TFEU.

9 Cases C-274/11 and C-395/11 having been joined, the arguments put forward in support of the two actions may be rearranged in five pleas in law: first, that the Council lacked competence to establish the enhanced cooperation in question; second, misuse of powers; third, breach of the condition that the decision authorising enhanced cooperation must be adopted as a last resort; fourth, infringements of Articles 20(1) TEU, 118 TEU, 326 TFEU and 327 TFEU and, fifth, disregard for the judicial system of the Union.

The first plea in law: that the Council lacked competence to establish the enhanced cooperation in question

Arguments of the parties

10 The Kingdom of Spain and the Italian Republic claim that the field concerned, that is to say, that of the creation of European intellectual property rights to provide uniform protection of intellectual property rights referred to in Article 118 TFEU, falls, not within the ambit of one of the competences shared by the Member States and the Union, but within that of the exclusive competence of the Union as provided for in Article 3(1)(b) TFEU, concerning 'the establishing of the competition rules necessary for the functioning of the internal market'.

11 In their opinion, the Council has, therefore, no competence to authorise the enhanced cooperation in question. Article 20(1) TFEU excludes any enhanced cooperation within the ambit of the Union's exclusive competences.

12 The applicants emphasise that the legislation on the unitary patent will define the extent and the limitations of the monopoly granted by that intellectual property right. That legislation will thus concern the drafting of rules essential to the preservation of undistorted competition.

13 Moreover, any classification of the competences conferred by Article 118 TFEU as shared competences is, they argue, gainsaid by the fact that what that provision, while making reference to the internal market and despite appearing in the chapter of the FEU Treaty that deals with the approximation of laws, confers on the Union is not the power to harmonise national legislation but a specific power to introduce European intellectual property rights.

14 The Italian Republic adds that Articles 3 to 6 TFEU do no more than set out a non-binding classification of the spheres of the Union's competences. It would, therefore, be permissible for the Court to treat as exclusive the competences conferred by Article 118 TFEU without relying on the list in Article 3(1) TFEU.

15 The Council and the parties intervening in its support argue that the rules governing intellectual property fall within the ambit of the internal market and that, in that sphere, the Union enjoys a shared competence under Article 4(2)(a) TFEU.

Findings of the Court

16 The purpose of the contested decision is to authorise the 25 Member States mentioned in the first article thereof to exercise between themselves the competences conferred by Article 118 TFEU so far as concerns the creation of protection by a unitary patent.

17 In order to determine whether those competences are non-exclusive and may, therefore, in accordance with Article 20 TFEU and subject to the conditions laid down therein and to Articles 326 TFEU to 334 TFEU, be exercised by way of enhanced cooperation, it is of importance to declare straight away that it is '[i]n the context of the establishment and functioning of the internal market' that the first paragraph of Article 118 TFEU confers the competence to create European intellectual property rights and to set up, as regards those rights, centralised, Union-wide authorisation, coordination and supervision arrangements.

18 The competence, conferred by the second paragraph of Article 118 TFEU, to establish language arrangements for those rights is closely bound up with the introduction of the latter and of the centralised arrangements referred to in the first paragraph of that article. As a result, that competence too falls within the ambit of the functioning of the internal market.

19 In accordance with Article 4(2) TFEU, competence shared between the Union and the Member States applies to, inter alia, the area of the 'internal market'.

20 With regard to the Kingdom of Spain and the Italian Republic's argument that the competences conferred by Article 118 TFEU fall within the ambit of the 'competition rules necessary for the functioning of the internal market' referred to in Article 3(1)(b) TFEU and, therefore, of the Union's exclusive competence, it is to be borne in mind that the area of the 'internal market' mentioned in Article 4(2)(a) TFEU refers, in accordance with the definition given in Article 26(2) TFEU, to 'an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured'. Article 26(1) TFEU provides that the Union is to 'adopt measures with the aim of establishing or ensuring the functioning of the internal market, in accordance with the relevant provisions of the Treaties'.

21 The expression 'relevant provisions of the Treaties' makes it clear that competences falling within the sphere of the internal market are not confined to those conferred by Articles 114 TFEU and 115 TFEU relating to the adoption of harmonisation measures but cover also any competence attaching to the objectives set out in Article 26 TFEU, such as the competences conferred on the Union by Article 118 TFEU.

22 Although it is true that rules on intellectual property are essential in order to maintain competition undistorted on the internal market, they do not, for all that, as noted by the Advocate General in points 58 to 60 of his Opinion, constitute 'competition rules' for the purpose of Article 3(1)(b) TFEU.

23 In this connection it may be recalled that, under Article 2(6) TFEU, the scope of, and arrangements for, exercising the Union's competences are to be determined by the provisions of the Treaties relating to each area.

24 The scope of, and arrangements for, exercising the Union's competences in the area of 'competition rules necessary for the functioning of the internal market' are determined in Part Three, Title VII, Chapter 1 of the FEU Treaty, in particular in Articles 101 TFEU to 109 TFEU. To regard Article 118 TFEU as forming part of that area would therefore be contrary to Article 2(6) TFEU and the result would be to extend unduly the scope of Article 3(1)(b) TFEU.

25 That being so, it must be concluded that the competences conferred by Article 118 TFEU fall within an area of shared competences for the purpose of Article 4(2) TFEU and are, in consequence, non-exclusive for the purpose of the first paragraph of Article 20(1) TEU.

26 It follows that the plea claiming that the Council had no competence to authorise the enhanced cooperation in question must be rejected.

The second plea in law: misuse of powers

Arguments of the parties

27 The Kingdom of Spain and the Italian Republic observe that all enhanced cooperation must contribute to the process of integration. In this case, however, they maintain that the true object of the contested decision was not to achieve integration but to exclude the Kingdom of Spain and the Italian Republic from the negotiations about the issue of the language arrangements for the unitary patent and so to deprive those Member States of their

right, conferred by the second paragraph of Article 118 TFEU, to oppose language arrangements they cannot approve.

28 They argue that the fact that the FEU Treaty provides, in the second paragraph of Article 118, a particular legislative basis for establishing the language arrangements for a European intellectual property right demonstrates the delicacy of this matter and the improper conduct of the Council. The short period of time elapsing between the Commission's proposal and the adoption of the contested decision is an example of that conduct.

29 The applicants conclude therefrom that the enhanced cooperation procedure was, in this instance, used in order to keep certain Member States out of difficult negotiations and to circumvent the requirement of unanimity, whereas that procedure is, they consider, designed to be used when one or more Member States is or are not yet ready to take part in a legislative action of the Union in its entirety.

30 The Kingdom of Spain adds that the unitary patent system envisaged by those taking part in the enhanced cooperation has to be analysed as being a special agreement for the purpose of Article 142 of the Convention on the grant of European patents (European Patent Convention), signed at Munich on 5 October 1973, which entered into force on 7 October 1977 ('the EPC'). The Council, while presenting the creation of a unitary patent as enhanced cooperation, actually wished, therefore, to authorise the creation of a specific category of European patent under the EPC, a creation that ought not, according to that Member State, to have taken place by means of a procedure provided for by the EU Treaty or by the FEU Treaty.

31 The Council contends that, if the Kingdom of Spain and the Italian Republic do not play a part in this enhanced cooperation, it is because they have refused to do so and not because they are excluded from it, recital 16 in the preamble to the contested decision stressing, indeed, that enhanced cooperation is open at any time to all Member States. Moreover, creating protection by a unitary patent would promote the objectives of the Union and strengthen the process of integration.

32 The parties intervening in support of the Council concur with that view. They emphasise that those areas that require unanimity are by no means excluded from the spheres in which it is permissible for enhanced cooperation to be established. What is more, the latter is a procedure that makes it possible to overcome the problems relating to blocking minorities.

Findings of the Court

33 A measure is vitiated by misuse of powers only if it appears, on the basis of objective, relevant and consistent evidence to have been taken solely, or at the very least chiefly, for ends other than those for which the power in question was conferred or with the aim of evading a procedure specifically prescribed by the Treaty for dealing with the circumstances of the case (see, to that effect, Case C-442/04 *Spain v Council* [1998] ECR I-3517, paragraph 49 and case-law cited).

34 By their plea alleging such a misuse of power, the Kingdom of Spain and the Italian Republic claim, in essence, that the Council, by authorising the enhanced cooperation in question, circumvented the requirement of unanimity laid down by the second paragraph of Article 118 TFEU and brushed aside those two Member States' objections to the Commission's proposal on the language arrangements for the unitary patent.

35 In this connection, it must be noted that nothing in Article 20 TEU or in Articles 326 TFEU to 334 TFEU forbids the Member States to establish between themselves enhanced cooperation within the ambit of those competences that must, according to the Treaties, be exercised unanimously. On the contrary, it follows from Article 333(1) TFEU that, when the conditions laid down in Article 20 TEU and in Articles 326 TFEU to 334 TFEU have been satisfied, those powers may be used in enhanced cooperation and that, in that case, provided that the Council has not decided to act by qualified majority, it is the votes of only those Member States taking part that constitute unanimity.

36 In addition, and contrary to what is maintained by the Kingdom of Spain and the Italian Republic, Article 20 TEU and Articles 326 TFEU to 334 TFEU do not circumscribe the right to resort to enhanced cooperation solely to the case in which at least one Member State declares that it is not yet ready to take part in a legislative action of the Union in its entirety. As provided in Article 20(2) TEU, the situation that may lawfully lead to enhanced cooperation is that in which 'the objectives of such cooperation cannot be attained within a reasonable period by

the Union as a whole'. The impossibility referred to in that provision may be due to various causes, for example, lack of interest on the part of one or more Member States or the inability of the Member States, who have all shown themselves interested in the adoption of an arrangement at Union level, to reach agreement on the content of that arrangement.

37 It follows that the Council's decision to authorise enhanced cooperation, having found that the unitary patent and its language arrangements could not be established by the Union as a whole within a reasonable period, by no means constitutes circumvention of the requirement of unanimity laid down in the second paragraph of Article 118 TFEU or, indeed, exclusion of those Member States that did not join in making requests for enhanced cooperation. The contested decision, provided that it is compatible with the conditions laid down in Article 20 TEU and in Article 326 et seq. TFEU, which is considered in connection with other pleas in law, does not amount to misuse of powers, but rather, having regard to its being impossible to reach common arrangements for the whole Union within a reasonable period, contributes to the process of integration.

38 What is more, this conclusion is by no means invalidated by the Kingdom of Spain's argument regarding the existence of Article 142 EPC.

39 In the words of that provision, '[a]ny group of Contracting States, which has provided by a special agreement that a European patent granted for those States has a unitary character throughout their territories, may provide that a European patent may only be granted jointly in respect of all those States'.

40 Given that every Member State of the Union is a Contracting State of the EPC, the introduction of a European patent with unitary effect between the Member States of the Union, as envisaged by the contested decision, may, as the Kingdom of Spain maintains, be effected by 'a special agreement' within the meaning of Article 142 EPC. Nevertheless, contrary to what is claimed by that Member State, it does not follow from that circumstance that the power provided for in Article 20 TEU is used for ends other than those for which it was conferred when Member States of the Union establish such a patent by a measure adopted under enhanced cooperation instead of concluding an international agreement.

41 It is clear from all the foregoing that the plea alleging misuse of powers must be rejected.

The third plea in law: breach of the condition that a decision authorising enhanced cooperation must be adopted as a last resort

Arguments of the parties

42 The applicants maintain that the condition laid down in Article 20(2) TEU, concerning the adoption of a decision authorising enhanced cooperation as a last resort, must be strictly observed. In this case, they consider that the possibilities of negotiations among all the Member States on the language arrangements had by no means been exhausted.

43 The Kingdom of Spain claims that there elapsed a period of not even six months between the proposal for language arrangements put forward by the Commission on 30 June 2010 and the proposal for enhanced cooperation put forward by that same institution on 14 December 2010. The period from the first proposal for a regulation on the Community patent put forward in August 2000 to the Commission's proposal for language arrangements cannot be taken into consideration in order to determine whether the contested decision was adopted as a last resort. On this head, that Member State explains that a common approach had been defined during the year 2003 and that the language question had not thereafter been further discussed in substance within the Council.

44 The Italian Republic acknowledges that the Council enjoys broad discretion as regards assessing the state of negotiations and that the question whether the condition relating to adoption as a last resort of a decision authorising enhanced cooperation had been satisfied may therefore be subject to only limited examination by the Court. In this instance, however, the 'legislative package' on the unitary patent was incomplete and the negotiations relating to language arrangements were brief. In those circumstances, it is clear that Article 20(2) TEU was disregarded.

45 According to the Italian Republic, the contested decision is vitiated also by failure to conduct a proper examination and failure to give reasons, in that it gives an excessively laconic explanation of the reasons why the

Council considers the conditions laid down by the EU and FEU Treaties in the sphere of enhanced cooperation to have been satisfied.

46 The Council and the parties intervening in its support draw attention to the deadlock at which the negotiations, already very lengthy, on the unitary patent and its language arrangements had arrived.

Findings of the Court

47 In accordance with Article 20(2) TEU, the Council may not authorise enhanced cooperation except ‘as a last resort, when it has established that the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole’.

48 This condition is particularly important and must be read in the light of the second paragraph of Article 20(1) TEU, which provides that enhanced cooperation is to ‘aim to further the objectives of the Union, protect its interests and reinforce its integration process’.

49 The Union’s interests and the process of integration would, quite clearly, not be protected if all fruitless negotiations could lead to one or more instances of enhanced cooperation, to the detriment of the search for a compromise enabling the adoption of legislation for the Union as a whole.

50 In consequence, as explained by the Advocate General in points 108 to 111 of his Opinion, the expression ‘as a last resort’ highlights the fact that only those situations in which it is impossible to adopt such legislation in the foreseeable future may give rise to the adoption of a decision authorising enhanced cooperation.

51 The applicants claim that both at the date on which the Commission presented its proposal for authorisation to the Council and at the date of the contested decision, there still existed real chances of reaching a compromise. They maintain too that the negotiations for reaching agreement on the unitary patent and its language arrangements were not as various or as thorough as claimed by the Council and the parties intervening in its support.

52 In this respect, it is to be borne in mind that taking part in the procedure leading to the adoption of a decision authorising enhanced cooperation are the Commission, which submits a proposal to that effect, the European Parliament, which approves the proposal, and the Council, which takes the final decision authorising enhanced cooperation.

53 The Council, in taking that final decision, is best placed to determine whether the Member States have demonstrated any willingness to compromise and are in a position to put forward proposals capable of leading to the adoption of legislation for the Union as a whole in the foreseeable future.

54 The Court, in exercising its review of whether the condition that a decision authorising enhanced cooperation must be adopted only as a last resort has been satisfied, should therefore ascertain whether the Council has carefully and impartially examined those aspects that are relevant to this point and whether adequate reasons have been given for the conclusion reached by the Council.

55 In this instance, the Council correctly took into account the fact that the legislative process undertaken with a view to the establishing of a unitary patent at Union level was begun during the year 2000 and covered several stages, which are set out by the Advocate General in points 119 to 123 of his Opinion and given in detail in the proposal for enhanced cooperation submitted by the Commission on 14 December 2010 (COM(2010) 790 final, pp. 3 to 6) and, more briefly, in recitals 3 and 4 of the preamble to the contested decision as well.

56 It is apparent too that a considerable number of different language arrangements for the unitary patent were discussed among all the Member States within the Council and that none of those arrangements, with or without the addition of elements of compromise, found support capable of leading to the adoption at Union level of a full ‘legislative package’ relating to that patent.

57 Furthermore, the applicants have adduced no specific evidence that could disprove the Council’s assertion that when the requests for enhanced cooperation were made, and when the proposal for authorisation was sent by

the Commission to the Council, and at the date on which the contested decision was adopted, there was still insufficient support for any of the language arrangements proposed or possible to contemplate.

58 With regard, lastly, to the reasons for the contested decision, it is to be borne in mind that, when the measure at issue was adopted in a context with which the persons concerned were familiar, summary reasons may be given (judgment of 26 June 2012 in Case C-335/09 P *Poland v Commission*, paragraph 152 and case-law cited). Having regard to the applicants' participation in the negotiations and to the detailed description of the fruitless stages before the contested decision set out in the proposal that was to lead to that decision, it cannot be concluded that that decision was vitiated by any failure to state reasons capable of resulting in its annulment.

59 Having regard to the foregoing, the plea in law alleging breach of the condition that a decision authorising enhanced cooperation is to be adopted only as a last resort must be rejected.

The fourth plea in law: infringement of Article 20(1) TEU and of Articles 118 TFEU, 326 TFEU and 327 TFEU

The alleged infringement of Article 20(1) TEU

– Arguments of the parties

60 According to the Kingdom of Spain and the Italian Republic, the Council was wrong to consider that the enhanced cooperation in question would pursue the objectives set out in Article 20(1) TEU by creating a higher level of integration compared to the current situation. They claim that there exists a certain level of uniformity because the legislation of all the Member States is compatible with the provisions of the EPC. Creating a unitary patent covering only part of the Union is, in their view, likely to damage that uniformity and not to improve it.

61 The Council and those parties intervening in its support observe that both national patents and European patents validated in one Member State or more confer only national protection. The unitary patent contemplated by the contested decision would give undertakings uniform protection in 25 Member States. Uniform protection throughout the Union would indeed be even more favourable to the functioning of the internal market, but enhanced cooperation would at least make it possible to draw close to that objective and would therefore result in better integration.

– Findings of the Court

62 As argued by the Council and the parties intervening in its support, European patents granted in accordance with the rules of the EPC do not confer uniform protection in the Contracting States to that convention but rather, in every one of those States, guarantee protection whose extent is defined by national law. In contrast, the unitary patent contemplated by the contested decision would confer uniform protection in the territory of all the Member States taking part in the enhanced cooperation.

63 In consequence, the applicants' argument that the protection conferred by that unitary patent would not be advantageous in terms of uniformity, and so of integration, compared to the situation created by the operation of the rules laid down by the EPC, must be rejected as unfounded.

The alleged infringement of Article 118 TFEU

– Arguments of the parties

64 The Italian Republic observes that Article 118 TFEU provides for the creation of European intellectual property rights to provide uniform protection 'throughout the Union', by means of the setting up of centralised, 'Union-wide' authorisation, coordination and supervision arrangements. However, what the Council has authorised is, precisely, the creation of a right that is not valid throughout the Union.

65 The Council and the parties intervening in its support repeat their view that the unitary patent contemplated by the contested decision allows undertakings to enjoy uniform protection in 25 Member States and so improves the functioning of the internal market.

– Findings of the Court

66 It is apparent from the first paragraph of Article 326 TFEU that the exercise, within the ambit of enhanced cooperation, of any competence conferred on the Union must comply with, among other provisions of the Treaties, that which confers that competence. The enhanced cooperation to which these actions relate must, therefore, be consistent with Article 118 TFEU.

67 Having regard to this duty to ensure accordance with Article 118 TFEU, the enhanced cooperation in question must establish measures for the creation of European intellectual property rights to provide uniform protection of intellectual property rights.

68 With regard, on the other hand, to the expressions ‘throughout the Union’ and ‘Union-wide’ used in Article 118 TFEU, it must be held that it is inherent in the fact that the competence conferred by that article is, in this instance, exercised within the ambit of enhanced cooperation that the European intellectual property right so created, the uniform protection given by it and the arrangements attaching to it will be in force, not in the Union in its entirety, but only in the territory of the participating Member States. Far from amounting to infringement of Article 118 TFEU, that consequence necessarily follows from Article 20(4) TEU, which states: ‘Acts adopted in the framework of enhanced cooperation shall bind only participating Member States.’

69 Consequently, the arguments alleging infringement of Article 118 TFEU are unfounded.

The alleged infringement of the second paragraph of Article 326 TFEU

– Arguments of the parties

70 The Kingdom of Spain and the Italian Republic recall the wording of the second paragraph of Article 326 TFEU, according to which enhanced cooperation ‘shall not undermine the internal market or economic, social and territorial cohesion [and] shall not constitute a barrier to or discrimination in trade between Member States, nor shall it distort competition between them’.

71 The enhanced cooperation in question would, in their opinion, jeopardise all those principles and objectives. Creating uniform protection for innovation in one part only of the Union would encourage activities relating to innovatory products to be drawn to that part of the Union, to the detriment of the non-participating Member States.

72 In addition, they claim that the enhanced cooperation in question would be the source of distortion of competition and of discrimination between undertakings by reason of the fact that trade in innovatory products will be, according to the language arrangements provided for in recital 7 of the preamble to the contested decision, made easier for undertakings working in English, French or German. The enhanced cooperation contemplated would, moreover, reduce the mobility of researchers from Member States not taking part in this cooperation or from Member States whose official language is not English, French or German, for the language arrangements provided for by the decision will make access to information on the scope of the patents difficult for those researchers.

73 Economic, social and territorial cohesion in the Union too would be damaged, they argue, in that the enhanced cooperation would prevent the coherent development of industrial policy and increase the differences between Member States from the technological point of view.

74 The Council and the parties intervening in its support take the view that this plea in law is based on premises in the realm of speculation. Furthermore, the origin of the fragmentation of the market is to be found, not in the contested decision, but in the present situation, in which the protection offered by European patents is national. What is more, inasmuch as the applicants base their arguments on the language arrangements contemplated, their actions are inadmissible, the definitive features of those language arrangements not being fixed by the contested decision.

– Findings of the Court

75 For the same reason as that set out in paragraph 68 above, it cannot validly be maintained that, by having it in view to create a unitary patent applicable in the participating Member States and not in the Union, the contested decision damages the internal market or the economic, social and territorial cohesion of the Union.

76 In so far as, in order to demonstrate such damage to the internal market and discrimination and distortion of competition as well, the applicants also make reference to the language arrangements considered in recital 7 in the preamble to the contested decision, it must be declared that the compatibility of those arrangements with Union law may not be examined in these actions.

77 As is stated in recital 7, the language arrangements there described do no more than correspond to a proposal by the Commission with the addition of certain elements of compromise proposed by the Member State presiding over the Council of the Union at the time the requests for enhanced cooperation were made. The language arrangements as set out in that recital were, therefore, only at a preparatory stage when the contested decision was adopted and do not form a component part of the latter.

78 It follows that the arguments alleging infringement of Article 326 TFEU are in part unfounded and in part inadmissible.

The alleged infringement of Article 327 TFEU

– Arguments of the parties

79 Contrary to what is prescribed by Article 327 TFEU, the enhanced cooperation in question does not, according to the Kingdom of Spain, respect the rights of the Member States not participating in it. In particular, the Kingdom of Spain and the Italian Republic's right to take part in future in this enhanced cooperation is infringed, for the Council favours language arrangements that those two Member States do not accept.

80 According to the Council and the parties intervening in its support, this plea relies on the mistaken premiss that it is impossible, *de facto* or *de jure*, for the Kingdom of Spain and the Italian Republic to take part in this cooperation.

– Findings of the Court

81 Under Article 327 TFEU, the enhanced cooperation authorised by the contested decision must respect 'the competences, rights and obligations' of the Kingdom of Spain and the Italian Republic as Member States not taking part in the cooperation.

82 Nothing in the contested decision prejudices any competence, right or obligation of those two Member States. In particular, the prospect, indicated by that decision, of the introduction of the language arrangements objected to by the Kingdom of Spain and the Italian Republic may not be described as prejudicial to the competences, rights or obligations of those latter States. While it is, admittedly, essential for enhanced cooperation not to lead to the adoption of measures that might prevent the non-participating Member States from exercising their competences and rights or shouldering their obligations, it is, in contrast, permissible for those taking part in this cooperation to prescribe rules with which those non-participating States would not agree if they did take part in it.

83 Indeed, the prescription of such rules does not render ineffective the opportunity for non-participating Member States of joining in the enhanced cooperation. As provided by the first paragraph of Article 328(1) TFEU, participation is subject to the condition of compliance with the acts already adopted by those Member States that have taken part in that cooperation since it began.

84 In addition, it has to be noted that the Kingdom of Spain and the Italian Republic have not disproved the matters mentioned in the second, third and fourth sentences of Recital 14 in the preamble to the contested decision.

85 It follows that the arguments alleging infringement of Article 327 TFEU are unfounded too.

86 It follows from all the foregoing that the fourth plea in law raised by the applicants in support of their actions, alleging infringement of Articles 20(1) TEU, 118 TFEU, 326 TFEU and 327 TFEU, must be rejected.

The fifth plea in law: disregard for the judicial system of the Union

Arguments of the parties

87 The Kingdom of Spain observes that the judicial system of the Union is composed of a whole body of means of obtaining redress and of procedures, designed to ensure review of the lawfulness of the acts of the institutions of the Union. It considers that the Council disregarded that system by authorising enhanced cooperation without specifying what the judicial system envisaged was. While it is true that it is not necessary to create, in every measure of secondary legislation, a set of judicial rules for that measure, the Kingdom of Spain takes the view that the judicial rules applicable must nevertheless be specified in a measure authorising the creation of a new European intellectual property right.

88 The Council and the parties intervening in its support argue that the Court has made it clear in paragraph 62 of Opinion 1/09 [2011] ECR I-1137 that Article 262 TFEU provides for the mere option of creating a specific legal remedy for disputes relating to the application of acts of the European Union creating European intellectual property rights, but does not require any particular judicial structure to be set up. At all events, it is in no way necessary for the decision by which enhanced cooperation is authorised to contain details of the procedures under the judicial rules to be introduced in respect of that cooperation.

Findings of the Court

89 The authorisation of enhanced cooperation challenged in these actions was granted by the Council pursuant to Article 329(1) TFEU, that is to say, on a proposal from the Commission and after obtaining the Parliament's consent.

90 The Commission's proposal was based on the requests of those Member States wishing to establish the enhanced cooperation in question. As provided for in that article, those requests must specify 'the scope and objectives of the enhanced cooperation proposed'.

91 It is clear from the documents before the Court that those details appeared both in the requests and in the Commission's proposal. They were repeated in the contested decision, in recitals 6 and 7 in particular.

92 The Council was not obliged to provide, in the contested decision, further information with regard to the possible content of the system adopted by the participants in the enhanced cooperation in question. The sole purpose of that decision was to authorise the requesting Member States to establish that cooperation. It was thereafter for those States, having recourse to the institutions of the Union following the procedures laid down in Articles 20 TEU and 326 TFEU to 334 TFEU, to set up the unitary patent and to lay down the rules attaching to it, including, if necessary, specific rules in the judicial sphere.

93 It follows that the fifth plea too must be rejected.

94 Given that none of the pleas in law relied on by the Kingdom of Spain and the Italian Republic in support of their actions may be upheld, those actions must be dismissed.

Costs

95 Under Article 138(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Council has requested that the Kingdom of Spain and the Italian Republic be ordered to pay the costs and they have been unsuccessful, each of them must be ordered to pay, in addition to its own costs, those incurred by the Council in Case C-274/11 and Case C-295/11, respectively.

96 Pursuant to Article 140(1) of the Rules of Procedure, the Member States and institutions that have intervened in the proceedings are to bear their own costs.

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

1. **Dismisses the actions;**
2. **Orders the Kingdom of Spain to bear, in addition to its own costs, those incurred by the Council of the European Union in Case C-274/11;**
3. **Orders the Italian Republic to bear, in addition to its own costs, those incurred by the Council of the European Union in Case C-295/11;**
4. **Orders the Kingdom of Belgium, the Czech Republic, the Federal Republic of Germany, Ireland, the French Republic, the Republic of Latvia, Hungary, the Kingdom of the Netherlands, the Polish Republic, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland, the European Parliament and the European Commission to pay their own costs.**

Case C-209/13, *United Kingdom v Council*

In Case C-209/13,

APPLICATION for annulment under Article 263 TFEU, brought on 18 April 2013,

United Kingdom of Great Britain and Northern Ireland, represented by E. Jenkinson and S. Behzadi Spencer, acting as Agents, and by M. Hoskins QC, P. Baker QC and V. Wakefield, Barrister,

applicant,

v

Council of the European Union, represented by A.-M. Colaert, F. Florindo Gijón and A. de Gregorio Merino, acting as Agents,

defendant,

supported by:

Kingdom of Belgium, represented by J.-C. Halleux and M. Jacobs, acting as Agents,

Federal Republic of Germany, represented by T. Henze, J. Möller and K. Petersen, acting as Agents,

French Republic, represented by D. Colas and J.-S. Pilezer, acting as Agents,

Republic of Austria, represented by C. Pesendorfer, acting as Agent,

Portuguese Republic, represented by L. Inez Fernandes, J. Menezes Leitão and A. Cunha, acting as Agents,

European Parliament, represented by A. Neergaard and R. van de Westelaken, acting as Agents, with an address for service in Luxembourg,

European Commission, represented by R. Lyal, B. Smulders and W. Mölls, acting as Agents, with an address for service in Luxembourg,

interveners,

THE COURT (Second Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, K. Lenaerts (Rapporteur), Vice-President of the Court, J.L. da Cruz Vilaça, G. Arestis and J.-C. Bonichot, Judges,

Advocate General: N. Wahl,

Registrar: A. Calot Escobar,

having regard to the written procedure,

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

gives the following

Judgment

1 By its application, the United Kingdom of Great Britain and Northern Ireland asks the Court to annul Council Decision 2013/52/EU of 22 January 2013 authorising enhanced cooperation in the area of financial transaction tax (OJ 2013 L 22, p. 11; ‘the contested decision’).

Background to the proceedings

2 On 28 September 2011 the European Commission adopted a proposal (COM(2011) 594 final) for a Council Directive on a common system of financial transaction tax and amending Directive 2008/7/EC (‘the 2011 proposal’).

3 Article 1(2) of the 2011 proposal, the article being headed ‘Subject matter and scope’ provided:

‘This Directive shall apply to all financial transactions, on condition that at least one party to the transaction is established in a Member State and that a financial institution established in the territory of a Member State is party to the transaction, acting either for its own account or for the account of another person, or is acting in the name of a party to the transaction.’

4 Article 3(1) of that proposal, the article being headed ‘Establishment’, provided:

‘For the purposes of this Directive, a financial institution shall be deemed to be established in the territory of a Member State where any of the following conditions is fulfilled:

...

(e) it is party, acting either for its own account or for the account of another person, or is acting in the name of a party to the transaction, to a financial transaction with another financial institution established in that Member State pursuant to points (a), (b), (c) or (d), or with a party established in the territory of that Member State and which is not a financial institution.’

5 After three meetings of the Council of the European Union which took place on 22 and 29 June and 10 July 2012, it became apparent that it would not be possible to achieve unanimous support for the principle of a common system of financial transaction tax (‘FTT’) within the Council in the foreseeable future and, consequently, that the objective of the whole European Union adopting such a common system could not be attained within a reasonable period.

6 In those circumstances, between 28 September and 23 October 2012 11 Member States informed the Commission that they wished to establish enhanced cooperation between themselves in the area of FTT.

7 On 22 January 2013 the Council, on the Commission’s proposal, adopted the contested decision.

8 Recital 6 of the preamble to that decision reads as follows:

‘... 11 Member States, namely Belgium, Germany, Estonia, Greece, Spain, France, Italy, Austria, Portugal, Slovenia and Slovakia, addressed requests to the Commission ... indicating that they wished to establish enhanced cooperation between themselves in the area of FTT. These Member States requested that the scope and objectives of the enhanced cooperation be based on the Commission proposal for a Directive of 28 September 2011. Reference was also made in particular to the need to avoid evasive actions, distortions and transfers to other jurisdictions’.

9 The contested decision contains two articles. Article 1 thereof authorises the 11 Member States referred to in the preceding paragraph of this judgment (‘the participating Member States’) to establish enhanced cooperation between themselves in the area of the establishment of a common system of FTT, by applying the relevant provisions of the Treaties. Article 2 of that decision provides that it is to enter into force on the day of its adoption.

10 On 14 February 2013 the Commission adopted a proposal for a Council Directive implementing enhanced cooperation in the area of FTT (‘the 2013 proposal’).

11 Article 3(1) of the 2013 proposal, that article being headed ‘Scope’ provides:

‘This Directive shall apply to all financial transactions, on the condition that at least one party to the transaction is established in the territory of a participating Member State and that a financial institution established in the territory of a participating Member State is party to the transaction, acting either for its own account or for the account of another person, or is acting in the name of a party to the transaction.’

12 Article 4(1) and (2) of the 2013 proposal, that article being headed ‘Establishment’, provide:

‘1. For the purposes of this Directive, a financial institution shall be deemed to be established in the territory of a participating Member State where any of the following conditions is fulfilled:

...

(g) it is party, acting either for its own account or for the account of another person, or is acting in the name of a party to the transaction, to a financial transaction in a structured product or one of the financial instruments referred to in Section C of Annex I of Directive 2004/39/EC issued within the territory of that Member State, with the exception of instruments referred to in points (4) to (10) of that Section which are not traded on an organised platform.

2. A person which is not a financial institution shall be deemed to be established within a participating Member State where any of the following conditions is fulfilled:

...

(c) it is party to a financial transaction in a structured product or one of the financial instruments referred to in Section C of Annex I to Directive 2004/39/EC issued within the territory of that Member State, with the exception of instruments referred to in points (4) to (10) of that Section which are not traded on an organised platform.’

Forms of order sought by the parties and the procedure before the Court

13 The United Kingdom claims that the Court should annul the contested decision and order the Council to pay the costs.

14 The Council contends that the Court should dismiss the action and order the United Kingdom to pay the costs.

15 The Kingdom of Belgium, the Federal Republic of Germany, the French Republic, the Republic of Austria, the Portuguese Republic, the European Parliament and the Commission were granted leave to intervene in support of the forms of order sought by the Council.

The action

16 While recognising that its action, brought as a precautionary measure, could be considered to be premature, the United Kingdom relies on two pleas in law in support of its action. The first plea concerns a claimed infringement of Article 327 TFEU and of customary international law in so far as the contested decision authorises the adoption of an FTT which produces extraterritorial effects. The second plea, relied on in the alternative, relates to a claimed infringement of Article 332 TFEU in that that decision authorises the adoption of an FTT which will impose costs on Member States which are not participating in the enhanced cooperation (‘the non-participating Member States’).

Arguments of the parties

17 The first plea has two parts, claiming infringement of Article 327 TFEU and of customary international law respectively.

18 In the first part of that plea, the United Kingdom claims that, by authorising the adoption of an FTT with extraterritorial effects because of ‘the counterparty principle’ laid down in Article 3(1)(e) of the 2011 proposal, and the ‘issuance principle’ laid down in Article 4(1)(g) and (2)(c) of the 2013 proposal, the contested decision was in breach of Article 327 TFEU.

19 The United Kingdom claims that that decision permits the introduction of an FTT applicable, by reason of the two abovementioned principles of taxation, to institutions, persons or transactions situated or taking place in the territory of non-participating Member States, a fact which adversely affects the competences and rights of those Member States.

20 In the second part of its first plea in law, the United Kingdom claims that customary international law permits legislation which produces extraterritorial effects only on the condition that there exists between the facts or subjects at issue and the State exercising its competences thereon a sufficiently close connection to justify an encroachment on the sovereign competences of another State.

21 In this case, the extraterritorial effects of the future FTT stemming from ‘the counterparty principle’ and ‘the issuance principle’ are not justified in the light of any accepted rule of tax jurisdiction under international law.

22 By its second plea in law, the United Kingdom claims that, whereas expenditure linked to the implementation of enhanced cooperation in the area of FTT may in principle, under Article 332 TFEU, be borne only by the participating Member States, that implementation will also be the source of costs for the non-participating Member States, because of the application of Council Directives 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures (OJ 2010 L 84, p. 1) and 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC (OJ 2011 L 64, p. 1).

23 The United Kingdom claims that those two directives do not authorise the non-participating Member States to seek the recovery of the costs of mutual assistance and administrative cooperation linked to the application of those directives to the future FTT.

24 The United Kingdom adds, in that regard, that the concept of ‘expenditure resulting from implementation of enhanced cooperation’, within the meaning of Article 332 TFEU, covers expenditure linked to requests for assistance or cooperation based on the national legislation adopted to give effect to enhanced cooperation in the area of FTT.

25 The Council, all of the Member States intervening in its support with the exception of the Federal Republic of Germany, the European Parliament and the Commission accept, explicitly or implicitly, the admissibility of this action and of the pleas in law which underpin it. They contend however that those pleas are unfounded.

26 As regards the first plea in law, those parties state, in essence, that the principles of taxation disputed by the United Kingdom within this plea are, at this stage, purely hypothetical components of legislation which is yet to be adopted. Consequently, the arguments relied on by the United Kingdom, based on the alleged extraterritorial effects of the future FTT, are premature and speculative. Consequently, they are ineffective in the context of this action.

27 As regards the second plea in law of the action, the same parties argue, in essence, that this plea invites a premature debate on the manner in which the European Union legislature will regulate the question of liability for costs linked to the implementation of enhanced cooperation authorised by the contested decision. Further, that decision in no way regulates questions of mutual assistance for the purposes of the application of the future FTT.

28 The Council, the Republic of Austria, the Portuguese Republic and the Commission add that the second plea in support of the action rests on a misinterpretation of Article 332 TFEU. That article concerns solely operational expenditure to be borne by the European Union budget in relation to measures establishing enhanced cooperation and not the expenditure, disputed by the United Kingdom, which might be incurred by the Member States under Directives 2010/24 and 2011/16.

29 The Federal Republic of Germany, relying on an argument analogous to that mentioned in paragraphs 26 and 27 of this judgment, considers that the action is inadmissible, even manifestly inadmissible, because of a disregard of the requirements of Article 120(c) of the Court's Rules of Procedure, given that the pleas relied on by the United Kingdom in support of its action bear no relation to the subject-matter of the contested decision. Alternatively, the Federal Republic of Germany contends that the action should be dismissed as being unfounded.

Findings of the Court

30 As regards, first, the plea of inadmissibility mentioned in the preceding paragraph of this judgment, it must be recalled that, under Article 120(c) of the Rules of Procedure and the case-law relating thereto, an application initiating proceedings must state the subject-matter of the dispute and a summary of the pleas in law on which the application is based. That statement must be sufficiently clear and precise to enable the defendant to prepare his defence and the Court to rule on the application. It is therefore necessary for the essential points of law and of fact on which a case is based to be indicated coherently and intelligibly in the application itself and for the heads of claim to be set out unambiguously so that the Court does not rule *ultra petita* or fail to rule on a claim (Case C-360/11 *Commission v Spain* EU:C:2013:17, paragraph 26, and Case C-545/10 *Commission v Czech Republic* EU:C:2013:509, paragraph 108).

31 It is clear, in this case, that the content of the application satisfies those requirements of clarity and precision. It enabled the Council and the Member States intervening in its support to prepare their arguments in relation to the pleas relied on by the United Kingdom and it puts the Court in a position to carry out its review of the contested decision.

32 It follows that that plea of inadmissibility must be rejected.

33 Secondly, it must be stated that, in the context of an action for the annulment of a Council decision which, like the contested decision, has as its subject-matter the authorisation of enhanced cooperation on the basis of Article 329 TFEU, the Court's review is related to the issue of whether that decision is valid as such in the light of, *inter alia*, the provisions, contained in Article 20 TEU and in Articles 326 TFEU to 334 TFEU, which define the substantive and procedural conditions relating to the granting of such authorisation.

34 That review should not be confused with the review which may be undertaken, in the context of a subsequent action for annulment, of a measure adopted for the purposes of the implementation of the authorised enhanced cooperation.

35 In this action, the purpose of the first plea in law therein is to challenge the effects which the recourse to certain principles of taxation in respect of the future FTT might have on institutions, persons and transactions situated in or taking place in the territory of non-participating Member States

36 It is clear that the objective of the contested decision is to authorise 11 Member States to establish enhanced cooperation between themselves in the area of the establishment of a common system of FTT with due regard to the relevant provisions of the Treaties. The principles of taxation challenged by the United Kingdom are, however, not in any way constituent elements of that decision. First, 'the counterparty principle' corresponds to an element in the 2011 proposal mentioned in recital 6 of that decision. Second, the 'issuance principle' first appeared in the 2013 proposal.

37 As regards the action's second plea in law, whereby the United Kingdom claims, in essence, that the future FTT will give rise to costs for the non-participating Member States because of the obligations of mutual assistance and administrative cooperation linked to the application of Directives 2010/24 and 2011/16 to that tax, which, according to the United Kingdom, is contrary to Article 332 TFEU, it must be observed that the contested decision contains no provision related to the issue of expenditure linked to the implementation of the enhanced cooperation authorised by that decision.

38 Further, and irrespective of whether the concept of 'expenditure resulting from implementation of enhanced cooperation', within the meaning of Article 332 TFEU, does or does not cover the costs of mutual assistance and administrative cooperation referred to by the United Kingdom in its second plea, it is obvious that the question of the possible effects of the future FTT on the administrative costs of the non-participating Member States cannot

be examined for as long as the principles of taxation in respect of that tax have not been definitively established as part of the implementation of the enhanced cooperation authorised by the contested decision.

39 Those effects are dependent on the adoption of ‘the counterparty principle’ and the ‘issuance principle’, which are however not constituent elements of the contested decision, as stated in paragraph 36 of this judgment.

40 It follows from the foregoing that the two pleas in law relied on by the United Kingdom in support of its action must be rejected and, accordingly, that the action must be dismissed.

Costs

41 Under Article 138(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party’s pleadings. Since the Council has applied for costs and the United Kingdom has been unsuccessful, the latter must be ordered to pay the costs. In accordance with Article 140(1) of those Rules, under which Member States and institutions which have intervened in the proceedings are to bear their own costs, the Kingdom of Belgium, the Federal Republic of Germany, the French Republic, the Republic of Austria, the Portuguese Republic, the European Parliament and the Commission shall bear their own costs.

On those grounds, the Court hereby:

1. **Dismisses the action;**
2. **Orders the United Kingdom of Great Britain and Northern Ireland to pay the costs;**
3. **Orders the Kingdom of Belgium, the Federal Republic of Germany, the French Republic, the Republic of Austria, the Portuguese Republic, the European Parliament and the European Commission to bear their own costs.**

4. BEYOND MARKET INTEGRATION: THE ECONOMIC AND MONETARY UNION

Although the internal market still comprises the core of EU integration – and also justifies and structures the EU’s institutional functioning – the European integration project was never meant only to serve the abolition of regulatory frontiers. Seeking to establish a truly common European Union, other means of integration have equally been considered. One of the major ambitions in this regard has been the establishment of a common European currency. From a mere politicians’ dream in the 1970s, the realisation of a European Economic and Monetary Union (EMU) became a constitutional reality in the wake of the 1993 Maastricht Treaty. Ever since, the EMU and its key institution, the European Central Bank, have also taken centre stage at the EU level.

The study of the European Central Bank and the Economic and Monetary Union has long been the object of even more advanced EU law courses, specialising in monetary law. In the wake of the financial crises that have struck the EU Member States in the 2008-2015 time frame, EMU law all of a sudden became a most contentious topic, often flirting with the limits of EU law. It therefore deserves to be treated in more detail in this advanced EU law course, as it demonstrates a continuous attempt to make the EU’s monetary integration project into a key feature of an ever more perfect Union between European Peoples and States.

In three lecture sessions, both the foundations of and the post-crisis developments in the EMU context will be elucidated; at the same time, the legal links between and institutional differences with the EU internal market law framework will be identified and questioned as well. The first lecture will outline the foundations of the EMU and the tasks of economic and monetary policy coordination conferred on the European Union. The European Central Bank and the European System of Central Banks play a peculiar role in this regard. We will highlight the functioning and features of the ECB as a monetary policymaker and – more recently as a result of the crisis – as a banking supervisor in its own right.

The Eurozone crisis constitutes the heart of the second lecture; confronted with the risk of Member State default and spill-over effects, the common currency has been on the brink of collapse on multiple occasions over the past seven years. In each case, however, the ECB managed to intervene in financial markets, reassuring investors to some extent. The second lecture will explore the legality of such interventions by zooming in on the recent *Gauweiler* judgment and the underlying discussion on the democratic legitimacy and EU law compatibility of ECB crisis interventions, resulting from a preliminary reference from the German Constitutional Court. It will be analysed how national and EU constitutional courts interact and engage on seemingly technical, yet highly important constitutional topics.

The crisis also triggered new regulatory and institutional initiatives that had to go above and beyond the institutional framework established by the founding EU Treaties. In order to bail out and rescue Member States and their failing banks, an intervention rescue fund had to be created. That fund, the European Stability Mechanism, has been established outside the EU legal order *sensu stricto*. We will explore the impact of this mechanism on the coherence within the EU legal order and on the future of EU law as an instrument of crisis prevention and remediation.

LECTURE 8: FOUNDATIONS AND INSTITUTIONS OF THE ECONOMIC AND MONETARY UNION

The establishment of the Economic and Monetary Union truly took off in the wake of the Maastricht Treaty, when a title on the coordination of economic and monetary policy was inserted in the founding Treaties. That title envisaged a three-phased transition to a truly monetary Union. It resulted in new institutions being created – the European Monetary Institute, later on the European Central Bank – and a common currency – the Euro – being implemented in participating Member States. The institutional framework and functioning of the EMU are governed by familiar EU law principles, which have been tailored to the specific features of monetary policymaking. This lecture will offer an introduction to that framework. It will subsequently zoom in on the multiple functions of the European Central Bank, which has recently also become responsible for the day-to-day supervision of large banks in the Eurozone.

Materials to read:

- Part III, Title VIII, TFEU.
- Protocol No 4 on the Statute of the European System of Central Banks and of the European Central Bank.
- Decision 2004/258/EC of the European Central Bank of 4 March 2004 on public access to European Central Bank documents (ECB/2004/3), [2004] *O.J.* L80/42.
- General Court, 29 November 2012, Case T-590/10, *Gabi Thesing and Bloomberg Finance v European Central Bank*, ECLI:EU:T:2012:635.

Lecture 8 outline:

- g. The gradual emergence of a monetary Union
 1. The Werner Report
 2. Beyond the Report – early steps
 3. A compromise in the wake of German reunification
 4. The Maastricht Treaty
 5. Three stages
 6. The common currency
- h. Foundations of the EMU
 1. Economic policy coordination competences
 2. Monetary policy streamlining competences
 3. Linking economic and monetary policies through convergence criteria
 4. Opt-outs and other exceptions to joining EMU
- i. Institutions of the EMU
 1. The European System of Central Banks
 2. The European Central Bank
 3. The European Parliament and Member States' parliaments?
 4. The Court of Justice of the European Union?
- j. The European Central Bank
 1. Institutional functioning and EU law principles

2. Governing Council and Executive Board
 3. Decision-making procedures and judicial review
 4. Confidentiality v. transparency
 5. Access to ECB proceedings
 6. Accountability of the ECB
- k. Improving the institutional functioning of the ECB
1. Towards more transparency/openness?
 2. Towards swifter decision-making procedures?
 3. Enhanced monetary dialogue with other EU institutions
 4. Decision-making procedures in times of crisis

Questions for discussion:

- To what extent is, as a matter of EU law, the establishment and maintaining of a common currency irreversible, absent modification of the Treaties?
- Is the functioning of the ECB, which is based on the premise of confidentiality, compatible with the ever increasing openness-access to documents focus imposed on EU institutions?

Part III, Title VIII, TFEU

TITLE VIII ECONOMIC AND MONETARY POLICY

Article 119

(ex Article 4 TEC)

1. For the purposes set out in Article 3 of the Treaty on European Union, the activities of the Member States and the Union shall include, as provided in the Treaties, the adoption of an economic policy which is based on the close coordination of Member States' economic policies, on the internal market and on the definition of common objectives, and conducted in accordance with the principle of an open market economy with free competition.

2. Concurrently with the foregoing, and as provided in the Treaties and in accordance with the procedures set out therein, these activities shall include a single currency, the euro, and the definition and conduct of a single monetary policy and exchange-rate policy the primary objective of both of which shall be to maintain price stability and, without prejudice to this objective, to support the general economic policies in the Union, in accordance with the principle of an open market economy with free competition.

3. These activities of the Member States and the Union shall entail compliance with the following guiding principles: stable prices, sound public finances and monetary conditions and a sustainable balance of payments.

CHAPTER 1

ECONOMIC POLICY

Article 120

(ex Article 98 TEC)

Member States shall conduct their economic policies with a view to contributing to the achievement of the objectives of the Union, as defined in Article 3 of the Treaty on European Union, and in the context of the broad guidelines referred to in Article 121(2). The Member States and the Union shall act in accordance with the principle of an open market economy with free competition, favouring an efficient allocation of resources, and in compliance with the principles set out in Article 119.

Article 121

(ex Article 99 TEC)

1. Member States shall regard their economic policies as a matter of common concern and shall coordinate them within the Council, in accordance with the provisions of Article 120.

2. The Council shall, on a recommendation from the Commission, formulate a draft for the broad guidelines of the economic policies of the Member States and of the Union, and shall report its findings to the European Council.

The European Council shall, acting on the basis of the report from the Council, discuss a conclusion on the broad guidelines of the economic policies of the Member States and of the Union.

On the basis of this conclusion, the Council shall adopt a recommendation setting out these broad guidelines. The Council shall inform the European Parliament of its recommendation.

3. In order to ensure closer coordination of economic policies and sustained convergence of the economic performances of the Member States, the Council shall, on the basis of reports submitted by the Commission, monitor economic developments in each of the Member States and in the Union as well as the consistency of

economic policies with the broad guidelines referred to in paragraph 2, and regularly carry out an overall assessment.

For the purpose of this multilateral surveillance, Member States shall forward information to the Commission about important measures taken by them in the field of their economic policy and such other information as they deem necessary.

4. Where it is established, under the procedure referred to in paragraph 3, that the economic policies of a Member State are not consistent with the broad guidelines referred to in paragraph 2 or that they risk jeopardising the proper functioning of economic and monetary union, the Commission may address a warning to the Member State concerned. The Council, on a recommendation from the Commission, may address the necessary recommendations to the Member State concerned. The Council may, on a proposal from the Commission, decide to make its recommendations public.

Within the scope of this paragraph, the Council shall act without taking into account the vote of the member of the Council representing the Member State concerned.

A qualified majority of the other members of the Council shall be defined in accordance with Article 238(3)(a).

5. The President of the Council and the Commission shall report to the European Parliament on the results of multilateral surveillance. The President of the Council may be invited to appear before the competent committee of the European Parliament if the Council has made its recommendations public.

6. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, may adopt detailed rules for the multilateral surveillance procedure referred to in paragraphs 3 and 4.

Article 122

(ex Article 100 TEC)

1. Without prejudice to any other procedures provided for in the Treaties, the Council, on a proposal from the Commission, may decide, in a spirit of solidarity between Member States, upon the measures appropriate to the economic situation, in particular if severe difficulties arise in the supply of certain products, notably in the area of energy.

2. Where a Member State is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control, the Council, on a proposal from the Commission, may grant, under certain conditions, Union financial assistance to the Member State concerned. The President of the Council shall inform the European Parliament of the decision taken.

Article 123

(ex Article 101 TEC)

1. Overdraft facilities or any other type of credit facility with the European Central Bank or with the central banks of the Member States (hereinafter referred to as "national central banks") in favour of Union institutions, bodies, offices or agencies, central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of Member States shall be prohibited, as shall the purchase directly from them by the European Central Bank or national central banks of debt instruments.

2. Paragraph 1 shall not apply to publicly owned credit institutions which, in the context of the supply of reserves by central banks, shall be given the same treatment by national central banks and the European Central Bank as private credit institutions.

Article 124

(ex Article 102 TEC)

Any measure, not based on prudential considerations, establishing privileged access by Union institutions, bodies, offices or agencies, central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of Member States to financial institutions, shall be prohibited.

Article 125

(ex Article 103 TEC)

1. The Union shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of any Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project. A Member State shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of another Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project.

2. The Council, on a proposal from the Commission and after consulting the European Parliament, may, as required, specify definitions for the application of the prohibitions referred to in Articles 123 and 124 and in this Article.

Article 126

(ex Article 104 TEC)

1. Member States shall avoid excessive government deficits.

2. The Commission shall monitor the development of the budgetary situation and of the stock of government debt in the Member States with a view to identifying gross errors. In particular it shall examine compliance with budgetary discipline on the basis of the following two criteria:

(a) whether the ratio of the planned or actual government deficit to gross domestic product exceeds a reference value, unless:

- either the ratio has declined substantially and continuously and reached a level that comes close to the reference value,

- or, alternatively, the excess over the reference value is only exceptional and temporary and the ratio remains close to the reference value;

(b) whether the ratio of government debt to gross domestic product exceeds a reference value, unless the ratio is sufficiently diminishing and approaching the reference value at a satisfactory pace.

The reference values are specified in the Protocol on the excessive deficit procedure annexed to the Treaties.

3. If a Member State does not fulfil the requirements under one or both of these criteria, the Commission shall prepare a report. The report of the Commission shall also take into account whether the government deficit exceeds government investment expenditure and take into account all other relevant factors, including the medium-term economic and budgetary position of the Member State.

The Commission may also prepare a report if, notwithstanding the fulfilment of the requirements under the criteria, it is of the opinion that there is a risk of an excessive deficit in a Member State.

4. The Economic and Financial Committee shall formulate an opinion on the report of the Commission.

5. If the Commission considers that an excessive deficit in a Member State exists or may occur, it shall address an opinion to the Member State concerned and shall inform the Council accordingly.

6. The Council shall, on a proposal from the Commission, and having considered any observations which the Member State concerned may wish to make, decide after an overall assessment whether an excessive deficit exists.

7. Where the Council decides, in accordance with paragraph 6, that an excessive deficit exists, it shall adopt, without undue delay, on a recommendation from the Commission, recommendations addressed to the Member State concerned with a view to bringing that situation to an end within a given period. Subject to the provisions of paragraph 8, these recommendations shall not be made public.

8. Where it establishes that there has been no effective action in response to its recommendations within the period laid down, the Council may make its recommendations public.

9. If a Member State persists in failing to put into practice the recommendations of the Council, the Council may decide to give notice to the Member State to take, within a specified time limit, measures for the deficit reduction which is judged necessary by the Council in order to remedy the situation.

In such a case, the Council may request the Member State concerned to submit reports in accordance with a specific timetable in order to examine the adjustment efforts of that Member State.

10. The rights to bring actions provided for in Articles 258 and 259 may not be exercised within the framework of paragraphs 1 to 9 of this Article.

11. As long as a Member State fails to comply with a decision taken in accordance with paragraph 9, the Council may decide to apply or, as the case may be, intensify one or more of the following measures:

- to require the Member State concerned to publish additional information, to be specified by the Council, before issuing bonds and securities,
- to invite the European Investment Bank to reconsider its lending policy towards the Member State concerned,
- to require the Member State concerned to make a non-interest-bearing deposit of an appropriate size with the Union until the excessive deficit has, in the view of the Council, been corrected,
- to impose fines of an appropriate size.

The President of the Council shall inform the European Parliament of the decisions taken.

12. The Council shall abrogate some or all of its decisions or recommendations referred to in paragraphs 6 to 9 and 11 to the extent that the excessive deficit in the Member State concerned has, in the view of the Council, been corrected. If the Council has previously made public recommendations, it shall, as soon as the decision under paragraph 8 has been abrogated, make a public statement that an excessive deficit in the Member State concerned no longer exists.

13. When taking the decisions or recommendations referred to in paragraphs 8, 9, 11 and 12, the Council shall act on a recommendation from the Commission.

When the Council adopts the measures referred to in paragraphs 6 to 9, 11 and 12, it shall act without taking into account the vote of the member of the Council representing the Member State concerned.

A qualified majority of the other members of the Council shall be defined in accordance with Article 238(3)(a).

14. Further provisions relating to the implementation of the procedure described in this Article are set out in the Protocol on the excessive deficit procedure annexed to the Treaties.

The Council shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the European Central Bank, adopt the appropriate provisions which shall then replace the said Protocol.

Subject to the other provisions of this paragraph, the Council shall, on a proposal from the Commission and after consulting the European Parliament, lay down detailed rules and definitions for the application of the provisions of the said Protocol.

CHAPTER 2

MONETARY POLICY

Article 127

(ex Article 105 TEC)

1. The primary objective of the European System of Central Banks (hereinafter referred to as "the ESCB") shall be to maintain price stability. Without prejudice to the objective of price stability, the ESCB shall support the general economic policies in the Union with a view to contributing to the achievement of the objectives of the Union as laid down in Article 3 of the Treaty on European Union. The ESCB shall act in accordance with the principle of an open market economy with free competition, favouring an efficient allocation of resources, and in compliance with the principles set out in Article 119.

2. The basic tasks to be carried out through the ESCB shall be:

- to define and implement the monetary policy of the Union,
- to conduct foreign-exchange operations consistent with the provisions of Article 219,
- to hold and manage the official foreign reserves of the Member States,
- to promote the smooth operation of payment systems.

3. The third indent of paragraph 2 shall be without prejudice to the holding and management by the governments of Member States of foreign-exchange working balances.

4. The European Central Bank shall be consulted:

- on any proposed Union act in its fields of competence,
- by national authorities regarding any draft legislative provision in its fields of competence, but within the limits and under the conditions set out by the Council in accordance with the procedure laid down in Article 129(4).

The European Central Bank may submit opinions to the appropriate Union institutions, bodies, offices or agencies or to national authorities on matters in its fields of competence.

5. The ESCB shall contribute to the smooth conduct of policies pursued by the competent authorities relating to the prudential supervision of credit institutions and the stability of the financial system.

6. The Council, acting by means of regulations in accordance with a special legislative procedure, may unanimously, and after consulting the European Parliament and the European Central Bank, confer specific tasks upon the European Central Bank concerning policies relating to the prudential supervision of credit institutions and other financial institutions with the exception of insurance undertakings.

Article 128

(ex Article 106 TEC)

1. The European Central Bank shall have the exclusive right to authorise the issue of euro banknotes within the Union. The European Central Bank and the national central banks may issue such notes. The banknotes issued by the European Central Bank and the national central banks shall be the only such notes to have the status of legal tender within the Union.

2. Member States may issue euro coins subject to approval by the European Central Bank of the volume of the issue. The Council, on a proposal from the Commission and after consulting the European Parliament and the European Central Bank, may adopt measures to harmonise the denominations and technical specifications of all coins intended for circulation to the extent necessary to permit their smooth circulation within the Union.

Article 129

(ex Article 107 TEC)

1. The ESCB shall be governed by the decision-making bodies of the European Central Bank which shall be the Governing Council and the Executive Board.

2. The Statute of the European System of Central Banks and of the European Central Bank (hereinafter referred to as "the Statute of the ESCB and of the ECB") is laid down in a Protocol annexed to the Treaties.

3. Articles 5.1, 5.2, 5.3, 17, 18, 19.1, 22, 23, 24, 26, 32.2, 32.3, 32.4, 32.6, 33.1(a) and 36 of the Statute of the ESCB and of the ECB may be amended by the European Parliament and the Council, acting in accordance with the ordinary legislative procedure. They shall act either on a recommendation from the European Central Bank and after consulting the Commission or on a proposal from the Commission and after consulting the European Central Bank.

4. The Council, either on a proposal from the Commission and after consulting the European Parliament and the European Central Bank or on a recommendation from the European Central Bank and after consulting the European Parliament and the Commission, shall adopt the provisions referred to in Articles 4, 5.4, 19.2, 20, 28.1, 29.2, 30.4 and 34.3 of the Statute of the ESCB and of the ECB.

Article 130

(ex Article 108 TEC)

When exercising the powers and carrying out the tasks and duties conferred upon them by the Treaties and the Statute of the ESCB and of the ECB, neither the European Central Bank, nor a national central bank, nor any member of their decision-making bodies shall seek or take instructions from Union institutions, bodies, offices or agencies, from any government of a Member State or from any other body. The Union institutions, bodies, offices or agencies and the governments of the Member States undertake to respect this principle and not to seek to influence the members of the decision-making bodies of the European Central Bank or of the national central banks in the performance of their tasks.

Article 131

(ex Article 109 TEC)

Each Member State shall ensure that its national legislation including the statutes of its national central bank is compatible with the Treaties and the Statute of the ESCB and of the ECB.

Article 132

(ex Article 110 TEC)

1. In order to carry out the tasks entrusted to the ESCB, the European Central Bank shall, in accordance with the provisions of the Treaties and under the conditions laid down in the Statute of the ESCB and of the ECB:

- make regulations to the extent necessary to implement the tasks defined in Article 3.1, first indent, Articles 19.1, 22 and 25.2 of the Statute of the ESCB and of the ECB in cases which shall be laid down in the acts of the Council referred to in Article 129(4),

- take decisions necessary for carrying out the tasks entrusted to the ESCB under the Treaties and the Statute of the ESCB and of the ECB,

- make recommendations and deliver opinions.

2. The European Central Bank may decide to publish its decisions, recommendations and opinions.

3. Within the limits and under the conditions adopted by the Council under the procedure laid down in Article 129(4), the European Central Bank shall be entitled to impose fines or periodic penalty payments on undertakings for failure to comply with obligations under its regulations and decisions.

Article 133

Without prejudice to the powers of the European Central Bank, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall lay down the measures necessary for the use of the euro as the single currency. Such measures shall be adopted after consultation of the European Central Bank.

CHAPTER 3

INSTITUTIONAL PROVISIONS

Article 134

(ex Article 114 TEC)

1. In order to promote coordination of the policies of Member States to the full extent needed for the functioning of the internal market, an Economic and Financial Committee is hereby set up.

2. The Economic and Financial Committee shall have the following tasks:

- to deliver opinions at the request of the Council or of the Commission, or on its own initiative for submission to those institutions,

- to keep under review the economic and financial situation of the Member States and of the Union and to report regularly thereon to the Council and to the Commission, in particular on financial relations with third countries and international institutions,

- without prejudice to Article 240, to contribute to the preparation of the work of the Council referred to in Articles 66, 75, 121(2), (3), (4) and (6), 122, 124, 125, 126, 127(6), 128(2), 129(3) and (4), 138, 140(2) and (3), 143, 144(2) and (3), and in Article 219, and to carry out other advisory and preparatory tasks assigned to it by the Council,

- to examine, at least once a year, the situation regarding the movement of capital and the freedom of payments, as they result from the application of the Treaties and of measures adopted by the Council; the examination shall cover all measures relating to capital movements and payments; the Committee shall report to the Commission and to the Council on the outcome of this examination.

The Member States, the Commission and the European Central Bank shall each appoint no more than two members of the Committee.

3. The Council shall, on a proposal from the Commission and after consulting the European Central Bank and the Committee referred to in this Article, lay down detailed provisions concerning the composition of the Economic and Financial Committee. The President of the Council shall inform the European Parliament of such a decision.

4. In addition to the tasks set out in paragraph 2, if and as long as there are Member States with a derogation as referred to in Article 139, the Committee shall keep under review the monetary and financial situation and the general payments system of those Member States and report regularly thereon to the Council and to the Commission.

Article 135

(ex Article 115 TEC)

For matters within the scope of Articles 121(4), 126 with the exception of paragraph 14, 138, 140(1), 140(2), first subparagraph, 140(3) and 219, the Council or a Member State may request the Commission to make a recommendation or a proposal, as appropriate. The Commission shall examine this request and submit its conclusions to the Council without delay.

CHAPTER 4

PROVISIONS SPECIFIC TO MEMBER STATES WHOSE CURRENCY IS THE EURO

Article 136

1. In order to ensure the proper functioning of economic and monetary union, and in accordance with the relevant provisions of the Treaties, the Council shall, in accordance with the relevant procedure from among those referred to in Articles 121 and 126, with the exception of the procedure set out in Article 126(14), adopt measures specific to those Member States whose currency is the euro:

(a) to strengthen the coordination and surveillance of their budgetary discipline;

(b) to set out economic policy guidelines for them, while ensuring that they are compatible with those adopted for the whole of the Union and are kept under surveillance.

2. For those measures set out in paragraph 1, only members of the Council representing Member States whose currency is the euro shall take part in the vote.

A qualified majority of the said members shall be defined in accordance with Article 238(3)(a).

Article 137

Arrangements for meetings between ministers of those Member States whose currency is the euro are laid down by the Protocol on the Euro Group.

Article 138

(ex Article 111(4), TEC)

1. In order to secure the euro's place in the international monetary system, the Council, on a proposal from the Commission, shall adopt a decision establishing common positions on matters of particular interest for economic and monetary union within the competent international financial institutions and conferences. The Council shall act after consulting the European Central Bank.

2. The Council, on a proposal from the Commission, may adopt appropriate measures to ensure unified representation within the international financial institutions and conferences. The Council shall act after consulting the European Central Bank.

3. For the measures referred to in paragraphs 1 and 2, only members of the Council representing Member States whose currency is the euro shall take part in the vote.

A qualified majority of the said members shall be defined in accordance with Article 238(3)(a).

CHAPTER 5

TRANSITIONAL PROVISIONS

Article 139

1. Member States in respect of which the Council has not decided that they fulfil the necessary conditions for the adoption of the euro shall hereinafter be referred to as "Member States with a derogation".

2. The following provisions of the Treaties shall not apply to Member States with a derogation:

(a) adoption of the parts of the broad economic policy guidelines which concern the euro area generally (Article 121(2));

(b) coercive means of remedying excessive deficits (Article 126(9) and (11));

(c) the objectives and tasks of the ESCB (Article 127(1) to (3) and (5));

(d) issue of the euro (Article 128);

(e) acts of the European Central Bank (Article 132);

(f) measures governing the use of the euro (Article 133);

(g) monetary agreements and other measures relating to exchange-rate policy (Article 219);

(h) appointment of members of the Executive Board of the European Central Bank (Article 283(2));

(i) decisions establishing common positions on issues of particular relevance for economic and monetary union within the competent international financial institutions and conferences (Article 138(1));

(j) measures to ensure unified representation within the international financial institutions and conferences (Article 138(2)).

In the Articles referred to in points (a) to (j), "Member States" shall therefore mean Member States whose currency is the euro.

3. Under Chapter IX of the Statute of the ESCB and of the ECB, Member States with a derogation and their national central banks are excluded from rights and obligations within the ESCB.

4. The voting rights of members of the Council representing Member States with a derogation shall be suspended for the adoption by the Council of the measures referred to in the Articles listed in paragraph 2, and in the following instances:

(a) recommendations made to those Member States whose currency is the euro in the framework of multilateral surveillance, including on stability programmes and warnings (Article 121(4));

(b) measures relating to excessive deficits concerning those Member States whose currency is the euro (Article 126(6), (7), (8), (12) and (13)).

A qualified majority of the other members of the Council shall be defined in accordance with Article 238(3)(a).

Article 140

(ex Articles 121(1), 122(2), second sentence, and 123(5) TEC)

1. At least once every two years, or at the request of a Member State with a derogation, the Commission and the European Central Bank shall report to the Council on the progress made by the Member States with a derogation in fulfilling their obligations regarding the achievement of economic and monetary union. These reports shall include an examination of the compatibility between the national legislation of each of these Member States, including the statutes of its national central bank, and Articles 130 and 131 and the Statute of the ESCB and of the ECB. The reports shall also examine the achievement of a high degree of sustainable convergence by reference to the fulfilment by each Member State of the following criteria:

- the achievement of a high degree of price stability; this will be apparent from a rate of inflation which is close to that of, at most, the three best performing Member States in terms of price stability,
- the sustainability of the government financial position; this will be apparent from having achieved a government budgetary position without a deficit that is excessive as determined in accordance with Article 126(6),
- the observance of the normal fluctuation margins provided for by the exchange-rate mechanism of the European Monetary System, for at least two years, without devaluing against the euro,
- the durability of convergence achieved by the Member State with a derogation and of its participation in the exchange-rate mechanism being reflected in the long-term interest-rate levels.

The four criteria mentioned in this paragraph and the relevant periods over which they are to be respected are developed further in a Protocol annexed to the Treaties. The reports of the Commission and the European Central Bank shall also take account of the results of the integration of markets, the situation and development of the balances of payments on current account and an examination of the development of unit labour costs and other price indices.

2. After consulting the European Parliament and after discussion in the European Council, the Council shall, on a proposal from the Commission, decide which Member States with a derogation fulfil the necessary conditions on the basis of the criteria set out in paragraph 1, and abrogate the derogations of the Member States concerned.

The Council shall act having received a recommendation of a qualified majority of those among its members representing Member States whose currency is the euro. These members shall act within six months of the Council receiving the Commission's proposal.

The qualified majority of the said members, as referred to in the second subparagraph, shall be defined in accordance with Article 238(3)(a).

3. If it is decided, in accordance with the procedure set out in paragraph 2, to abrogate a derogation, the Council shall, acting with the unanimity of the Member States whose currency is the euro and the Member State concerned, on a proposal from the Commission and after consulting the European Central Bank, irrevocably fix the rate at which the euro shall be substituted for the currency of the Member State concerned, and take the other measures necessary for the introduction of the euro as the single currency in the Member State concerned.

Article 141

(ex Articles 123(3) and 117(2) first five indents, TEC)

1. If and as long as there are Member States with a derogation, and without prejudice to Article 129(1), the General Council of the European Central Bank referred to in Article 44 of the Statute of the ESCB and of the ECB shall be constituted as a third decision-making body of the European Central Bank.

2. If and as long as there are Member States with a derogation, the European Central Bank shall, as regards those Member States:

- strengthen cooperation between the national central banks,
- strengthen the coordination of the monetary policies of the Member States, with the aim of ensuring price stability,
- monitor the functioning of the exchange-rate mechanism,
- hold consultations concerning issues falling within the competence of the national central banks and affecting the stability of financial institutions and markets,
- carry out the former tasks of the European Monetary Cooperation Fund which had subsequently been taken over by the European Monetary Institute.

Article 142

(ex Article 124(1) TEC)

Each Member State with a derogation shall treat its exchange-rate policy as a matter of common interest. In so doing, Member States shall take account of the experience acquired in cooperation within the framework of the exchange-rate mechanism.

Article 143

(ex Article 119 TEC)

1. Where a Member State with a derogation is in difficulties or is seriously threatened with difficulties as regards its balance of payments either as a result of an overall disequilibrium in its balance of payments, or as a result of the type of currency at its disposal, and where such difficulties are liable in particular to jeopardise the functioning of the internal market or the implementation of the common commercial policy, the Commission shall immediately investigate the position of the State in question and the action which, making use of all the means at its disposal, that State has taken or may take in accordance with the provisions of the Treaties. The Commission shall state what measures it recommends the State concerned to take.

If the action taken by a Member State with a derogation and the measures suggested by the Commission do not prove sufficient to overcome the difficulties which have arisen or which threaten, the Commission shall, after consulting the Economic and Financial Committee, recommend to the Council the granting of mutual assistance and appropriate methods therefor.

The Commission shall keep the Council regularly informed of the situation and of how it is developing.

2. The Council shall grant such mutual assistance; it shall adopt directives or decisions laying down the conditions and details of such assistance, which may take such forms as:

- (a) a concerted approach to or within any other international organisations to which Member States with a derogation may have recourse;
- (b) measures needed to avoid deflection of trade where the Member State with a derogation which is in difficulties maintains or reintroduces quantitative restrictions against third countries;
- (c) the granting of limited credits by other Member States, subject to their agreement.

3. If the mutual assistance recommended by the Commission is not granted by the Council or if the mutual assistance granted and the measures taken are insufficient, the Commission shall authorise the Member State with

a derogation which is in difficulties to take protective measures, the conditions and details of which the Commission shall determine.

Such authorisation may be revoked and such conditions and details may be changed by the Council.

Article 144

(ex Article 120 TEC)

1. Where a sudden crisis in the balance of payments occurs and a decision within the meaning of Article 143(2) is not immediately taken, a Member State with a derogation may, as a precaution, take the necessary protective measures. Such measures must cause the least possible disturbance in the functioning of the internal market and must not be wider in scope than is strictly necessary to remedy the sudden difficulties which have arisen.

2. The Commission and the other Member States shall be informed of such protective measures not later than when they enter into force. The Commission may recommend to the Council the granting of mutual assistance under Article 143.

3. After the Commission has delivered a recommendation and the Economic and Financial Committee has been consulted, the Council may decide that the Member State concerned shall amend, suspend or abolish the protective measures referred to above.

Protocol No 4 on the Statute of the European System of Central Banks and of the European Central Bank

THE HIGH CONTRACTING PARTIES,

DESIRING to lay down the Statute of the European System of Central Banks and of the European Central Bank provided for in the second paragraph of Article 129 of the Treaty on the Functioning of the European Union,

HAVE AGREED upon the following provisions, which shall be annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union:

CHAPTER I

THE EUROPEAN SYSTEM OF CENTRAL BANKS

Article 1

The European System of Central Banks

In accordance with Article 282(1) of the Treaty on the Functioning of the European Union, the European Central Bank (ECB) and the national central banks shall constitute the European System of Central Banks (ESCB). The ECB and the national central banks of those Member States whose currency is the euro shall constitute the Eurosystem.

The ESCB and the ECB shall perform their tasks and carry on their activities in accordance with the provisions of the Treaties and of this Statute.

CHAPTER II

OBJECTIVES AND TASKS OF THE ESCB

Article 2

Objectives

In accordance with Article 127(1) and Article 282(2) of the Treaty on the Functioning of the European Union, the primary objective of the ESCB shall be to maintain price stability. Without prejudice to the objective of price stability, it shall support the general economic policies in the Union with a view to contributing to the achievement of the objectives of the Union as laid down in Article 3 of the Treaty on European Union. The ESCB shall act in accordance with the principle of an open market economy with free competition, favouring an efficient allocation of resources, and in compliance with the principles set out in Article 119 of the Treaty on the Functioning of the European Union.

Article 3

Tasks

3.1. In accordance with Article 127(2) of the Treaty on the Functioning of the European Union, the basic tasks to be carried out through the ESCB shall be:

- to define and implement the monetary policy of the Union;
- to conduct foreign-exchange operations consistent with the provisions of Article 219 of that Treaty;
- to hold and manage the official foreign reserves of the Member States;

- to promote the smooth operation of payment systems.

3.2. In accordance with Article 127(3) of the Treaty on the Functioning of the European Union, the third indent of Article 3.1 shall be without prejudice to the holding and management by the governments of Member States of foreign-exchange working balances.

3.3. In accordance with Article 127(5) of the Treaty on the Functioning of the European Union, the ESCB shall contribute to the smooth conduct of policies pursued by the competent authorities relating to the prudential supervision of credit institutions and the stability of the financial system.

Article 4

Advisory functions

In accordance with Article 127(4) of the Treaty on the Functioning of the European Union:

(a) the ECB shall be consulted:

- on any proposed Union act in its fields of competence;

- by national authorities regarding any draft legislative provision in its fields of competence, but within the limits and under the conditions set out by the Council in accordance with the procedure laid down in Article 41;

(b) the ECB may submit opinions to the Union institutions, bodies, offices or agencies or to national authorities on matters in its fields of competence.

Article 5

Collection of statistical information

5.1. In order to undertake the tasks of the ESCB, the ECB, assisted by the national central banks, shall collect the necessary statistical information either from the competent national authorities or directly from economic agents. For these purposes it shall cooperate with the Union institutions, bodies, offices or agencies and with the competent authorities of the Member States or third countries and with international organisations.

5.2. The national central banks shall carry out, to the extent possible, the tasks described in Article 5.1.

5.3. The ECB shall contribute to the harmonisation, where necessary, of the rules and practices governing the collection, compilation and distribution of statistics in the areas within its fields of competence.

5.4. The Council, in accordance with the procedure laid down in Article 41, shall define the natural and legal persons subject to reporting requirements, the confidentiality regime and the appropriate provisions for enforcement.

Article 6

International cooperation

6.1. In the field of international cooperation involving the tasks entrusted to the ESCB, the ECB shall decide how the ESCB shall be represented.

6.2. The ECB and, subject to its approval, the national central banks may participate in international monetary institutions.

6.3. Articles 6.1 and 6.2 shall be without prejudice to Article 138 of the Treaty on the Functioning of the European Union.

CHAPTER III

ORGANISATION OF THE ESCB

Article 7

Independence

In accordance with Article 130 of the Treaty on the Functioning of the European Union, when exercising the powers and carrying out the tasks and duties conferred upon them by the Treaties and this Statute, neither the ECB, nor a national central bank, nor any member of their decision-making bodies shall seek or take instructions from Union institutions, bodies, offices or agencies, from any government of a Member State or from any other body. The Union institutions, bodies, offices or agencies and the governments of the Member States undertake to respect this principle and not to seek to influence the members of the decision-making bodies of the ECB or of the national central banks in the performance of their tasks.

Article 8

General principle

The ESCB shall be governed by the decision-making bodies of the ECB.

Article 9

The European Central Bank

9.1. The ECB which, in accordance with Article 282(3) of the Treaty on the Functioning of the European Union, shall have legal personality, shall enjoy in each of the Member States the most extensive legal capacity accorded to legal persons under its law; it may, in particular, acquire or dispose of movable and immovable property and may be a party to legal proceedings.

9.2. The ECB shall ensure that the tasks conferred upon the ESCB under Article 127(2), (3) and (5) of the Treaty on the Functioning of the European Union are implemented either by its own activities pursuant to this Statute or through the national central banks pursuant to Articles 12.1 and 14.

9.3. In accordance with Article 129(1) of the Treaty on the Functioning of the European Union, the decision making bodies of the ECB shall be the Governing Council and the Executive Board.

Article 10

The Governing Council

10.1. In accordance with Article 283(1) of the Treaty on the Functioning of the European Union, the Governing Council shall comprise the members of the Executive Board of the ECB and the governors of the national central banks of the Member States whose currency is the euro.

10.2. Each member of the Governing Council shall have one vote. As from the date on which the number of members of the Governing Council exceeds 21, each member of the Executive Board shall have one vote and the number of governors with a voting right shall be 15. The latter voting rights shall be assigned and shall rotate as follows:

- as from the date on which the number of governors exceeds 15, until it reaches 22, the governors shall be allocated to two groups, according to a ranking of the size of the share of their national central bank's Member State in the aggregate gross domestic product at market prices and in the total aggregated balance sheet of the monetary financial institutions of the Member States whose currency is the euro. The shares in the aggregate gross domestic product at market prices and in the total aggregated balance sheet of the monetary financial institutions

shall be assigned weights of 5/6 and 1/6, respectively. The first group shall be composed of five governors and the second group of the remaining governors. The frequency of voting rights of the governors allocated to the first group shall not be lower than the frequency of voting rights of those of the second group. Subject to the previous sentence, the first group shall be assigned four voting rights and the second group eleven voting rights,

- as from the date on which the number of governors reaches 22, the governors shall be allocated to three groups according to a ranking based on the above criteria. The first group shall be composed of five governors and shall be assigned four voting rights. The second group shall be composed of half of the total number of governors, with any fraction rounded up to the nearest integer, and shall be assigned eight voting rights. The third group shall be composed of the remaining governors and shall be assigned three voting rights,

- within each group, the governors shall have their voting rights for equal amounts of time,

- for the calculation of the shares in the aggregate gross domestic product at market prices Article 29.2 shall apply. The total aggregated balance sheet of the monetary financial institutions shall be calculated in accordance with the statistical framework applying in the Union at the time of the calculation,

- whenever the aggregate gross domestic product at market prices is adjusted in accordance with Article 29.3, or whenever the number of governors increases, the size and/or composition of the groups shall be adjusted in accordance with the above principles,

- the Governing Council, acting by a two-thirds majority of all its members, with and without a voting right, shall take all measures necessary for the implementation of the above principles and may decide to postpone the start of the rotation system until the date on which the number of governors exceeds 18.

The right to vote shall be exercised in person. By way of derogation from this rule, the Rules of Procedure referred to in Article 12.3 may lay down that members of the Governing Council may cast their vote by means of teleconferencing. These rules shall also provide that a member of the Governing Council who is prevented from attending meetings of the Governing Council for a prolonged period may appoint an alternate as a member of the Governing Council.

The provisions of the previous paragraphs are without prejudice to the voting rights of all members of the Governing Council, with and without a voting right, under Articles 10.3, 40.2 and 40.3.

Save as otherwise provided for in this Statute, the Governing Council shall act by a simple majority of the members having a voting right. In the event of a tie, the President shall have the casting vote.

In order for the Governing Council to vote, there shall be a quorum of two-thirds of the members having a voting right. If the quorum is not met, the President may convene an extraordinary meeting at which decisions may be taken without regard to the quorum.

10.3. For any decisions to be taken under Articles 28, 29, 30, 32 and 33, the votes in the Governing Council shall be weighted according to the national central banks' shares in the subscribed capital of the ECB. The weights of the votes of the members of the Executive Board shall be zero. A decision requiring a qualified majority shall be adopted if the votes cast in favour represent at least two thirds of the subscribed capital of the ECB and represent at least half of the shareholders. If a Governor is unable to be present, he may nominate an alternate to cast his weighted vote.

10.4. The proceedings of the meetings shall be confidential. The Governing Council may decide to make the outcome of its deliberations public.

10.5. The Governing Council shall meet at least 10 times a year.

Article 11

The Executive Board

11.1. In accordance with the first subparagraph of Article 283(2) of the Treaty on the Functioning of the European Union, the Executive Board shall comprise the President, the Vice-President and four other members.

The members shall perform their duties on a full-time basis. No member shall engage in any occupation, whether gainful or not, unless exemption is exceptionally granted by the Governing Council.

11.2. In accordance with the second subparagraph of Article 283(2) of the Treaty on the Functioning of the European Union, the President, the Vice-President and the other members of the Executive Board shall be appointed by the European Council, acting by a qualified majority, from among persons of recognised standing and professional experience in monetary or banking matters, on a recommendation from the Council after it has consulted the European Parliament and the Governing Council.

Their term of office shall be eight years and shall not be renewable.

Only nationals of Member States may be members of the Executive Board.

11.3. The terms and conditions of employment of the members of the Executive Board, in particular their salaries, pensions and other social security benefits shall be the subject of contracts with the ECB and shall be fixed by the Governing Council on a proposal from a Committee comprising three members appointed by the Governing Council and three members appointed by the Council. The members of the Executive Board shall not have the right to vote on matters referred to in this paragraph.

11.4. If a member of the Executive Board no longer fulfils the conditions required for the performance of his duties or if he has been guilty of serious misconduct, the Court of Justice may, on application by the Governing Council or the Executive Board, compulsorily retire him.

11.5. Each member of the Executive Board present in person shall have the right to vote and shall have, for that purpose, one vote. Save as otherwise provided, the Executive Board shall act by a simple majority of the votes cast. In the event of a tie, the President shall have the casting vote. The voting arrangements shall be specified in the Rules of Procedure referred to in Article 12.3.

11.6. The Executive Board shall be responsible for the current business of the ECB.

11.7. Any vacancy on the Executive Board shall be filled by the appointment of a new member in accordance with Article 11.2.

Article 12

Responsibilities of the decision-making bodies

12.1. The Governing Council shall adopt the guidelines and take the decisions necessary to ensure the performance of the tasks entrusted to the ESCB under these Treaties and this Statute. The Governing Council shall formulate the monetary policy of the Union including, as appropriate, decisions relating to intermediate monetary objectives, key interest rates and the supply of reserves in the ESCB, and shall establish the necessary guidelines for their implementation.

The Executive Board shall implement monetary policy in accordance with the guidelines and decisions laid down by the Governing Council. In doing so the Executive Board shall give the necessary instructions to national central banks. In addition the Executive Board may have certain powers delegated to it where the Governing Council so decides.

To the extent deemed possible and appropriate and without prejudice to the provisions of this Article, the ECB shall have recourse to the national central banks to carry out operations which form part of the tasks of the ESCB.

12.2. The Executive Board shall have responsibility for the preparation of meetings of the Governing Council.

12.3. The Governing Council shall adopt Rules of Procedure which determine the internal organisation of the ECB and its decision-making bodies.

12.4. The Governing Council shall exercise the advisory functions referred to in Article 4.

12.5. The Governing Council shall take the decisions referred to in Article 6.

Article 13

The President

13.1. The President or, in his absence, the Vice-President shall chair the Governing Council and the Executive Board of the ECB.

13.2. Without prejudice to Article 38, the President or his nominee shall represent the ECB externally.

Article 14

National central banks

14.1. In accordance with Article 131 of the Treaty on the Functioning of the European Union, each Member State shall ensure that its national legislation, including the statutes of its national central bank, is compatible with these Treaties and this Statute.

14.2. The statutes of the national central banks shall, in particular, provide that the term of office of a Governor of a national central bank shall be no less than five years.

A Governor may be relieved from office only if he no longer fulfils the conditions required for the performance of his duties or if he has been guilty of serious misconduct. A decision to this effect may be referred to the Court of Justice by the Governor concerned or the Governing Council on grounds of infringement of these Treaties or of any rule of law relating to their application. Such proceedings shall be instituted within two months of the publication of the decision or of its notification to the plaintiff or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.

14.3. The national central banks are an integral part of the ESCB and shall act in accordance with the guidelines and instructions of the ECB. The Governing Council shall take the necessary steps to ensure compliance with the guidelines and instructions of the ECB, and shall require that any necessary information be given to it.

14.4. National central banks may perform functions other than those specified in this Statute unless the Governing Council finds, by a majority of two thirds of the votes cast, that these interfere with the objectives and tasks of the ESCB. Such functions shall be performed on the responsibility and liability of national central banks and shall not be regarded as being part of the functions of the ESCB.

Article 15

Reporting commitments

15.1. The ECB shall draw up and publish reports on the activities of the ESCB at least quarterly.

15.2. A consolidated financial statement of the ESCB shall be published each week.

15.3. In accordance with Article 284(3) of the Treaty on the Functioning of the European Union, the ECB shall address an annual report on the activities of the ESCB and on the monetary policy of both the previous and the current year to the European Parliament, the Council and the Commission, and also to the European Council.

15.4. The reports and statements referred to in this Article shall be made available to interested parties free of charge.

Article 16

Banknotes

In accordance with Article 128(1) of the Treaty on the Functioning of the European Union, the Governing Council shall have the exclusive right to authorise the issue of euro banknotes within the Union. The ECB and the national central banks may issue such notes. The banknotes issued by the ECB and the national central banks shall be the only such notes to have the status of legal tender within the Union.

The ECB shall respect as far as possible existing practices regarding the issue and design of banknotes.

CHAPTER IV

MONETARY FUNCTIONS AND OPERATIONS OF THE ESCB

Article 17

Accounts with the ECB and the national central banks

In order to conduct their operations, the ECB and the national central banks may open accounts for credit institutions, public entities and other market participants and accept assets, including book entry securities, as collateral.

Article 18

Open market and credit operations

18.1. In order to achieve the objectives of the ESCB and to carry out its tasks, the ECB and the national central banks may:

- operate in the financial markets by buying and selling outright (spot and forward) or under repurchase agreement and by lending or borrowing claims and marketable instruments, whether in euro or other currencies, as well as precious metals;
- conduct credit operations with credit institutions and other market participants, with lending being based on adequate collateral.

18.2. The ECB shall establish general principles for open market and credit operations carried out by itself or the national central banks, including for the announcement of conditions under which they stand ready to enter into such transactions.

Article 19

Minimum reserves

19.1. Subject to Article 2, the ECB may require credit institutions established in Member States to hold minimum reserve on accounts with the ECB and national central banks in pursuance of monetary policy objectives. Regulations concerning the calculation and determination of the required minimum reserves may be established by the Governing Council. In cases of non-compliance the ECB shall be entitled to levy penalty interest and to impose other sanctions with comparable effect.

19.2. For the application of this Article, the Council shall, in accordance with the procedure laid down in Article 41, define the basis for minimum reserves and the maximum permissible ratios between those reserves and their basis, as well as the appropriate sanctions in cases of non-compliance.

Article 20

Other instruments of monetary control

The Governing Council may, by a majority of two thirds of the votes cast, decide upon the use of such other operational methods of monetary control as it sees fit, respecting Article 2.

The Council shall, in accordance with the procedure laid down in Article 41, define the scope of such methods if they impose obligations on third parties.

Article 21

Operations with public entities

21.1. In accordance with Article 123 of the Treaty on the Functioning of the European Union, overdrafts or any other type of credit facility with the ECB or with the national central banks in favour of Union institutions, bodies, offices or agencies, central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of Member States shall be prohibited, as shall the purchase directly from them by the ECB or national central banks of debt instruments.

21.2. The ECB and national central banks may act as fiscal agents for the entities referred to in Article 21.1.

21.3. The provisions of this Article shall not apply to publicly owned credit institutions which, in the context of the supply of reserves by central banks, shall be given the same treatment by national central banks and the ECB as private credit institutions.

Article 22

Clearing and payment systems

The ECB and national central banks may provide facilities, and the ECB may make regulations, to ensure efficient and sound clearing and payment systems within the Union and with other countries.

Article 23

External operations

The ECB and national central banks may:

- establish relations with central banks and financial institutions in other countries and, where appropriate, with international organisations;
- acquire and sell spot and forward all types of foreign exchange assets and precious metals; the term "foreign exchange asset" shall include securities and all other assets in the currency of any country or units of account and in whatever form held;
- hold and manage the assets referred to in this Article;
- conduct all types of banking transactions in relations with third countries and international organisations, including borrowing and lending operations.

Article 24

Other operations

In addition to operations arising from their tasks, the ECB and national central banks may enter into operations for their administrative purposes or for their staff.

CHAPTER V

PRUDENTIAL SUPERVISION

Article 25

Prudential supervision

25.1. The ECB may offer advice to and be consulted by the Council, the Commission and the competent authorities of the Member States on the scope and implementation of Union legislation relating to the prudential supervision of credit institutions and to the stability of the financial system.

25.2. In accordance with any regulation of the Council under Article 127(6) of the Treaty on the Functioning of the European Union, the ECB may perform specific tasks concerning policies relating to the prudential supervision of credit institutions and other financial institutions with the exception of insurance undertakings.

CHAPTER VI

FINANCIAL PROVISIONS OF THE ESCB

Article 26

Financial accounts

26.1. The financial year of the ECB and national central banks shall begin on the first day of January and end on the last day of December.

26.2. The annual accounts of the ECB shall be drawn up by the Executive Board, in accordance with the principles established by the Governing Council. The accounts shall be approved by the Governing Council and shall thereafter be published.

26.3. For analytical and operational purposes, the Executive Board shall draw up a consolidated balance sheet of the ESCB, comprising those assets and liabilities of the national central banks that fall within the ESCB.

26.4. For the application of this Article, the Governing Council shall establish the necessary rules for standardising the accounting and reporting of operations undertaken by the national central banks.

Article 27

Auditing

27.1. The accounts of the ECB and national central banks shall be audited by independent external auditors recommended by the Governing Council and approved by the Council. The auditors shall have full power to examine all books and accounts of the ECB and national central banks and obtain full information about their transactions.

27.2. The provisions of Article 287 of the Treaty on the Functioning of the European Union shall only apply to an examination of the operational efficiency of the management of the ECB.

Article 28

Capital of the ECB

28.1. The capital of the ECB shall be euro 5000 million. The capital may be increased by such amounts as may be decided by the Governing Council acting by the qualified majority provided for in Article 10.3, within the limits and under the conditions set by the Council under the procedure laid down in Article 41.

28.2. The national central banks shall be the sole subscribers to and holders of the capital of the ECB. The subscription of capital shall be according to the key established in accordance with Article 29.

28.3. The Governing Council, acting by the qualified majority provided for in Article 10.3, shall determine the extent to which and the form in which the capital shall be paid up.

28.4. Subject to Article 28.5, the shares of the national central banks in the subscribed capital of the ECB may not be transferred, pledged or attached.

28.5. If the key referred to in Article 29 is adjusted, the national central banks shall transfer among themselves capital shares to the extent necessary to ensure that the distribution of capital shares corresponds to the adjusted key. The Governing Council shall determine the terms and conditions of such transfers.

Article 29

Key for capital subscription

29.1. The key for subscription of the ECB's capital, fixed for the first time in 1998 when the ESCB was established, shall be determined by assigning to each national central bank a weighting in this key equal to the sum of:

- 50 % of the share of its respective Member State in the population of the Union in the penultimate year preceding the establishment of the ESCB;

- 50 % of the share of its respective Member State in the gross domestic product at market prices of the Union as recorded in the last five years preceding the penultimate year before the establishment of the ESCB.

The percentages shall be rounded up or down to the nearest multiple of 0,0001 percentage points.

29.2. The statistical data to be used for the application of this Article shall be provided by the Commission in accordance with the rules adopted by the Council under the procedure provided for in Article 41.

29.3. The weightings assigned to the national central banks shall be adjusted every five years after the establishment of the ESCB by analogy with the provisions laid down in Article 29.1. The adjusted key shall apply with effect from the first day of the following year.

29.4. The Governing Council shall take all other measures necessary for the application of this Article.

Article 30

Transfer of foreign reserve assets to the ECB

30.1. Without prejudice to Article 28, the ECB shall be provided by the national central banks with foreign reserve assets, other than Member States' currencies, euro, IMF reserve positions and SDRs, up to an amount equivalent to euro 50000 million. The Governing Council shall decide upon the proportion to be called up by the ECB following its establishment and the amounts called up at later dates. The ECB shall have the full right to hold and manage the foreign reserves that are transferred to it and to use them for the purposes set out in this Statute.

30.2. The contributions of each national central bank shall be fixed in proportion to its share in the subscribed capital of the ECB.

30.3. Each national central bank shall be credited by the ECB with a claim equivalent to its contribution. The Governing Council shall determine the denomination and remuneration of such claims.

30.4. Further calls of foreign reserve assets beyond the limit set in Article 30.1 may be effected by the ECB, in accordance with Article 30.2, within the limits and under the conditions set by the Council in accordance with the procedure laid down in Article 41.

30.5. The ECB may hold and manage IMF reserve positions and SDRs and provide for the pooling of such assets.

30.6. The Governing Council shall take all other measures necessary for the application of this Article.

Article 31

Foreign reserve assets held by national central banks

31.1. The national central banks shall be allowed to perform transactions in fulfilment of their obligations towards international organisations in accordance with Article 23.

31.2. All other operations in foreign reserve assets remaining with the national central banks after the transfers referred to in Article 30, and Member States' transactions with their foreign exchange working balances shall, above a certain limit to be established within the framework of Article 31.3, be subject to approval by the ECB in order to ensure consistency with the exchange rate and monetary policies of the Union.

31.3. The Governing Council shall issue guidelines with a view to facilitating such operations.

Article 32

Allocation of monetary income of national central banks

32.1. The income accruing to the national central banks in the performance of the ESCB's monetary policy function (hereinafter referred to as "monetary income") shall be allocated at the end of each financial year in accordance with the provisions of this Article.

32.2. The amount of each national central bank's monetary income shall be equal to its annual income derived from its assets held against notes in circulation and deposit liabilities to credit institutions. These assets shall be earmarked by national central banks in accordance with guidelines to be established by the Governing Council.

32.3. If, after the introduction of the euro, the balance sheet structures of the national central banks do not, in the judgment of the Governing Council, permit the application of Article 32.2, the Governing Council, acting by a qualified majority, may decide that, by way of derogation from Article 32.2, monetary income shall be measured according to an alternative method for a period of not more than five years.

32.4. The amount of each national central bank's monetary income shall be reduced by an amount equivalent to any interest paid by that central bank on its deposit liabilities to credit institutions in accordance with Article 19.

The Governing Council may decide that national central banks shall be indemnified against costs incurred in connection with the issue of banknotes or in exceptional circumstances for specific losses arising from monetary policy operations undertaken for the ESCB. Indemnification shall be in a form deemed appropriate in the judgment of the Governing Council; these amounts may be offset against the national central banks' monetary income.

32.5. The sum of the national central banks' monetary income shall be allocated to the national central banks in proportion to their paid up shares in the capital of the ECB, subject to any decision taken by the Governing Council pursuant to Article 33.2.

32.6. The clearing and settlement of the balances arising from the allocation of monetary income shall be carried out by the ECB in accordance with guidelines established by the Governing Council.

32.7. The Governing Council shall take all other measures necessary for the application of this Article.

Article 33

Allocation of net profits and losses of the ECB

33.1. The net profit of the ECB shall be transferred in the following order:

(a) an amount to be determined by the Governing Council, which may not exceed 20 % of the net profit, shall be transferred to the general reserve fund subject to a limit equal to 100 % of the capital;

(b) the remaining net profit shall be distributed to the shareholders of the ECB in proportion to their paid-up shares.

33.2. In the event of a loss incurred by the ECB, the shortfall may be offset against the general reserve fund of the ECB and, if necessary, following a decision by the Governing Council, against the monetary income of the relevant financial year in proportion and up to the amounts allocated to the national central banks in accordance with Article 32.5.

CHAPTER VII

GENERAL PROVISIONS

Article 34

Legal acts

34.1. In accordance with Article 132 of the Treaty on the Functioning of the European Union, the ECB shall:

- make regulations to the extent necessary to implement the tasks defined in Article 3.1, first indent, Articles 19.1, 22 or 25.2 and in cases which shall be laid down in the acts of the Council referred to in Article 41;

- take decisions necessary for carrying out the tasks entrusted to the ESCB under these Treaties and this Statute;

- make recommendations and deliver opinions.

34.2. The ECB may decide to publish its decisions, recommendations and opinions.

34.3. Within the limits and under the conditions adopted by the Council under the procedure laid down in Article 41, the ECB shall be entitled to impose fines or periodic penalty payments on undertakings for failure to comply with obligations under its regulations and decisions.

Article 35

Judicial control and related matters

35.1. The acts or omissions of the ECB shall be open to review or interpretation by the Court of Justice of the European Union in the cases and under the conditions laid down in the Treaty on the Functioning of the European Union. The ECB may institute proceedings in the cases and under the conditions laid down in the Treaties.

35.2. Disputes between the ECB, on the one hand, and its creditors, debtors or any other person, on the other, shall be decided by the competent national courts, save where jurisdiction has been conferred upon the Court of Justice of the European Union.

35.3. The ECB shall be subject to the liability regime provided for in Article 340 of the Treaty on the Functioning of the European Union. The national central banks shall be liable according to their respective national laws.

35.4. The Court of Justice of the European Union shall have jurisdiction to give judgment pursuant to any arbitration clause contained in a contract concluded by or on behalf of the ECB, whether that contract be governed by public or private law.

35.5. A decision of the ECB to bring an action before the Court of Justice of the European Union shall be taken by the Governing Council.

35.6. The Court of Justice of the European Union shall have jurisdiction in disputes concerning the fulfilment by a national central bank of obligations under the Treaties and this Statute. If the ECB considers that a national central bank has failed to fulfil an obligation under the Treaties and this Statute, it shall deliver a reasoned opinion on the matter after giving the national central bank concerned the opportunity to submit its observations. If the national central bank concerned does not comply with the opinion within the period laid down by the ECB, the latter may bring the matter before the Court of Justice of the European Union.

Article 36

Staff

36.1. The Governing Council, on a proposal from the Executive Board, shall lay down the conditions of employment of the staff of the ECB.

36.2. The Court of Justice of the European Union shall have jurisdiction in any dispute between the ECB and its servants within the limits and under the conditions laid down in the conditions of employment.

Article 37 (ex Article 38)

Professional secrecy

37.1. Members of the governing bodies and the staff of the ECB and the national central banks shall be required, even after their duties have ceased, not to disclose information of the kind covered by the obligation of professional secrecy.

37.2. Persons having access to data covered by Union legislation imposing an obligation of secrecy shall be subject to such legislation.

Article 38 (ex Article 39)

Signatories

The ECB shall be legally committed to third parties by the President or by two members of the Executive Board or by the signatures of two members of the staff of the ECB who have been duly authorised by the President to sign on behalf of the ECB.

Article 39 (ex Article 40)

Privileges and immunities

The ECB shall enjoy in the territories of the Member States such privileges and immunities as are necessary for the performance of its tasks, under the conditions laid down in the Protocol on the privileges and immunities of the European Union.

CHAPTER VIII

AMENDMENT OF THE STATUTE AND COMPLEMENTARY LEGISLATION

Article 40 (ex Article 41)

Simplified amendment procedure

40.1. In accordance with Article 129(3) of the Treaty on the Functioning of the European Union, Articles 5.1, 5.2, 5.3, 17, 18, 19.1, 22, 23, 24, 26, 32.2, 32.3, 32.4, 32.6, 33.1(a) and 36 of this Statute may be amended by the European Parliament and the Council, acting in accordance with the ordinary legislative procedure either on a recommendation from the ECB and after consulting the Commission, or on a proposal from the Commission and after consulting the ECB.

40.2. Article 10.2 may be amended by a decision of the European Council, acting unanimously, either on a recommendation from the European Central Bank and after consulting the European Parliament and the Commission, or on a recommendation from the Commission and after consulting the European Parliament and the European Central Bank. These amendments shall not enter into force until they are approved by the Member States in accordance with their respective constitutional requirements.

40.3. A recommendation made by the ECB under this Article shall require a unanimous decision by the Governing Council.

Article 41 (ex Article 42)

Complementary legislation

In accordance with Article 129(4) of the Treaty on the Functioning of the European Union, the Council, either on a proposal from the Commission and after consulting the European Parliament and the ECB or on a recommendation from the ECB and after consulting the European Parliament and the Commission, shall adopt the provisions referred to in Articles 4, 5.4, 19.2, 20, 28.1, 29.2, 30.4 and 34.3 of this Statute.

CHAPTER IX

TRANSITIONAL AND OTHER PROVISIONS FOR THE ESCB

Article 42 (ex Article 43)

General provisions

42.1. A derogation as referred to in Article 139 of the Treaty on the Functioning of the European Union shall entail that the following Articles of this Statute shall not confer any rights or impose any obligations on the Member State concerned: 3, 6, 9.2, 12.1, 14.3, 16, 18, 19, 20, 22, 23, 26.2, 27, 30, 31, 32, 33, 34, and 49.

42.2. The central banks of Member States with a derogation as specified in Article 139(1) of the Treaty on the Functioning of the European Union shall retain their powers in the field of monetary policy according to national law.

42.3. In accordance with Article 139 of the Treaty on the Functioning of the European Union, "Member States" shall be read as "Member States whose currency is the euro" in the following Articles of this Statute: 3, 11.2 and 19.

42.4. "National central banks" shall be read as "central banks of Member States whose currency is the euro" in the following Articles of this Statute: 9.2, 10.2, 10.3, 12.1, 16, 17, 18, 22, 23, 27, 30, 31, 32, 33.2 and 49.

42.5. "Shareholders" shall be read as "central banks of Member States whose currency is the euro" in Articles 10.3 and 33.1.

42.6. "Subscribed capital of the ECB" shall be read as "capital of the ECB subscribed by the central banks of Member States whose currency is the euro" in Articles 10.3 and 30.2.

Article 43 (ex Article 44)

Transitional tasks of the ECB

The ECB shall take over the former tasks of the EMI referred to in Article 141(2) of the Treaty on the Functioning of the European Union which, because of the derogations of one or more Member States, still have to be performed after the introduction of the euro.

The ECB shall give advice in the preparations for the abrogation of the derogations specified in Article 140 of the Treaty on the Functioning of the European Union.

Article 44 (ex Article 45)

The General Council of the ECB

44.1. Without prejudice to Article 129(1) of the Treaty on the Functioning of the European Union, the General Council shall be constituted as a third decision-making body of the ECB.

44.2. The General Council shall comprise the President and Vice-President of the ECB and the Governors of the national central banks. The other members of the Executive Board may participate, without having the right to vote, in meetings of the General Council.

44.3. The responsibilities of the General Council are listed in full in Article 46 of this Statute.

Article 45 (ex Article 46)

Rules of Procedure of the General Council

45.1. The President or, in his absence, the Vice-President of the ECB shall chair the General Council of the ECB.

45.2. The President of the Council and a Member of the Commission may participate, without having the right to vote, in meetings of the General Council.

45.3. The President shall prepare the meetings of the General Council.

45.4. By way of derogation from Article 12.3, the General Council shall adopt its Rules of Procedure.

45.5. The Secretariat of the General Council shall be provided by the ECB.

Article 46 (ex Article 47)

Responsibilities of the General Council

46.1. The General Council shall:

- perform the tasks referred to in Article 43;
- contribute to the advisory functions referred to in Articles 4 and 25.1.

46.2. The General Council shall contribute to:

- the collection of statistical information as referred to in Article 5;
- the reporting activities of the ECB as referred to in Article 15;
- the establishment of the necessary rules for the application of Article 26 as referred to in Article 26.4;

- the taking of all other measures necessary for the application of Article 29 as referred to in Article 29.4;
- the laying down of the conditions of employment of the staff of the ECB as referred to in Article 36.

46.3. The General Council shall contribute to the necessary preparations for irrevocably fixing the exchange rates of the currencies of Member States with a derogation against the euro as referred to in Article 140(3) of the Treaty on the Functioning of the European Union.

46.4. The General Council shall be informed by the President of the ECB of decisions of the Governing Council.

Article 47 (ex Article 48)

Transitional provisions for the capital of the ECB

In accordance with Article 29.1, each national central bank shall be assigned a weighting in the key for subscription of the ECB's capital. By way of derogation from Article 28.3, central banks of Member States with a derogation shall not pay up their subscribed capital unless the General Council, acting by a majority representing at least two thirds of the subscribed capital of the ECB and at least half of the shareholders, decides that a minimal percentage has to be paid up as a contribution to the operational costs of the ECB.

Article 48 (ex Article 49)

Deferred payment of capital, reserves and provisions of the ECB

48.1. The central bank of a Member State whose derogation has been abrogated shall pay up its subscribed share of the capital of the ECB to the same extent as the central banks of other Member States whose currency is the euro, and shall transfer to the ECB foreign reserve assets in accordance with Article 30.1. The sum to be transferred shall be determined by multiplying the euro value at current exchange rates of the foreign reserve assets which have already been transferred to the ECB in accordance with Article 30.1, by the ratio between the number of shares subscribed by the national central bank concerned and the number of shares already paid up by the other national central banks.

48.2. In addition to the payment to be made in accordance with Article 48.1, the central bank concerned shall contribute to the reserves of the ECB, to those provisions equivalent to reserves, and to the amount still to be appropriated to the reserves and provisions corresponding to the balance of the profit and loss account as at 31 December of the year prior to the abrogation of the derogation. The sum to be contributed shall be determined by multiplying the amount of the reserves, as defined above and as stated in the approved balance sheet of the ECB, by the ratio between the number of shares subscribed by the central bank concerned and the number of shares already paid up by the other central banks.

48.3. Upon one or more countries becoming Member States and their respective national central banks becoming part of the ESCB, the subscribed capital of the ECB and the limit on the amount of foreign reserve assets that may be transferred to the ECB shall be automatically increased. The increase shall be determined by multiplying the respective amounts then prevailing by the ratio, within the expanded capital key, between the weighting of the entering national central banks concerned and the weighting of the national central banks already members of the ESCB. Each national central bank's weighting in the capital key shall be calculated by analogy with Article 29.1 and in compliance with Article 29.2. The reference periods to be used for the statistical data shall be identical to those applied for the latest quinquennial adjustment of the weightings under Article 29.3.

Article 49 (ex Article 52)

Exchange of banknotes in the currencies of the Member States

Following the irrevocable fixing of exchange rates in accordance with Article 140 of the Treaty on the Functioning of the European Union, the Governing Council shall take the necessary measures to ensure that banknotes denominated in currencies with irrevocably fixed exchange rates are exchanged by the national central banks at their respective par values.

Article 50 (ex Article 53)

Applicability of the transitional provisions

If and as long as there are Member States with a derogation, Articles 42 to 47 shall be applicable.

**Decision 2004/258/EC of the European Central Bank of 4 March 2004 on public access
to European Central Bank documents (ECB/2004/3)**

Decision of the European Central Bank

of 4 March 2004

on public access to European Central Bank documents

(ECB/2004/3)

(2004/258/EC)

THE GOVERNING COUNCIL OF THE EUROPEAN CENTRAL BANK,

Having regard to the Statute of the European System of Central Banks and of the European Central Bank, and in particular to Article 12.3 thereof,

Having regard to the Rules of Procedure of the European Central Bank(1), and in particular to Article 23 thereof,

Whereas:

(1) The second subparagraph of Article 1 of the Treaty on European Union enshrines the concept of openness, stating that the Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen. Openness enhances the administration's legitimacy, effectiveness and accountability, thus strengthening the principles of democracy.

(2) In the Joint Declaration(2) relating to Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents(3), the European Parliament, the Council and the Commission call on the other institutions and bodies of the Union to adopt internal rules on public access to documents which take account of the principles and limits set out in the Regulation. The regime on public access to ECB documents as laid down in Decision ECB/1998/12 of 3 November 1998 concerning public access to documentation and the archives of the European Central Bank(4) should be revised accordingly.

(3) Wider access should be granted to ECB documents, while at the same time protecting the independence of the ECB and of the national central banks (NCBs) foreseen by Article 108 of the Treaty and Article 7 of the Statute, and the confidentiality of certain matters specific to the performance of the ECB's tasks. In order to safeguard the effectiveness of its decision-making process, including its internal consultations and preparations, the proceedings of the meetings of the ECB's decision-making bodies are confidential, unless the relevant body decides to make the outcome of its deliberations public.

(4) However, certain public and private interests should be protected by way of exceptions. Furthermore, the ECB needs to protect the integrity of euro banknotes as a means of payment including, without limitation, the security features against counterfeiting, the technical production specifications, the physical security of stocks and the transportation of euro banknotes.

(5) When NCBs handle requests for ECB documents that are in their possession, they should consult the ECB in order to ensure the full application of this Decision unless it is clear whether or not the document may be disclosed.

(6) In order to bring about greater openness, the ECB should grant access not only to documents drawn up by it, but also to documents received by it while at the same time preserving the right for the third parties concerned to express their positions with regard to access to documents originating from those parties.

(7) In order to ensure that good administrative practice is respected, the ECB should apply a two-stage procedure,

HAS DECIDED AS FOLLOWS:

Article 1

Purpose

The purpose of this Decision is to define the conditions and limits according to which the ECB shall give public access to ECB documents and to promote good administrative practice on public access to such documents.

Article 2

Beneficiaries and scope

1. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to ECB documents, subject to the conditions and limits defined in this Decision.
2. The ECB may, subject to the same conditions and limits, grant access to ECB documents to any natural or legal person not residing or not having its registered office in a Member State.
3. This Decision shall be without prejudice to rights of public access to ECB documents which might follow from instruments of international law or acts which implement them.

Article 3

Definitions

For the purpose of this Decision:

(a) "document" and "ECB document" shall mean any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) drawn up or held by the ECB and relating to its policies, activities or decisions, as well as documents originating from the European Monetary Institute (EMI) and from the Committee of Governors of the central banks of the Member States of the European Economic Community (Committee of Governors);

(b) "third party" shall mean any natural or legal person, or any entity outside the ECB.

Article 4

Exceptions

1. The ECB shall refuse access to a document where disclosure would undermine the protection of:

(a) the public interest as regards:

- the confidentiality of the proceedings of the ECB's decision-making bodies,
- the financial, monetary or economic policy of the Community or a Member State,
- the internal finances of the ECB or of the NCBs,
- protecting the integrity of euro banknotes,
- public security,
- international financial, monetary or economic relations;

(b) the privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data;

(c) the confidentiality of information that is protected as such under Community law.

2. The ECB shall refuse access to a document where disclosure would undermine the protection of:

- the commercial interests of a natural or legal person, including intellectual property,
- court proceedings and legal advice,
- the purpose of inspections, investigations and audits,

unless there is an overriding public interest in disclosure.

3. Access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the ECB or with NCBs shall be refused even after the decision has been taken, unless there is an overriding public interest in disclosure.

4. As regards third-party documents, the ECB shall consult the third party concerned with a view to assessing whether an exception in this Article is applicable, unless it is clear that the document shall or shall not be disclosed.

5. If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released.

6. The exceptions as laid down in this Article shall only apply for the period during which protection is justified on the basis of the content of the document. The exceptions may apply for a maximum period of 30 years unless specifically provided otherwise by the ECB's Governing Council. In the case of documents covered by the exceptions relating to privacy or commercial interests, the exceptions may continue to apply after this period.

Article 5

Documents at the NCBs

Documents that are in the possession of an NCB and have been drawn up by the ECB as well as documents originating from the EMI or the Committee of Governors may be disclosed by the NCB only subject to prior consultation of the ECB concerning the scope of access, unless it is clear that the document shall or shall not be disclosed.

Alternatively the NCB may refer the request to the ECB.

Article 6

Applications

1. An application for access to a document shall be made to the ECB(5) in any written form, including electronic form, in one of the official languages of the Union and in a sufficiently precise manner to enable the ECB to identify the document. The applicant is not obliged to state the reasons for the application.

2. If an application is not sufficiently precise, the ECB shall ask the applicant to clarify the application and shall assist the applicant in doing so.

3. In the event of an application relating to a very long document or to a very large number of documents, the ECB may confer with the applicant informally, with a view to finding a fair solution.

Article 7

Processing of initial applications

1. An application for access to a document shall be handled promptly. An acknowledgement of receipt shall be sent to the applicant. Within 20 working days from the receipt of the application, or on receipt of the clarifications requested in accordance with Article 6(2), the Director General Secretariat and Language Services of the ECB shall either grant access to the document requested and provide access in accordance with Article 9 or, in a written reply, state the reasons for total or partial refusal and inform the applicant of their right to make a confirmatory application in accordance with paragraph 2.
2. In the event of total or partial refusal, the applicant may, within 20 working days of receiving the ECB's reply, make a confirmatory application asking the ECB's Executive Board to reconsider its position. Furthermore, failure by the ECB to reply within the prescribed 20 working days' time limit for handling the initial application shall entitle the applicant to make a confirmatory application.
3. In exceptional cases, for example in the event of an application relating to a very long document or to a very large number of documents, or if the consultation of a third party is required, the ECB may extend the time limit provided for in paragraph 1 by 20 working days, provided that the applicant is notified in advance and that detailed reasons are given.
4. Paragraph 1 shall not apply in case of excessive or unreasonable applications, in particular when they are of a repetitive nature.

Article 8

Processing of confirmatory applications

1. A confirmatory application shall be handled promptly. Within 20 working days from the receipt of such application, the Executive Board shall either grant access to the document requested and provide access in accordance with Article 9 or, in a written reply, state the reasons for the total or partial refusal. In the event of a total or partial refusal, the ECB shall inform the applicant of the remedies open to them in accordance with Articles 230 and 195 of the Treaty.
2. In exceptional cases, for example in the event of an application relating to a very long document or to a very large number of documents, the ECB may extend the time limit provided for in paragraph 1 by 20 working days, provided that the applicant is notified in advance and that detailed reasons are given.
3. Failure by the ECB to reply within the prescribed time limit shall be considered to be a negative reply and shall entitle the applicant to institute court proceedings and/or submit a complaint to the European Ombudsman, under Articles 230 and 195 of the Treaty, respectively.

Article 9

[...]

Decision ECB/1998/12 shall be repealed.

Done at Frankfurt am Main, 4 March 2004.

Case T-590/10, *Gabi Thesing and Bloomberg Finance v European Central Bank*

In Case T-590/10,

Gabi Thesing, residing in London (United Kingdom),

Bloomberg Finance LP, established in Wilmington, Delaware (United States),

represented by M. Stephens and R. Lands, Solicitors, and T. Pitt-Payne QC,

applicants,

v

European Central Bank (ECB), represented initially by A. Sáinz de Viqueña Barroso, M. López Torres and S. Lambrinoc, and subsequently by M. López Torres and S. Lambrinoc, acting as Agents,

defendant,

APPLICATION for annulment of the decision of the ECB's Executive Board, which was notified to Ms Thesing by letter of the President of the ECB of 21 October 2010, rejecting an application by Ms Thesing for access to two documents concerning the government deficit and debt of the Hellenic Republic,

THE GENERAL COURT (Seventh Chamber),

composed of A. Dittrich (Rapporteur), President, I. Wiszniewska-Białecka and M. Prek, Judges,

Registrar: N. Rosner, Administrator,

having regard to the written procedure and further to the hearing on 14 June 2012,

gives the following

Judgment

Background to the dispute

1 The first applicant, Ms Gabi Thesing, is a journalist. She works for the second applicant, Bloomberg Finance LP, which operates in London (United Kingdom) under the name of Bloomberg News.

2 On 20 August 2010, the first applicant requested the European Central Bank (ECB) to grant access to document SEC/GovC/X/10/88a, entitled 'The impact on government deficit and debt from off-market swaps. The Greek case' ('the first document'), and to document SEC/GovC/X/10/88b, entitled 'The Titlos transaction and possible existence of similar transactions impacting on the euro area government debt or deficit levels' (the second document). Those documents concerned the use of derivative transactions in financing deficit and in government debt management.

3 By letter of 17 September 2010, the ECB's Director-General of the Secretariat and Language Services informed the first applicant of the decision not to grant access to the requested documents.

4 On 28 September 2010, the applicants sent a confirmatory application to the ECB, under Article 7(2) of Decision 2004/258/EC of the ECB of 4 March 2004 on public access to ECB documents (OJ 2004 L 80, p. 42). That application requested that the Executive Board of the ECB review the ECB's position relating to the refusal to grant access to the documents at issue.

5 By letter of 21 October 2010, the President of the ECB informed the first applicant of the decision of the ECB's Executive Board confirming the decision contained in the letter of 17 September 2010 to refuse access to the documents at issue ('the contested decision'). That refusal was based, in the case of those two documents, on the protection of the public interest so far as concerns the economic policy of the European Union and the Hellenic Republic and on the protection of the ECB's internal deliberations and consultations, pursuant to the second indent of Article 4(1)(a) and Article 4(3) of Decision 2004/258. As regards the second document only, the refusal was also based on the protection of the commercial interests of a natural or legal person, under the first indent of Article 4(2) of that decision.

Procedure and forms of order sought

6 By application lodged at the Registry of the General Court on 27 December 2010, the applicants brought the present action.

7 By document lodged at the Registry of the General Court on 11 April 2011, Mr Athanasios Pitsiorlas applied for leave to intervene in this case in support of the form of order sought by the applicants. By order of the President of the Seventh Chamber of the General Court of 14 July 2011, the application was refused.

8 Upon hearing the report of the Judge-Rapporteur, the Court (Seventh Chamber) decided to open the oral procedure.

9 By way of measures of organisation of procedure under Article 64 of its Rules of Procedure, the Court sent a written question on 14 May 2012 to the ECB, to which the ECB was requested to reply at the hearing.

10 By way of a measure of inquiry pursuant to Article 65 of the Rules of Procedure, by order of 21 May 2012 the General Court ordered the ECB to produce the two documents at issue, and stated that they would not be disclosed to the applicants. The ECB complied with that measure of inquiry within the prescribed time-limit.

11 By letter lodged at the Registry of the General Court on 30 May 2012, the applicants requested that further evidence offered in support be placed in the file, namely the judgment of the European Court of Human Rights in *Gillberg v. Sweden* of 3 April 2012 (not yet published in the *Reports of Judgments and Decisions*). By decision of the President of the Seventh Chamber of the Court of 31 May 2012, that request was granted.

12 The parties' oral arguments and their answers to the questions put by the Court were heard at the hearing of 14 June 2012.

13 The applicants claim that the Court should:

- annul the contested decision;
- order the ECB to grant the applicants access to the documents at issue;
- order the ECB to pay the costs.

14 The ECB contends that the Court should:

- dismiss the action as inadmissible in its entirety or, in the alternative, dismiss the second applicant's action as inadmissible;
- dismiss the applicants' second head of claim as inadmissible;
- dismiss the action as unfounded;
- order the applicants to pay the costs.

Law

Admissibility

15 The ECB, while not raising a plea of inadmissibility under Article 114(1) of the Rules of Procedure, contends that the action is totally or partially inadmissible. In its submission, the applicants' action is inadmissible in its entirety since the application was not signed by their lawyer. Moreover, the second applicant's action is inadmissible, first, on the ground that it does not have standing to bring legal proceedings since it did not request access to the documents at issue, and, second, on the ground that it cannot achieve the application's objective because it has no right of access to the ECB's documents. In addition, the ECB asserts that the applicants' second head of claim, requesting the Court to order the ECB to grant them access to the documents at issue, is inadmissible. Lastly, the ECB contends that the applicants' arguments, set out in the reply, relating to an alleged infringement of Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 ('the ECHR'), are not consistent with Article 48(2) of the Rules of Procedure and are thus inadmissible.

The alleged absence of a signature on the application by the applicants' lawyer

16 The ECB contends that the action is inadmissible on the ground that the application that it received was not signed by the applicants' lawyer. Under the first subparagraph of Article 43(1) of the Rules of Procedure, the original of every pleading must be signed by the party's agent or lawyer. In the present case, the original of the application was signed by the applicants' lawyer. The argument of the ECB by which it seeks to claim that the action is inadmissible on the ground that the application was not signed by the applicants' lawyer must therefore be rejected.

Admissibility of the second applicant's action

17 The ECB contends that the second applicant's action is inadmissible, first, on the ground that it does not have standing to bring legal proceedings since it did not request access to the documents at issue and, second, on the ground that it cannot achieve the application's objective because it has no right of access to the ECB's documents.

18 The applicants assert that the first applicant made her initial application for access to the documents at issue both on her own behalf, and on behalf of the second applicant. In any event, the second applicant was party to the confirmatory application. Moreover, the second applicant can achieve the objective referred to in the application since it operates throughout the Union and has seats in Member States other than the United Kingdom. In addition, it has an interest in the success of the first applicant's application.

19 Since the applicants have brought a single action the admissibility of which is not in doubt in relation to the first applicant – which has not moreover been contested by the ECB – it is not necessary, for reasons of procedural economy, to examine the admissibility of the action as regards the second applicant (see, to that effect, Case C-313/90 *CIRFS and Others v Commission* [1993] ECR I-1125, paragraph 31, and Joined Cases C-71/09 P, C-73/09 P and C-76/09 P *Comitato 'Venezia vuole vivere' v Commission* [2011] ECR I-0000, paragraph 37; judgment of 7 October 2010 in Case T-452/08 *DHL Aviation and DHL Hub Leipzig v Commission*, not published in the ECR, paragraph 27, and judgment of 16 December 2010 in Case T-191/09 *HIT Trading and Berkman Forwarding v Commission*, not published in the ECR, paragraph 24).

Admissibility of the applicants' second head of claim

20 The ECB submits that the applicants' second head of claim is inadmissible inasmuch as it requests the Court to order the ECB to grant access to the documents at issue.

21 It is settled case-law that the Court is not entitled, when exercising judicial review of legality, to issue directions to the institutions or to assume the role assigned to them. That limitation of the scope of judicial review applies to all types of contentious matters that might be brought before it, including those concerning access to documents (Case T-204/99 *Mattila v Council and Commission* [2001] ECR II-2265, paragraph 26, upheld in Case C-353/01 P *Mattila v Council and Commission* [2004] ECR I-1073, paragraph 15). When the Court annuls an act of an institution, that institution is required, under Article 266 TFEU, to take the measures necessary to comply with the Court's judgment (Case C-41/00 P *Interporc v Commission* [2003] ECR I-2125, paragraph 28).

22 The second head of claim is therefore inadmissible.

Admissibility of the arguments relating to an alleged infringement of Article 10 of the ECHR

23 The applicants submit, in the reply, that the refusal to grant them access to the documents at issue is an infringement of their right to receive information under Article 10 of the ECHR. In order to avoid a breach of the rights conferred by that provision, it is necessary to construe the exceptions to the right of access referred to in Article 4 of Decision 2004/258 in the manner indicated by the applicants.

24 As regards the admissibility of those arguments, it follows from Article 44(1)(c) in conjunction with Article 48(2) of the Rules of Procedure that the original application must state the subject-matter of the proceedings and contain a summary of the pleas in law relied on, and that new pleas in law may not be introduced in the course of the proceedings unless they are based on matters of law or of fact which come to light in the course of the procedure. However, a plea or an argument which amplifies a plea put forward previously, whether directly or by implication, in the original application, and which is closely connected therewith, must be declared admissible (Case T-252/97 *Dürbeck v Commission* [2000] ECR II-3031, paragraph 39).

25 In the present case, the pleas put forward in the application allege infringement of Article 4 of Decision 2004/258. The alleged infringement of Article 10 of the ECHR by an incorrect interpretation of Article 4 of Decision 2004/258 was raised only at the stage of the reply, and no reasons were provided for the absence of those arguments in the application.

26 However, those arguments relate, in essence, to the interpretation of the right of access to a document under Decision 2004/258. In the applicants' submission, the ECB ought, under Article 6 TEU, to have taken account of Article 10 of the ECHR when interpreting Article 4 of Decision 2004/258 in order to avoid infringing the latter provision. The applicants' arguments therefore relate to the effects of Article 10 of the ECHR in the light of the exceptions to the right of access under Article 4 of that decision. It is therefore apparent that those arguments amount to an amplification of the pleas alleging infringement of Article 4 of Decision 2004/258 in that they are closely connected with the pleas put forward in the application. They must therefore be considered admissible.

Admissibility of the arguments relating to partial access to the documents at issue under Article 4(5) of Decision 2004/258

27 In the application, the applicants did not raise the issue of partial access to the documents at issue. In the light of the ECB's assertion in the defence that the applicants did not contest, in the application, the decision not to grant partial access, the applicants invited the Court, in the reply, to consider, in the alternative, whether the ECB ought to have made partial disclosure of those documents.

28 It must be pointed out that, since the conditions for admissibility of an action and of the complaints set out therein are a matter of public policy, the Court may consider them of its own motion in accordance with Article 113 of the Rules of Procedure (see, to that effect, Case C-160/08 *Commission v Germany* [2010] ECR I-3713, paragraph 40).

29 First, it follows from Article 44(1)(c) in conjunction with Article 48(2) of the Rules of Procedure that the application must state the subject-matter of the proceedings and contain a summary of the pleas in law relied on, and that new pleas in law may not be introduced in the course of the proceedings unless they are based on matters of law or of fact which come to light in the course of the procedure.

30 In the light of the foregoing, it must be concluded that the applicants' arguments concerning Article 4(5) of Decision 2004/258 are inadmissible, given that they were not relied upon in the application. Moreover, it must be pointed out that those arguments do not constitute an amplification of the pleas set out by the applicants in the application.

31 Article 4(5) of Decision 2004/258 is not closely connected with Article 4(1) to (3) of that decision. Although the concrete, individual examination of the exceptions referred to in Article 4(1) to (3) of Decision 2004/258 is indeed an essential condition for deciding whether to grant partial access to the documents at issue (see, by analogy, Case T-36/04 *API v Commission* [2007] ECR II-3201, paragraph 56), examination of such a possibility does not concern the conditions for the application of the exceptions at issue provided for in Article 4(1) to (3) of

that decision. The requirement of such an examination flows from the principle of proportionality. In the context of Article 4(5) of Decision 2004/258, it must be considered whether the aim pursued in refusing access to the documents at issue may be achieved even if one removes only the passages which might harm one of the public interests protected by Article 4(1) and (2) of that decision or which contain opinions for internal use as part of deliberations and preliminary consultations within the ECB or with the national central banks ('the NCBs') (see, to that effect and by analogy, Case C-353/99 P *Council v Hautala* [2001] ECR I-9565, paragraphs 27 to 29, and Case T-264/04 *WWF European Policy Programme v Council* [2007] ECR II-911, paragraph 50).

32 Second, it is apparent from Article 44(1)(c) of the Rules of Procedure that, in the application, the subject-matter of the proceedings and the summary of the pleas in law must be stated sufficiently clearly and precisely to enable the defendant to prepare its defence and the Court to rule on the action, if necessary without any other supporting information. In order to ensure legal certainty and the sound administration of justice it is necessary, for an action to be admissible, that the basic legal and factual particulars relied on be indicated, at least in summary form, but coherently and intelligibly, in the application itself (see order in Case T-481/08 *Alisei v Commission* [2010] ECR II-117, paragraph 89 and the case-law cited).

33 In the present case, it was in their reply that the applicants requested the Court to consider whether the ECB ought to have made partial disclosure of the documents at issue, whilst they did not put forward any arguments in this respect in the application.

34 It follows that the applicants' arguments relating to Article 4(5) of Decision 2004/258 must also be rejected as inadmissible on the ground that they do not comply with the requirements referred to in Article 44(1)(c) of the Rules of Procedure.

35 Consequently, the applicants' arguments relating to the possibility of granting partial access must be rejected as inadmissible.

Substance

36 The applicants put forward three pleas in law in support of their action. The first alleges infringement of the second indent of Article 4(1)(a) of Decision 2004/258 in so far as the ECB incorrectly interpreted the exception to the right of access relating to the protection of the public interest so far as concerns the economic policy of the Union and the Hellenic Republic. The second plea concerns the exception to the right of access relating to the protection of the commercial interests of a natural or legal person, under the first indent of Article 4(2) of that decision. The third plea alleges infringement of Article 4(3) of that decision relating to the protection of the ECB's internal deliberations and consultations.

37 With respect to the first plea, alleging infringement of the second indent of Article 4(1)(a) of Decision 2004/258, the applicants claim, in essence, that the ECB incorrectly based its refusal to grant them access to the documents at issue on the exception to the right of access provided for in that provision, given that disclosure of those documents would not undermine the protection of the public interest, so far as concerns the economic policy of the Union and the Hellenic Republic.

38 Under the second indent of Article 4(1)(a) of Decision 2004/258, the ECB is to refuse access to a document where disclosure would undermine the protection of the public interest as regards the financial, monetary or economic policy of the Union or a Member State.

39 With respect to the legal framework applicable to the right of access to ECB documents, it must be observed that the second paragraph of Article 1 TEU is devoted to the openness of the Union's decision-making process. In this respect, Article 15(1) TFEU states that, in order to promote good governance and ensure the participation of civil society, the Union's institutions, bodies, offices and agencies are to conduct their work as openly as possible. According to the first subparagraph of Article 15(3) TFEU, any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, is to have a right of access to documents of the Union's institutions, bodies, offices and agencies, whatever their medium, subject to the principles and the conditions to be defined in accordance with that paragraph. Moreover, according to the second subparagraph of Article 15(3), the general principles and limits on grounds of public or private interest governing this right of access to documents are to be determined by the European Parliament and the Council of the European Union, by means of regulations, acting in accordance with the ordinary legislative procedure. In accordance with the third

subparagraph of Article 15(3) TFEU, each institution, body, office or agency is to ensure that its proceedings are transparent and is to elaborate in its own Rules of Procedure specific provisions regarding access to its documents, in accordance with the regulations referred to in the second subparagraph of Article 15(3) TFEU. According to the fourth subparagraph of Article 15(3) TFEU, the Court of Justice of the European Union, the ECB and the European Investment Bank are to be subject to this paragraph only when exercising their administrative tasks.

40 Decision 2004/258 seeks, as recitals 1 and 2 in the preamble thereto state, to authorise wider access to ECB documents than that which existed under the system established by Decision ECB/1998/12 of the ECB of 3 November 1998 concerning public access to documentation and the archives of the ECB (OJ 1999 L 110, p. 30), while at the same time protecting the independence of the ECB and of the NCBs, and the confidentiality of certain matters specific to the performance of the ECB's tasks. Article 2(1) of Decision 2004/258 therefore gives any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, a right of access to ECB documents, subject to the conditions and limits defined in that decision.

41 That right is subject to certain limits based on reasons of public or private interest. More specifically, and in accordance with recital 4 in the preamble thereto, Decision 2004/258 provides, in Article 4, for a system of exceptions authorising the ECB to refuse access to a document where disclosure of that document would undermine one of the interests protected by Article 4(1) and (2) or where that document contains opinions for internal use as part of deliberations and preliminary consultations within the ECB or with NCBs. Since the exceptions to the right of access referred to in Article 4 of Decision 2004/258 derogate from the right of access to documents, they must be interpreted and applied strictly.

42 Thus, if the ECB decides to refuse access to a document which it has been asked to disclose under Article 4(1) of Decision 2004/258, it must, in principle, explain how disclosure of that document could specifically and effectively undermine the interest protected by the exception – among those provided for in that provision – upon which it is relying. Moreover, the risk of that undermining must be reasonably foreseeable and not purely hypothetical (see, by analogy, Case C-506/08 P *Sweden v MyTravel and Commission* [2011] ECR I-0000, paragraph 76 and the case-law cited).

43 With respect to the extent of the review of the legality of an ECB decision refusing public access to a document on the basis of the exception relating to the public interest provided for in the second indent of Article 4(1)(a) of Decision 2004/258, the ECB must be recognised as enjoying a wide discretion for the purpose of determining whether the disclosure of documents relating to the fields covered by that exception could undermine the public interest. The European Union judicature's review of the legality of such a decision must therefore be limited to verifying whether the procedural rules and the duty to state reasons have been complied with, whether the facts have been accurately stated, and whether there has been a manifest error of assessment or a misuse of powers (see, by analogy, Case C-266/05 P *Sison v Council* [2007] ECR I-1233, paragraph 34).

44 It is true that the European Union judicature set out those principles in relation to the extent of the review concerning the exceptions to the right of access to the documents referred to in Article 4(1)(a) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43). However, the reasoning on which those principles are based is also valid in a case where the ECB refuses to grant access to a document under the second indent of Article 4(1)(a) of Decision 2004/258. The wording of that latter provision is identical to the wording of the fourth indent of Article 4(1)(a) of Regulation No 1049/2001. In addition, a refusal decision based on the second indent of Article 4(1)(a) of Decision 2004/258 is, just like a decision based on the fourth indent of Article 4(1)(a) of Regulation No 1049/2001, of a complex and delicate nature which calls for the exercise of particular care and the criteria set out in those two provisions are very general (see, to that effect, *Sison v Council*, paragraph 43 above, paragraphs 35 and 36).

45 First, with respect to the applicants' arguments that the ECB incorrectly failed to take account of the public interest considerations in favour of disclosure and that there is a compelling public interest for disclosure of the documents at issue which would in fact further the public interest, the Court notes that the exceptions to the right of access to documents provided for in Article 4(1)(a) of Decision 2004/258 are framed in mandatory terms. It follows that the ECB is obliged to refuse access to documents falling under any one of those exceptions once the relevant circumstances are shown to exist, and no weighing up of an 'overriding public interest' is provided for in that provision, in contrast with the exceptions referred to in Article 4(2) and (3) of that decision (see, by analogy, Joined Cases T-3/00 and T-337/04 *Pitsiorlas v Council and ECB* [2007] ECR II-4779, paragraph 227 and the case-law cited).

46 Consequently, those arguments of the applicants and their arguments put forward as justification for the overriding public interest alleged must be rejected as irrelevant in the context of the examination of whether the ECB correctly applied the exception to the right of access provided for in the second indent of Article 4(1)(a) of Decision 2004/258.

47 Second, the applicants assert that, contrary to the ECB's submission in its letters of 17 September and 21 October 2010, disclosure of the documents at issue would not undermine the protection of the public interest so far as concerns the economic policy of the Union and the Hellenic Republic. That disclosure would not bear a substantial and acute risk of misleading the public and the markets. Moreover, the fact that the European Commission was carrying out a thorough examination of the relevant issues in the framework of the excessive debt procedure does not constitute a factor against disclosure.

48 In the light of those arguments, it is therefore necessary, in respect of each document referred to in the application, to examine whether the contested decision is vitiated by a manifest error of assessment.

49 With respect to the first document, the ECB justified its refusal to grant access to that document by stating, in its letters of 17 September and 21 October 2010, that that document contained ECB staff assumptions and views regarding the impact of off-market swaps on government deficit and on government debt with a particular view to the case of the Hellenic Republic on the basis of partial data that were available at the time the document was drafted in order to give a snapshot of the situation in March 2010. In the ECB's submission, the information contained in that document was outdated at the time of the request for access. Disclosure of that information would bear the substantial and acute risk of severely misleading the public in general and the financial markets in particular. In a very vulnerable market environment, that disclosure would affect the proper functioning of the financial markets. Thus, disclosure of the information contained in that document would undermine public confidence as regards the effective conduct of economic policy in the Union and the Hellenic Republic. Moreover, as an additional element, the ECB noted, by way of justification for the refusal to grant access to that document, that the issues examined in the document at issue were then part of a thorough examination by the Commission in the framework of the excessive deficit procedure, and that the result of that examination would be published in due time.

50 The first document, submitted by the ECB in response to the measures of inquiry ordered by the Court (see paragraph 10 above), contains, in essence, a description of the manner in which the financial instrument of off-market swaps functions, ECB staff assumptions and views regarding the impact of those swaps on government debt and on government deficit with a particular view to the case of the Hellenic Republic and of possible action envisaged. In particular, that document contains an analysis of the possible impact of the operation of the financial instrument of off-market swaps on the government debt and government deficit of the Hellenic Republic on the basis of various assumptions made in accordance with data which were available at the time that that document was drafted, relating to the manner in which off-market swaps operate.

51 The first document therefore deals with aspects relating to the economic policy of the Union and the Hellenic Republic and falls within the scope of the exception provided for in the second indent of Article 4(1)(a) of Decision 2004/258; moreover, the applicants do not contest this.

52 As regards the issue whether disclosure of the first document would specifically and effectively undermine the protected interest in question, it is common ground, as the ECB stated in its letter of 21 October 2010, that, at the time of the adoption of the contested decision, the European financial markets were in a very vulnerable environment. The stability of those markets was fragile, in particular, because of the economic and financial situation of the Hellenic Republic. It is also common ground that that situation and the related sales of Greek financial assets were causing strong depreciations in the value of those assets, which also triggered losses for Greek and other European holders. The applicants did not dispute that that development had the potential of leading to negative spillover effects on the solvency and funding conditions of other issuers and countries in the euro area. In such an environment, it is clear that market participants use the information disclosed by central banks and that their analyses and decisions are considered a particularly important and reliable source to assess current and prospective financial market developments. Moreover, the ECB was entitled to find that public confidence is an essential element affecting the proper functioning of the financial markets. The ECB was not indeed contradicted in this respect by the applicants.

53 In the light of the content of the first document and the environment in which the European financial markets found themselves, as described above, the Court takes the view that the ECB did not commit a manifest error of

assessment in considering, in its letters of 17 September and 21 October 2010, that disclosure of the information contained in the first document would specifically and effectively undermine the public interest so far as concerns the economic policy of the Union and the Hellenic Republic.

54 In support of its arguments regarding the substantial and acute risk of severely misleading the public in general and the financial markets in particular in a very vulnerable market environment, the ECB asserts that assumptions and views of members of its staff regarding the impact of off-market swaps on government deficit and on government debt, which are contained in the first document, were based on partial information that was available at the time the document was drafted in order to give a snapshot of the situation in March 2010.

55 In this respect, it must be stated that it is apparent from the case-file that the first document, which is based on information that was available before the end of February 2010, was examined by the ECB's Executive Board on 2 March 2010 and submitted to the ECB's Governing Council on 3 March 2010. Since access to that document was definitively refused on 21 October 2010, and therefore more than seven months after it was drafted, it is possible to conclude that that document did not contain, at the time of the definitive refusal, updated data regarding the impact of off-market swaps on government deficit and on government debt, in particular, of the Hellenic Republic. That is corroborated by the fact that on 22 April 2010, Eurostat (the Statistical Office of the European Union) issued a press release, regarding the first notification excessive deficit procedure, presenting the deficit and debt figures for the EU Member States for 2006 to 2009 and including a reservation on the Greek data citing, inter alia, uncertainties in the recording of off-market swaps. In this respect, Eurostat also announced investigations which might lead to a revision of the deficit and debt figures.

56 None the less, the fact that, on 21 October 2010, the data contained in the first document were outdated and that they gave only a snapshot of the factual situation at the time that the document was drafted does not permit the conclusion that, in the event of disclosure of that document, financial market participants would also have regarded as outdated and therefore of no value ECB staff assumptions and views regarding the impact of off-market swaps on government deficit and on government debt which are contained in that document.

57 Although it is true that those participants are professionals who can be expected to use information taken from documents in the context of their work, the fact remains that they consider assumptions and views originating from the ECB to be particularly important and reliable for assessing the financial market. It cannot reasonably be precluded that, even if those assumptions and views were made on the basis of data available well before 21 October 2010, they would have been regarded as still valid on that date. Moreover, it can be assumed that, by relying on those assumptions and views that were based on a certain known factual situation, those professionals might have inferred, on the basis of additional data, assumptions and views allegedly held by the ECB regarding the government deficit and government debt at the time that the ECB definitively refused access to that document. In this respect, any clarification by the ECB on the disclosed version of that document, indicating that the information contained therein was no longer up to date, would not have been able to prevent disclosure of that document from misleading the public and financial market participants in particular on the situation regarding the government deficit and government debt as assessed by the ECB.

58 In the light of the very vulnerable environment in which the financial markets found themselves at the time of adoption of the contested decision, the assessment that such an error would undermine the economic policy of the Union and the Hellenic Republic cannot be rejected as manifestly incorrect. Indeed, such an error might have had negative consequences on access, in particular for that Member State, to the financial markets and might therefore have affected the effective conduct of economic policy in the Hellenic Republic and the Union.

59 The ECB was therefore entitled to base its refusal to grant access to the first document on the exception provided for in the second indent of Article 4(1)(a) of Decision 2004/258.

60 With respect to the second document, the ECB justified its refusal to grant access to that document by stating, in its letter of 17 September 2010, that it contained the ECB's staff assumptions and views regarding the 'Titlos' transaction, the possible existence of similar transactions impacting on the euro area government debt or deficit levels, the relevance for the Eurosystem collateral framework, associated risk control measures, and their possible revision. According to the ECB, Titlos plc is a special purpose financial vehicle that was created on 26 February 2009 by the National Bank of Greece. Titlos plc issued a certain amount in euro of asset-backed securities due in September 2039. The ECB specifies that the underlying asset for the asset-backed securities named 'Titlos' was an interest rate swap between the National Bank of Greece and the Hellenic Republic. The 'Titlos' asset was required to be eligible as collateral for Eurosystem credit operations, and this was assessed by

the central bank of another Member State after consultation with the ECB. According to the ECB's reasoning in its letter of 17 September 2010, since that document was closely connected with the first document, it also fell within the exception to the right of access referred to in the second indent of Article 4(1)(a) of Decision 2004/258. Subsequently, in its letter of 21 October 2010, the ECB no longer made a distinction between the first and second document in its statement of reasons for the refusal. According to the ECB, the reasoning set out in paragraph 49 above relating to the refusal to grant access to the first document was therefore also valid in relation to the second document.

61 The second document, which was submitted by the ECB in response to the measures of inquiry ordered by the Court (see paragraph 10 above), contains, in essence, the background to the 'Titlos' transaction as well as an examination carried out by ECB staff of the financial structure of that transaction and the possible existence of similar transactions. In this respect, the manner in which the Hellenic Republic used off-market swaps and the consequences of those swaps for existing risks were *inter alia* analysed. Moreover, that document contains several conclusions regarding the Hellenic Republic and the Eurosystem based on the analyses carried out.

62 That document therefore deals with aspects relating to the economic policy of the Union and the Hellenic Republic and falls within the scope of the exception provided for in the second indent of Article 4(1)(a) of Decision 2004/258; moreover, the applicants do not contest this.

63 As regards the issue whether disclosure of the second document would specifically and effectively undermine the protected interest in question, the Court notes that the content of that document is closely connected with that of the first document. In a very vulnerable environment for the financial markets such as that which existed at the time of adoption of the contested decision (see paragraph 52 above), it must be stated that the ECB's assessment that disclosure of the analyses and conclusions contained in the second document would undermine the economic policy of the Union and the Hellenic Republic is not vitiated by a manifest error. Even if those analyses and conclusions were based on the partial data available at the time that the second document was drafted, their disclosure might have influenced the financial markets and their assessment of the situation regarding the government deficit and the government debt of the Hellenic Republic in the same manner as disclosure of the first document (see paragraphs 56 to 58 above). Such repercussions might have had negative consequences on access, in particular for that Member State, to the financial markets and might therefore have affected the effective conduct of economic policy in the Hellenic Republic and the Union.

64 Consequently, the ECB was entitled to base its refusal to grant access to the second document on the exception provided for in the second indent of Article 4(1)(a) of Decision 2004/258.

65 In so far as the ECB based its refusal to grant access to the documents at issue on the exception referred to in the second indent of Article 4(1)(a) of Decision 2004/258, the contested decision is not therefore vitiated by a manifest error of assessment.

66 That conclusion is not undermined by the applicants' arguments relating to Article 10 of the ECHR.

67 The applicants claim that, in order to avoid a breach of their rights under Article 10 of the ECHR, it is necessary to construe and apply the exception referred to in the second indent of Article 4(1)(a) of Decision 2004/258 in the manner stated by the applicants. In this respect, they refer to the judgments of the European Court of Human Rights in *Társaság a Szabadságjogokért v. Hungary* of 14 April 2009, *Kenedi v. Hungary* of 26 May 2009 (not yet published in the *Reports of Judgments and Decisions*) and *Gillberg v. Sweden*, paragraph 11 above.

68 Article 10 of the ECHR provides, in its relevant part, that everyone has the right to freedom of expression and that this right includes freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society for the protection of the reputation or rights of others or for preventing the disclosure of information received in confidence.

69 In this respect, the Court observes that Article 52(3) of the Charter of Fundamental Rights of the European Union (OJ 2010 C 83, p. 389; 'the Charter'), which has the same legal value as the Treaties in accordance with the first subparagraph of Article 6(1) TEU, provides that, in so far as the Charter contains rights which correspond

to rights guaranteed by the ECHR, the meaning and scope of those rights are to be the same as those laid down by the ECHR. However, that provision is not to prevent Union law providing more extensive protection.

70 Pursuant to Article 52(7) of the Charter, the explanations drawn up as a way of providing guidance in the interpretation of the Charter, namely the Explanations relating to the Charter (OJ 2007 C 303, p. 17), are to be given due regard by the courts of the Union and of the Member States.

71 It is apparent from the Explanations relating to the Charter that Article 10 of the ECHR corresponds to Article 11 of the Charter, according to which everyone is to have the right to freedom of expression. This right includes freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. The freedom and pluralism of the media are to be respected.

72 According to Article 52(1) and (2) of the Charter of Fundamental Rights, any limitation on the exercise of the rights and freedoms recognised by that charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others. Rights recognised by the Charter for which provision is made in the Treaties are to be exercised under the conditions and within the limits defined by those Treaties. That being so, it is clear that Article 11 of the Charter, in conjunction with Article 52(1) and (2) of the Charter, contains rights which correspond to those guaranteed by Article 10 of the ECHR. Those articles of the Charter must therefore be given the same meaning and the same scope as Article 10 of the ECHR, as interpreted by the case-law of the European Court of Human Rights (see, by analogy, Case C-400/10 PPU *McB* [2010] ECR I-8965, paragraph 53, and Case C-256/11 *Dereci and Others* [2011] ECR II-0000, paragraph 70).

73 The Court notes that, with respect to the right of access to documents of the Union's institutions, bodies, offices and agencies, the Charter provides for a special fundamental right. Under Article 42 of the Charter, any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, is to have a right of access to those documents, whatever their medium. However, the applicants did not claim that there was an infringement of that special right, but merely asserted an alleged infringement of the general right of freedom of expression guaranteed by Article 10 of the ECHR and Article 11 of the Charter. In so doing, they did not explain how, in their view, the ECB's conduct could amount to an infringement of Article 10 of the ECHR and Article 11 of the Charter.

74 With respect to the issue whether, for the purposes of the application of the second indent of Article 4(1)(a) of Decision 2004/258, the ECB misconstrued the scope of the right of access as interpreted in the light of Articles 11 and 52 of the Charter and of Article 10 of the ECHR by refusing to grant access to the documents at issue, the applicants merely refer to the judgments of the European Court of Human Rights in *Társaság a Szabadságjogokért v. Hungary*, paragraph 67 above, *Kenedi v. Hungary*, paragraph 67 above, and *Gillberg v. Sweden*, paragraph 11 above.

75 However, those judgments do not permit the conclusion that, by refusing to grant access to the documents at issue, the ECB misconstrued the scope of the right of access as interpreted in the light of Articles 11 and 52 of the Charter and of Article 10 of the ECHR.

76 In *Kenedi v. Hungary*, paragraph 67 above, the European Court of Human Rights found that there had been an infringement of Article 10 of the ECHR on the ground that the measure in question in that case was not prescribed by law (see paragraph 45 of that judgment). In the present case, the refusal to grant access to the documents at issue was based on the second indent of Article 4(1)(a) of Decision 2004/258. That decision was adopted pursuant to Article 23(2) of ECB Decision 2004/257/EC of 19 February 2004 adopting the Rules of Procedure of the ECB (OJ 2004 L 80, p. 33), in conjunction with Article 12(3) of the Protocol on the Statute of the European System of Central Banks and of the ECB (OJ 1992 C 191, p. 68), and with Article 8 EC. That refusal sought to achieve the legitimate aim of protecting the public interest so far as concerns the economic policy of the Union and the Hellenic Republic.

77 Moreover, although it is true that, in *Gillberg v. Sweden*, paragraph 11 above, the European Court of Human Rights found that the applicant in that case did not, under Article 10 of the ECHR, have a negative right to refuse to make available the documents concerned (paragraph 94 of that judgment), that case can be distinguished from the present one. Whilst the documents concerned in *Gillberg v. Sweden*, paragraph 11 above, were not the property

of the person who refused to grant access to them (paragraphs 92 and 93 of that judgment), in the present case, the documents at issue requested by the applicants were the property of the ECB. Moreover, unlike in *Gillberg v. Sweden* (paragraph 93 of that judgment), the ECB's refusal to grant access to those documents was not contrary to a court decision ordering the ECB to grant access to them.

78 As regards *Társaság a Szabadságjogokért v. Hungary*, paragraph 67 above, it is true that that judgment deals with the need to limit the right of access to information. However, the facts in that case are not similar to those of the present case, and that judgment cannot therefore be usefully relied upon in the present case. *Társaság a Szabadságjogokért v. Hungary*, paragraph 67 above, concerned the refusal to communicate information relating to a constitutional complaint brought by a public figure on the ground of the personality rights of the latter. In that complaint, it was alleged that the opinions of public figures on public matters are related to their person and therefore constitute private data which cannot be disclosed without their consent (see paragraph 37 of that judgment). By contrast, this case does not concern alleged private data of a public figure.

79 Moreover, the Court notes that the contested decision does not contain a general prohibition on receiving ECB information relating to the government deficit and the government debt of the Hellenic Republic. In this respect, it should also be observed that, in applying the exceptions to the right of access provided for in Article 4 of Decision 2004/258, the ECB did not limit that right solely to documents falling within the exercise of its administrative tasks, as referred to in the fourth subparagraph of Article 15(3) TFEU (see paragraph 39 above).

80 With respect to the applicants' arguments that the public must have access to information regarding, first, the level of debt of the Hellenic Republic and, second, the question whether the Greek authorities provided complete and correct information to Eurostat on the Greek Government debt, including the off-market swap operations, it must be stated that, at the time of adoption of the contested decision, the Eurostat report entitled 'Report on Greek Government deficit and debt statistics' of 8 January 2010 explained the persistent weaknesses of the Greek fiscal data by reference to instances of misreporting by the Greek authorities of deficit and debt data. Moreover, in the Eurostat note entitled 'Information note on Greece – 24.02.2010', it is stated that, for the first time, the Greek authorities declared the existence of an off-market swap operation in 2001 and that Eurostat would request the Greek authorities to supply, as soon as possible, all the information necessary for a complete evaluation and recording of this operation in the next excessive deficit procedure notification. Moreover, on 22 April 2010, Eurostat issued a press release, regarding the first notification excessive deficit procedure, presenting the deficit and debt figures for the EU Member States for 2006 to 2009 and including a reservation on the Greek data citing, inter alia, uncertainties in the recording of off-market swaps.

81 In those circumstances, the applicants' arguments relating to the judgments in *Társaság a Szabadságjogokért v. Hungary*, paragraph 67 above, *Kenedi v. Hungary*, paragraph 67 above, and *Gillberg v. Sweden*, paragraph 11 above, must be rejected.

82 Consequently the first plea must be rejected.

83 Given that the ECB was entitled to base its refusal to grant access to the documents at issue on the exception to the right of access provided for in the second indent of Article 4(1)(a) of Decision 2004/258, it is no longer necessary for the Court to examine the second and third pleas concerning the exceptions to the right of access provided for in the first indent of Article 4(2), and in Article 4(3) of that decision.

84 In the light of all the foregoing, the action must be dismissed in its entirety as in part inadmissible and in part unfounded.

Costs

85 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

86 As the applicants have been unsuccessful, they must be ordered to pay the costs, in accordance with the form of order sought by the ECB.

On those grounds,

THE GENERAL COURT (Seventh Chamber)

hereby:

1. **Dismisses the action;**
2. **Orders Ms Gabi Thesing and Bloomberg Finance LP to bear their own costs and to pay those incurred by the European Central Bank (ECB).**

LECTURE 9: ECONOMIC AND MONETARY UNION IN TIMES OF CRISIS

After having lived through a seemingly seamless first decade, the EU's common currency hit hard grounds when the sovereign debt crisis in Greece resulted in markets losing faith in the Euro as a stable currency. Commitments to safeguarding the Euro being made by important Euro area Member States such as Germany, the European Central Bank also intervened by promising to establish an outright monetary transaction (OMT) programme, buying financial instruments in the open market. The set-up of this programme was deemed problematic by German Member of Parliament Peter Gauweiler, who considered the ECB actions proposed to go against the German constitution and the EU Treaties. In an unprecedented move, the German Federal Constitutional Court – the *Bundesverfassungsgericht* – referred the matter to the Court of Justice, asking whether the establishment of the OMT programme fell within the ECB's mandate. Arguing that it did in June 2015, the *Bundesverfassungsgericht* dismissed Mr. Gauweiler's claim in on 21 June 2016. In this lecture, we will explore the legal reasoning behind and the constitutional implications of the Gauweiler case. Doing so will allow us to question how the ECB's mandate and its crisis responses have been made to fit the EU legal framework. Analysing the case will additionally allow us to reflect upon how EU Courts and national constitutional courts interact in the realisation and construction of an integrated legal space for monetary policy.

Materials to read:

- Opinion of Advocate General Cruz Villalón of 14 January 2015 in Case C-62/14, *Peter Gauweiler and others v. Deutsche Bundestag*, ECLI:EU:C:2015:7.
- Court of Justice, 16 June 2015, *Peter Gauweiler and others v. Deutsche Bundestag*, ECLI:EU:C:2015:400.
- Bundesverfassungsgericht, Gauweiler Press Release 21 June 2016, <http://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2016/bvg16-034.html> (in English).
- Bundesverfassungsgericht, Order of 18 July 2017, English press release, <http://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2017/bvg17-070.html>.

Lecture 9 outline:

- a. The Eurozone crisis and the development of an outright monetary transaction programme by the ECB
 1. The Eurozone crisis and EU law
 2. Making monetary policy work
 3. The 2012 Draghi speech: “whatever it takes”
 4. An outright monetary transaction programme still in the making
- b. The Gauweiler saga
 1. Gauweiler's appeal before the *Bundesverfassungsgericht*
 2. An unprecedented reference for a preliminary ruling
 3. The Advocate General's Opinion

4. The Court's judgment
5. The 21 June 2016 *Bundesverfassungsgericht* judgment
- c. The limits of monetary policy in the wake of *Gauweiler*
 1. Economic policy v. monetary policy
 2. The role of EU law in limiting and defining monetary policy
 3. Can the notion of monetary policy be limited by EU law?
- d. Judicial dialogues between national constitutional courts and the Court of Justice after *Gauweiler*
 1. From antagonism to cooperation
 2. A new dawn for an integrated EU constitutional law regime
 3. Limits of the renewed judicial dialogue

Questions for discussion:

- What are the legal and EU constitutional limits on the ECB's monetary policy mandate? Can the Court of Justice, in your opinion, police that mandate? If so, according to which criteria?
- Is a judicial dialogue between national constitutional courts and the EU Courts necessary in order to make the EU's constitutional law regime meet its targets?

Opinion of Advocate General Cruz Villalón of 14 January 2015 in Case C-62/14, *Peter Gauweiler and others v. Deutsche Bundestag*

1. By a press release issued after the meeting of its Governing Council on 5 and 6 September 2012, the European Central Bank gave details of a decision outlining a programme for the purchase of government bonds issued by States of the euro area — transactions which were to be known as Outright Monetary Transactions (OMTs). The press release set out the basic features of the programme for purchasing government bonds. However, adoption of the legal instruments regulating the programme was postponed and those instruments have still not been adopted today.

2. In its press release, the European Central Bank ('the ECB' or 'the Bank') gave notice of its intention to purchase on secondary markets, subject to certain conditions, government bonds issued by States in the euro area. In brief, the ECB made application of the programme conditional upon the States concerned being subject to a financial support programme of the European Financial Stability Facility or the European Stability Mechanism, provided that such a programme included the possibility of primary market purchases. It was also announced that transactions under the OMT programme were to be focused on the shorter part of the yield curve, with no *ex ante* quantitative limits being set, and that the Eurosystem accepted the same (*pari passu*) treatment as private creditors, whilst an undertaking was given that liquidity created would be fully sterilised.

3. The OMT programme was thus created in the context of, and in response to, a situation regarded as exceptional for the viability of the ECB's monetary policy. The international financial crisis which started in 2008 had, by 2010, become a sovereign debt crisis for various euro area States. In the summer of 2012, faced with investors' lack of confidence in whether the euro could survive, the financial situation of various Member States of the euro area was becoming unsustainable as a result of the apparently unstoppable increases in the risk premia applied to their government bonds. The 'reversibility' of the euro and the consequent return to national currencies seemed destined to become a self-fulfilling prophecy. It was in that precise context that the ECB made its announcement about the OMT programme, which was generally perceived as giving concrete expression to the pledge which its President, Mr Draghi, had given a few weeks beforehand to do, within the ECB's mandate, 'whatever it takes' to restore confidence in the single currency.

4. For the first time in its history the Bundesverfassungsgericht (Germany's Federal Constitutional Court; 'the BVerfG') has made a reference to the Court of Justice under Article 267 TFEU and has done so in order to raise the question of the legality of the OMT programme. As will be seen below, the questions raised by the BVerfG give rise to difficulties of interpretation of utmost importance, which the Court of Justice will have to resolve.

5. A first point that should be made about this case is that the BVerfG has made its request for a preliminary ruling in the context of what it classifies as an *ultra vires* review of European Union (EU) acts which have consequences for the 'constitutional identity' of the Federal Republic of Germany. The BVerfG's starting point is an initial finding that the act of the ECB at issue is unlawful under national constitutional law, as well as under EU law, but, before proceeding any further with its assessment, it has decided to bring the matter before the Court of Justice so that the latter may give a ruling on that act from the perspective of EU law.

6. The Court of Justice must also address a question of admissibility, which concerns the actionable nature of a decision only the basic features of which were set out in a press release. Although it may, on the face of it, appear to be a simple press release which it is hard to imagine forming the subject-matter of a review of validity, the circumstances of the present case, together with the special role played by public communication in central bank activity, might be grounds for reaching a different conclusion.

7. As regards the substance of the case, the Court of Justice is confronted with the difficulties which extraordinary circumstances have long presented for public law. Against a background of the possible disintegration of the euro area, it is faced with a question about the powers of the ECB, an institution which, unlike other central banks, is subject to a particularly restricted mandate. The ECB has argued that the OMT programme is a proper instrument for dealing with exceptional circumstances, since, despite its 'unconventional' nature and the risks it entails, its objective is merely to do what has to be done in order to restore the ECB's ability to make effective use of its monetary policy instruments. By contrast, the complainants and the applicant in the main proceedings (hereinafter referred to together as 'the applicants in the main proceedings'), like the referring court

itself, have doubts as to whether that is the real aim of the OMT programme, since in their view the ultimate objective of that programme is to transform the ECB into a ‘lender of last resort’ for the States of the euro area.

8. This situation has led the BVerfG to share with the Court of Justice its doubts as to whether the OMT programme is compatible with the Treaties. First, it asks whether that programme is an economic policy measure — and therefore beyond the scope of the ECB’s mandate — rather than a monetary policy measure. Second, it questions whether the measure in issue observes the prohibition on monetary financing laid down in Article 123(1) TFEU.

I – Legal framework

A – *EU legal framework*

9. Title VIII of Part Three of the FEU Treaty, which is entitled ‘Economic and Monetary Policy’, opens with the following overarching provision:

‘Article 119

1. For the purposes set out in Article 3 of the Treaty on European Union, the activities of the Member States and the Union shall include, as provided in the Treaties, the adoption of an economic policy which is based on the close coordination of Member States’ economic policies, on the internal market and on the definition of common objectives, and conducted in accordance with the principle of an open market economy with free competition.

2. Concurrently with the foregoing, and as provided in the Treaties and in accordance with the procedures set out therein, these activities shall include a single currency, the euro, and the definition and conduct of a single monetary policy and exchange-rate policy the primary objective of both of which shall be to maintain price stability and, without prejudice to this objective, to support the general economic policies in the Union, in accordance with the principle of an open market economy with free competition.

3. These activities of the Member States and the Union shall entail compliance with the following guiding principles: stable prices, sound public finances and monetary conditions and a sustainable balance of payments.’

10. The FEU Treaty then lays down a provision prohibiting the monetary financing of the Member States, which is worded as follows:

‘Article 123

1. Overdraft facilities or any other type of credit facility with the European Central Bank or with the central banks of the Member States (hereinafter referred to as “national central banks”) in favour of Union institutions, bodies, offices or agencies, central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of Member States shall be prohibited, as shall the purchase directly from them by the European Central Bank or national central banks of debt instruments.

2. Paragraph 1 shall not apply to publicly owned credit institutions which, in the context of the supply of reserves by central banks, shall be given the same treatment by national central banks and the European Central Bank as private credit institutions.’

11. The objectives and basic tasks of the ECB are set out in the FEU Treaty in the following terms:

‘Article 127

1. The primary objective of the European System of Central Banks (hereinafter referred to as “the ESCB”) shall be to maintain price stability. Without prejudice to the objective of price stability, the ESCB shall support the general economic policies in the Union with a view to contributing to the achievement of the objectives of the Union as laid down in Article 3 of the Treaty on European Union. The ESCB shall act in accordance with the principle of an open market economy with free competition, favouring an efficient allocation of resources, and in compliance with the principles set out in Article 119.

2. The basic tasks to be carried out through the ESCB shall be:

- to define and implement the monetary policy of the Union,
- to conduct foreign-exchange operations consistent with the provisions of Article 219,
- to hold and manage the official foreign reserves of the Member States,
- to promote the smooth operation of payment systems.

...’

12. Article 130 TFEU provides for and ensures the independence of the ECB as follows:

‘When exercising the powers and carrying out the tasks and duties conferred upon them by the Treaties and the Statute of the ESCB and of the ECB, neither the European Central Bank, nor a national central bank, nor any member of their decision-making bodies shall seek or take instructions from Union institutions, bodies, offices or agencies, from any government of a Member State or from any other body. The Union institutions, bodies, offices or agencies and the governments of the Member States undertake to respect this principle and not to seek to influence the members of the decision-making bodies of the European Central Bank or of the national central banks in the performance of their tasks.’

13. Protocol No 4 on the Statute of the European System of Central Banks and of the European Central Bank sets out the instruments of monetary policy available to the ECB; the following of which should be highlighted for the purposes of the present case:

‘Article 18

Open market and credit operations

18.1. In order to achieve the objectives of the ESCB and to carry out its tasks, the ECB and the national central banks may:

- operate in the financial markets by buying and selling outright (spot and forward) or under repurchase agreement and by lending or borrowing claims and marketable instruments, whether in euro or other currencies, as well as precious metals;
- conduct credit operations with credit institutions and other market participants, with lending being based on adequate collateral.

18.2. The ECB shall establish general principles for open market and credit operations carried out by itself or the national central banks, including for the announcement of conditions under which they stand ready to enter into such transactions.’

14. In 1993, before the ECB was established and in the course of the process of transition to economic and monetary union, the Council adopted Regulation (EC) No 3603/93 of 13 December 1993 specifying definitions for the application of the prohibitions referred to in Articles 104 and 104b(1) of the Treaty [Article 123 TFEU] (OJ 1993 L 332, p. 1). For the purposes of these proceedings, attention should be drawn to the following statements and provisions of that regulation:

‘...’

Whereas Member States must take appropriate measures to ensure that the prohibitions referred to in Article 104 of the Treaty are applied effectively and fully; whereas, in particular, purchases made on the secondary market must not be used to circumvent the objective of that Article;’

...

Article 1

1. For the purposes of Article 104 of the Treaty:

(a) “overdraft facilities” means any provision of funds to the public sector resulting or likely to result in a debit balance;

(b) “other type of credit facility” means:

(i) any claim against the public sector existing at 1 January 1994, except for fixed-maturity claims acquired before that date;

(ii) any financing of the public sector’s obligations vis-à-vis third parties;

(iii) without prejudice to Article 104(2) of the Treaty, any transaction with the public sector resulting or likely to result in a claim against that sector.

...’

B – *National legal framework*

15. For the purposes of these proceedings, attention should be drawn to the following provisions of the Basic Law of the Federal Republic of Germany:

‘Article 1

1. Human dignity shall be inviolable. It shall be the duty of every public authority to observe and protect it.

2. The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.

3. The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law.

...

Article 20

1. The Federal Republic of Germany is a democratic and social federal state.

2. All state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive and judicial bodies.

3. The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice.

...

Article 23

1. With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social and federal principles, to the rule of law, and to the principle of subsidiarity, and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law. To this end the Federation may transfer sovereign powers by a law

with the consent of the Bundesrat. The establishment of the European Union, as well as changes in its founding Treaties and in comparable regulations which amend or supplement this Basic Law, or make such amendments or supplements possible, shall be subject to paragraphs 2 and 3 of Article 79.

...

Article 79

...

3. Amendments to this Basic Law which affect the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible.

...

Article 88

The Federation shall establish a note-issuing and currency bank as the Federal Bank. Within the framework of the European Union, its responsibilities and powers may be transferred to the European Central Bank, which is independent and committed to the overriding goal of assuring price stability.'

16. The BVerfG has developed a body of case-law pursuant to which it carries out a review of the constitutionality of acts of the institutions and bodies of the European Union when the acts concerned are obviously ultra vires or affect 'constitutional identity', as it results from the 'eternity clause' in Article 79(3) of the German Basic Law.

17. As regards the review of ultra vires acts, referred to as an 'ultra vires review', the BVerfG stated, in its judgment of 6 July 2010 in *Honeywell*, that it is to be conducted in a manner that is amicable to EU law. The BVerfG has also pointed out that in an ultra vires review decisions of the Court of Justice are to be recognised as a binding interpretation of EU law.

18. For the BVerfG, an ultra vires review of an EU act takes place only when it is apparent that, in adopting an act, the European institutions and bodies have acted in a way that is beyond the scope of the powers conferred on them, provided that, taking account of the principle of conferral and the principle of legality that is a feature of a State governed by the rule of law, the breaches of those powers are 'sufficiently serious'. (2)

II – The facts and proceedings before the national court

19. Between early 2010 and early 2012, the Heads of State and Government of the European Union and of the euro area adopted a number of measures intended to counter the severe effects of the financial crisis afflicting the world economy. As the financial crisis turned into a sovereign debt crisis in various Member States, it was decided, amongst other initiatives, to establish on a permanent basis the European Stability Mechanism, the purpose of which is to safeguard the financial stability of the euro area by granting financial assistance to any of the States participating in the Mechanism.

20. Despite the efforts of the European Union ('the Union') and the Member States, the risk premia for bonds of various euro-area States rose sharply in the summer of 2012. In the face of investors' doubts about the survival of monetary union, the representatives of the Union and of the States of the euro area repeatedly stressed that the single currency was irreversible. It was at that time that the President of the ECB, in words that were subsequently repeated over and over again, stated that he would, within his mandate, do whatever it took to preserve the euro. (3)

21. Some weeks later, according to the minutes of the 340th meeting of the Governing Council of the ECB on 5 and 6 September 2012, the Council approved the main parameters of the programme of outright monetary transactions in the secondary sovereign bond markets, formally to be known as 'Outright Monetary Transactions'. As is clear from the written observations submitted by the ECB in these proceedings, approval was also given at that meeting to a draft Decision on outright monetary transactions and repealing Decision ECB/2010/5, as well as

to a draft Guideline on the implementation of outright monetary transactions. Both drafts were subsequently amended at the meetings of the Governing Council on 4 October and 7 and 8 November 2012.

22. On 6 September 2012 at the press conference after the meeting of the Governing Council, the President of the ECB gave details of the main parameters of the OMT programme, which were also set out in the press release of the same date made available in English on the ECB's website. That press release is the document in which the technical features of the OMT programme were set out; those features are described as follows:

‘As announced on 2 August 2012, the Governing Council of the European Central Bank (ECB) has today taken decisions on a number of technical features regarding the Eurosystem's outright transactions in secondary sovereign bond markets that aim at safeguarding an appropriate monetary policy transmission and the singleness of the monetary policy. These will be known as Outright Monetary Transactions (OMTs) and will be conducted within the following framework:

Conditionality

A necessary condition for Outright Monetary Transactions is strict and effective conditionality attached to an appropriate European Financial Stability Facility/European Stability Mechanism (EFSF/ESM) programme. Such programmes can take the form of a full EFSF/ESM macroeconomic adjustment programme or a precautionary programme (Enhanced Conditions Credit Line), provided that they include the possibility of EFSF/ESM primary market purchases. The involvement of the IMF shall also be sought for the design of the country-specific conditionality and the monitoring of such a programme.

The Governing Council will consider Outright Monetary Transactions to the extent that they are warranted from a monetary policy perspective as long as programme conditionality is fully respected, and terminate them once their objectives are achieved or when there is non-compliance with the macroeconomic adjustment or precautionary programme.

Following a thorough assessment, the Governing Council will decide on the start, continuation and suspension of Outright Monetary Transactions in full discretion and acting in accordance with its monetary policy mandate.

Coverage

Outright Monetary Transactions will be considered for future cases of EFSF/ESM macroeconomic adjustment programmes or precautionary programmes as specified above. They may also be considered for Member States currently under a macroeconomic adjustment programme when they will be regaining bond market access.

Transactions will be focused on the shorter part of the yield curve, and in particular on sovereign bonds with a maturity of between one and three years.

No *ex ante* quantitative limits are set on the size of Outright Monetary Transactions.

Creditor treatment

The Eurosystem intends to clarify in the legal act concerning Outright Monetary Transactions that it accepts the same (*pari passu*) treatment as private or other creditors with respect to bonds issued by euro area countries and purchased by the Eurosystem through Outright Monetary Transactions, in accordance with the terms of such bonds.

Sterilisation

The liquidity created through Outright Monetary Transactions will be fully sterilised.

Transparency

Aggregate Outright Monetary Transaction holdings and their market values will be published on a weekly basis. Publication of the average duration of Outright Monetary Transaction holdings and the breakdown by country will take place on a monthly basis.

Securities Markets Programme

Following today's decision on Outright Monetary Transactions, the Securities Markets Programme (SMP) is herewith terminated. The liquidity injected through the SMP will continue to be absorbed as in the past, and the existing securities in the SMP portfolio will be held to maturity.'

23. Various German individuals brought proceedings for the protection of fundamental rights (constitutional complaints) before the BVerfG, which they based on the failure of the Federal German Government to bring an action for annulment before the Court of Justice against the announcement of 6 September 2012 concerning the OMT programme.

24. Similarly, Fraktion DIE LINKE im Deutschen Bundestag ('Die Linke'), a political group with parliamentary representation in the Bundestag, brought proceedings before the BVerfG on the ground of a conflict between constitutional bodies, seeking a declaration that the Bundestag should work to achieve the annulment of the OMT programme announced by the ECB on 6 September 2012.

III – The request to the Court of Justice for a preliminary ruling

25. The request for a preliminary ruling from the BVerfG, which was lodged at the Court Registry on 10 February 2014, was made in the proceedings brought by the individual applicants referred to above and by the parliamentary group Die Linke.

26. The following questions have been raised by the referring court:

'(1) (a) Is the decision of the Governing Council of the European Central Bank of 6 September 2012 on Technical features of Outright Monetary Transactions incompatible with Article 119 TFEU and Article 127(1) and (2) TFEU and with Articles 17 to 24 of the Protocol on the Statute of the European System of Central Banks and of the European Central Bank because it exceeds the monetary policy mandate of the European Central Bank laid down in the abovementioned provisions and encroaches upon the competence of the Member States?

Is the mandate of the European Central Bank exceeded in particular because the decision of the Governing Council of the European Central Bank of 6 September 2012

(aa) is linked to economic assistance programmes of the European Financial Stability Facility or of the European Stability Mechanism (conditionality)?

(bb) provides for the purchase of government bonds of selected Member States only (selectivity)?

(cc) provides for the purchase of government bonds of programme countries in addition to assistance programmes of the European Financial Stability Facility or of the European Stability Mechanism (parallelism)?

(dd) could undermine the limits and conditions laid down by assistance programmes of the European Financial Stability Facility or of the European Stability Mechanism (circumvention)?

(b) Is the decision of the Governing Council of the European Central Bank of 6 September 2012 on Technical features of Outright Monetary Transactions incompatible with the prohibition of monetary financing enshrined in Article 123 TFEU?

Is compatibility with Article 123 TFEU precluded in particular by the fact that the decision of the Governing Council of the European Central Bank of 6 September 2012

(aa) does not provide for quantitative limits for government bond purchases (volume)?

(bb) does not provide for a time gap between the issue of government bonds on the primary market and their purchase by the European System of Central Banks on the secondary market (market pricing)?

(cc) allows all purchased government bonds to be held to maturity (interference with market logic)?

(dd) does not contain any specific requirements for the credit standing of the government bonds to be purchased (default risk)?

(ee) provides for the same treatment of the European System of Central Banks as private or other holders of government bonds (debt cut)?

(2) In the alternative, in the event that the Court does not consider the decision of the Governing Council of the European Central Bank of 6 September 2012 on Technical features of Outright Monetary Transactions, qua act of an EU institution, to be an appropriate object for a request pursuant to point (b) of the first paragraph of Article 267 TFEU:

(a) Are Article 119 TFEU and Article 127 TFEU and Articles 17 to 24 of the Protocol on the Statute of the European System of Central Banks and of the European Central Bank to be interpreted as permitting the Eurosystem, alternatively or cumulatively,

(aa) to make government bond purchases conditional on the existence of and compliance with economic assistance programmes of the European Financial Stability Facility or of the European Stability Mechanism (conditionality)?

(bb) to purchase government bonds of selected Member States only (selectivity)?

(cc) to purchase government bonds of programme countries in addition to assistance programmes of the European Financial Stability Facility or of the European Stability Mechanism (parallelism)?

(dd) to undermine the limits and conditions laid down by assistance programmes of the European Financial Stability Facility or of the European Stability Mechanism (circumvention)?

(b) Having regard to the prohibition of monetary financing, is Article 123 TFEU to be interpreted as permitting the Eurosystem, alternatively or cumulatively,

(aa) to purchase government bonds without quantitative limits (volume)?

(bb) to purchase government bonds without a minimum time gap from their issue on the primary market (market pricing)?

(cc) to hold all purchased government bonds to maturity (interference with market logic)?

(dd) to purchase government bonds without minimum credit standing requirements (default risk)?

(ee) to accept the same treatment of the European System of Central Banks as private and other holders of government bonds (debt cut)?

(ff) to influence pricing, by communicating the intention to purchase or otherwise, coinciding with the issue of government bonds by Member States of the euro area (encouragement to purchase newly issued bonds)?

27. Written observations have been submitted by the individual complainants in the main proceedings for the protection of basic rights and by Die Linke, as well as by the Federal Republic of Germany, the Hellenic Republic, the Republic of Cyprus, the Portuguese Republic, the Republic of Poland, the French Republic, the Italian Republic, the Kingdom of the Netherlands, the Kingdom of Spain, Ireland and the Republic of Finland, the ECB, the European Parliament and the European Commission.

28. As a preliminary matter, I must point out that the European Parliament, although it has submitted written and oral observations, is not entitled to do so in proceedings such as these. Since these proceedings involve a reference for a preliminary ruling concerning validity in which the act in issue has not been adopted by the European Parliament, Article 23 of the Statute of the Court of Justice does not enable the Parliament to participate in these proceedings. I therefore take the view that the Court of Justice should not take into account the written and oral submissions put forward by the European Parliament.

29. The hearing was held on 14 October 2014. Apart from the Republic of Cyprus and the Republic of Finland, all the interested persons that had previously submitted written observations participated in the hearing.

IV – Preliminary consideration: The ‘functional’ difficulty of the request for a preliminary ruling, when placed in the context of the relevant case-law of the BVerfG

30. A singular feature of the order for reference in these proceedings is that it devotes an extensive introductory section to national legislative provisions and national case-law which are considered to be relevant. That singularity naturally does not lie in the fact that national legislation is cited — in this case a small number of constitutional provisions (Articles 20, 23, 38, 79 and 88 of the Basic Law of the Federal Republic of Germany; ‘the BL’) — but rather in the very full presentation of the BVerfG’s case-law concerning the constitutional basis and limits of the Federal Republic of Germany’s integration in the European Union. In a section of the order for reference dealing with the ‘case-law of the BVerfG’, (4) the latter interprets the scope of its own previous case-law as contained essentially in the judgments of 12 October 1993 (*Maastricht*), (5) 30 June 2009 (*Lisbon*) (6) and 6 July 2010 (*Honeywell*), (7) a direct precedent for the order under consideration here.

31. It might be thought that, as in so many other cases, this introductory section of the order for reference serves no purpose other than to help the Court of Justice to place the questions raised in their proper context. The section in question certainly does that, although it cannot be said that it confines itself to summarising the national case-law concerned. It also contains appraisals that cannot be regarded as being of minor importance. (8)

32. The fact that the background of national case-law is presented in that way, with its significance being explained as a preliminary matter to the Court of Justice, has, to my mind, immediate consequences for the *function* of the present request for a preliminary ruling. I would stress at the outset that all that case-law is sufficiently complex for me to frame my own reading of it in extremely cautious terms. The dissenting opinions that are attached to the order for reference show that there are different views on how the rules in *Honeywell* are to be applied to the present case. (9)

33. Stated in the simplest possible way, the following points may be gleaned from the section of the order for reference dealing with national case-law. In certain circumstances, which it is not essential to consider in detail at this point, when the Court of Justice answers a question raised in respect of a given EU act, as would be the case here, that answer is not necessarily a determining factor in deciding the case in the main proceedings. Rather, if the criterion constituted by EU law has been satisfied, *another* criterion for assessing validity, which is a matter for the BVerfG, could possibly be applied to the same contested act: that of the national constitution itself.

34. More specifically, a constitutional criterion of that kind, which is subsequently used by the BVerfG in its assessment, is said to consist in both the unalterable core content of the national constitution (‘constitutional identity’, as enshrined in Article 79(3) BL), and the principle of conferral of powers (with the logical consequences for ‘ultra vires’ EU acts that follow from that principle implicit in Article 23(1) BL). It seems that these two constitutional criteria, far from being mutually exclusive, are each able to provide support for the other, (10) as appears to be the case here. Such criteria for reviewing validity (the so-called ‘identity review’ and the ‘ultra vires review’), by definition, may be applied only by the BVerfG itself. (11)

35. That being so, it is not surprising that various Member States participating in these proceedings (the Kingdom of the Netherlands, the Italian Republic and the Kingdom of Spain) have, more or less emphatically, questioned, or even denied, the admissibility of the present reference. Simplifying matters once again, it is argued that a reference for a preliminary ruling is not a procedural mechanism intended to make it easier for national courts or tribunals to carry out their own review of the validity of EU acts, such as the review by the BVerfG in the present case, but is instead intended to ensure that the review of validity is carried out before the judicial body having exclusive jurisdiction for that purpose: namely the Court of Justice. In the same vein, it has been argued that, if a national court or tribunal were to reserve for itself the last word on the validity of an EU act, the

preliminary ruling procedure would then be merely advisory in nature, and its function in the scheme of actions provided for by the Treaties would thus be severely undermined. (12)

36. In short, a national court should not be able to request a preliminary ruling from the Court of Justice if its request already includes, intrinsically or conceptually, the possibility that it will in fact depart from the answer received. The national court should not be able to proceed in that way because Article 267 TFEU cannot be regarded as providing for such a possibility. (13)

37. Having thus explained what I am classifying as the ‘functional’ difficulty of the present request for a preliminary ruling, I would add that, in my view, the Court of Justice must address this difficulty when responding to the questions raised. I should, however, also point out that it must do so only in so far as is essential for the purposes of the present case, that is to say, in so far as this difficulty has consequences for whether the reference may proceed. Neither the significance nor the possible consequences of the aforementioned case-law of the BVerfG can be denied, as has long been made abundantly clear in a wide range of academic writing. (14) By way of example, it is sufficient to refer to the matters mentioned in point 30 of the order for reference, according to which the concepts of ‘constitutional identity’ and ‘ultra vires review’ are part of the constitutional traditions of many Member States.

38. As regards the last-mentioned point, it is the case that a number of national constitutional and supreme courts, in quite different ways but with an essentially precautionary aim, have found it appropriate to discuss or allude to the possibility, normally conceived of as a last resort, (15) of — stated in the most general possible terms — a breakdown in the European ‘constitutional compact’ underlying the integration process, specifically because of the conduct of one of the EU institutions.

39. As with other questions of similar significance, it does not seem to me to be essential for the purposes of these proceedings for the Court of Justice to go into the reasons why those courts have made such statements, which, I repeat, normally pertain to a situation envisaged as a last resort; nor is it necessary to go into the extent to which they are general at Member State level or the extent to which they overlap with the views put forward by the BVerfG. The cautious approach of ‘one case at a time’ (16) should also be adopted on this occasion. I shall try to explain why I believe that is so.

40. First of all, the fact that, in the course of a long history, this is the first time that the BVerfG has made a reference to the Court of Justice for a preliminary ruling does not call for particular comment on my part, except to observe that it provides confirmation of something which is starting to become more normal. The *intensification*, as it were, of the EU legal order is prompting the courts of the Member States with a specifically constitutional role to behave increasingly as courts or tribunals within the meaning of Article 267 TFEU. (17) The unique position of the constitutional court in most Member States has in the past been a sufficient explanation of why the cases in which such courts have brought matters before the Court of Justice have been exceptional, both for the purposes of judicial assistance and for the purposes of cooperation to ensure the uniform interpretation of EU law. The general picture is starting to change and the present reference perhaps bears that out.

41. At the same time, however, the introductory section of the order for reference reveals the ‘exceptional nature’ of the BVerfG’s initiative. It is not at all clear that the making of this request for a preliminary ruling is to be seen as part of the process of ‘normalisation’ in the sense I have indicated above.

42. In fact, it follows from the case-law concerned that the present request for a preliminary ruling can be said to be the inevitable consequence of a situation regarded as ‘exceptional’ which may for now, to state matters simply, be classified as *ultra vires*: namely a finding that an EU body or authority has seriously breached the limits of the competences derived from the Treaties, the basis and prior conditions for that finding being the national constitution. I shall, for the time being, confine myself to the *ultra vires* aspect of this case-law, leaving to one side the ‘constitutional identity’ aspect.

43. The present case corresponds precisely to the situation I have just described: the national court starts from a finding of principle that there has been an *ultra vires* act on the part of an EU body. (18) More specifically, under national law, it is a question of ‘an obvious and structurally significant *ultra vires* act’, (19) with additionally, in this case, consequences for core provisions of the national constitutional order. (20)

44. So far as the function of the present request for a preliminary ruling is concerned, the BVerfG had stated in *Honeywell* that, in a situation of that kind and in the framework of an ultra vires review to a certain extent already under way, the Court of Justice is to be ‘given the opportunity’ to rule on the validity of the act at issue, a ruling which the BVerfG will regard as ‘in principle ... a binding interpretation of EU law’. (21)

45. For the moment we may leave to one side the issue as to whether the referring court’s turn of phrase adequately reflects the duty incumbent on national courts of last instance under Article 267 TFEU. What matters is that proceedings before the Court of Justice concerning the validity of a contested act are in this way ‘inserted’ in a main action whose object has, since the commencement of the action, been an ultra vires review of that act. It is true that this entails recognition of the principle that it is for the Court of Justice to give its interpretation of EU law — which is binding for national courts — in the course of the review of the contested act. The issue is, however, somewhat more problematic.

46. That is because recognition of that principle does not exclude — as the case-law immediately adds (and if I have understood it correctly) — a subsequent review (‘in addition’) by the BVerfG when it is ‘obvious’ that the contested act has infringed the principle of conferral, such an infringement being taken to be ‘obvious’ when it takes place ‘in such a way as specifically infringes’ that principle, and when, in addition, the infringement may be regarded as ‘sufficiently serious’. (22) If my interpretation of the passage in question is correct, it is clear that the ‘insertion’, so to speak, of the request for a preliminary ruling in the course of a final assessment by a national court of an ultra vires act gives rise to problems which I shall describe as functional.

47. That request, which is considered to be necessary, that the Court of Justice give a preliminary ruling on the contested act, albeit solely from the perspective of EU law, is for its part presented as an expression of the ‘cooperative relationship’ which must obtain between the two courts, a notion that was created by the referring court itself.

48. This ‘cooperative relationship’ is far from being precisely defined but it is clear that it purports to be something more than the imprecise ‘dialogue’ between courts. It is said to derive ultimately from the notion that the obligation of the BVerfG to safeguard the basic order under the national constitution must always be guided by an open and receptive attitude to EU law (‘europarechtsfreundlich’), a notion which it might also have been possible to derive from the principle of sincere cooperation (Article 4(3) TEU).

49. Therein lies all the ambiguity with which the Court of Justice is faced in this reference for a preliminary ruling: there is a national constitutional court which, on the one hand, ultimately accepts its position as a court of last instance for the purposes of Article 267 TFEU, and does so as the expression of a special ‘cooperative relationship’ and a general principle of openness to the so-called ‘integration programme’ but which, on the other hand, wishes, as it makes clear, to bring a matter before the Court of Justice without relinquishing its own ultimate responsibility to state what the law is with regard to the constitutional conditions and limits of European integration so far as its own State is concerned. That ambivalence runs all through the request for a preliminary ruling, so that it is extremely difficult to disregard it entirely when analysing the case.

50. Confining myself to the problem which I am classifying as that of the function of the present request for a preliminary ruling, I think it appropriate to start by examining whether the present request is founded on the basic premisses on which the so-called preliminary ruling procedure before the Court of Justice has been developed in successive Treaties and on which the judicial guarantee of EU law has strategically been built up. (23)

51. If the only way of interpreting the present reference for a preliminary ruling were the one emphatically proposed by the Republic of Italy, (24) the only possible conclusion would be that, appearances aside, this is not *actually* an ‘Article 267’ reference for a preliminary ruling but something else — something which in any event is difficult to locate in the Treaty.

52. As some of the interested persons participating in these proceedings have rightly observed, the preliminary ruling procedure was, in fact, never conceived of as a mere ‘opportunity’ for the Court of Justice to ‘concur’ with the national court, either on a finding of ultra vires or on something else, with the possible consequence that any ‘failure to concur’ on the part of the Court of Justice could render its answer nugatory. It is also clear that that view is not invalidated by the fact that there is an attitude which is in principle receptive to an interpretation of the act at issue in conformity with EU law. Finally, in such circumstances, a request to the Court of Justice to give

a preliminary ruling could even end by having the undesirable effect of embroiling the Court in the chain of events ultimately leading to the breakdown in the ‘constitutional compact’ underlying European integration. (25)

53. If the present request for a preliminary ruling is understood in that way, the referring court appears to suggest, still within the sphere of the ultra vires review, that its criterion or benchmark for assessing the act in issue could be *different* from that of the Court of Justice (they might not ‘entirely coincide’). (26) That would mean that the dispute before the BVerfG would to some extent be *different* from the previous proceedings before the Court of Justice. However, on the basis of both the caution with which the BVerfG expresses itself and the nature of the arguments that it advances, (27) I am inclined to think that, in substantive terms, the criterion for ultra vires review would to a large extent be the same.

54. In this respect the present reference may be a good indication that that is so. Whilst the assessment of the validity of the contested decision of the ECB will to a great extent be determined by the interpretation given to the scope of the Bank’s mandate, in particular the primary objective of ‘price stability’, that concept is an integral part of both the Treaty (Article 127(1) TFEU) and the national constitution (Article 88, BL, in fine). In both cases, it would be a question of interpreting the scope of a single concept, that of ‘price stability’ as the overriding objective of the ECB, regardless of whether that concept is to be found in one or other of the basic provisions, or in both of them.

55. According to the order for reference, however, it is not only the principle of conferral (ultra vires) which is in issue in the main proceedings but also the ‘constitutional identity’ of the Federal Republic of Germany; that is so because of the consequences which the contested act is said to entail for the national constitutional body which is first and foremost responsible for expressing the will of the citizens. ‘Ultra vires review’ and ‘identity review’, to use the terms employed by the BVerfG itself, are said to converge in the main proceedings.

56. The question of the different review criteria to be applied by each of the courts arises again in this part of the order for reference. Thus, as regards specifically the ‘identity review’, the BVerfG expressly proposes that ‘in the cooperative relationship which exists, it is for the Court of Justice to interpret the measure. On the other hand, it is for the BVerfG to determine the inviolable core of constitutional identity and to review whether the measure (as interpreted by the Court of Justice) encroaches on that core’. (28)

57. At this point it would once again be appropriate to include a number of considerations of some importance. I shall merely point out, however, without it being necessary to examine other possibilities, that in the present case — in which everything seems to suggest that the ‘ultra vires review’ and the ‘identity review’ are inextricably linked — the difficulties, alluded to above, connected with recognising a difference in review criteria as between the task of the Court of Justice and that of the BVerfG remain relevant.

58. In any event, at this stage of my reflections, I should like to make two observations of a general nature.

59. The first is that it seems to me an all but impossible task to preserve *this* Union, as we know it today, if it is to be made subject to an absolute reservation, ill-defined and virtually at the discretion of each of the Member States, which takes the form of a category described as ‘constitutional identity’. That is particularly the case if that ‘constitutional identity’ is stated to be different from the ‘national identity’ referred to in Article 4(2) TEU.

60. Such a ‘reservation of identity’, independently formed and interpreted by the competent — often judicial — bodies of the Member States (of which, it need hardly be recalled, there are currently 28) would very probably leave the EU legal order in a subordinate position, at least in qualitative terms. Without going into details, and without seeking to pass judgment, I think that the characteristics of the case before us may provide a good illustration of the scenario I have just outlined.

61. Second, I think it useful to recall that the Court of Justice has long worked with the category of ‘constitutional traditions common’ to the Member States when seeking guidelines on which to construct the system of values on which the Union is based. (29) Specifically, the Court of Justice has given preference to those constitutional traditions when establishing a particular culture of rights, namely that of the Union. The Union has thus acquired the character, not just of a community governed by the rule of law, but also of a ‘community imbued with a constitutional culture’. (30) That common constitutional culture can be seen as part of the common identity of the Union, with the important consequence, to my mind, that the constitutional identity of each Member State, which of course is specific to the extent necessary, cannot be regarded, to state matters cautiously, as light years

away from that common constitutional culture. Rather, a clearly understood, open, attitude to EU law should in the medium and long term give rise, as a principle, to basic convergence between the constitutional identity of the Union and that of each of the Member States.

62. Returning now to the functional difficulty of the request for a preliminary ruling, I consider that the risk of the latter being ‘manipulated’, in the context of a *national* assessment in the event of an ‘*ultra vires* review’ in conjunction with an ‘identity review’, is sufficiently real to ask whether an alternative interpretation would be possible which would allow the difficulty in question to be overcome. In my view, an alternative reading would be possible, having regard to what appears to have been at the origin of this line of case-law, whilst at the same time making use of the possibilities afforded by the principle of sincere cooperation (Article 4(3) TEU). Ultimately, it would involve taking advantage of the virtues of the ambiguity that seems to be inherent in the request for a preliminary ruling, to which I have already alluded.

63. It must be borne in mind that the commitment, so to speak, to refer a question to the Court of Justice for a preliminary ruling appears to have been an innovation introduced in the judgment of the BVerfG of 6 July 2010 (*Honeywell*) with the intention, as has been widely acknowledged, of keeping open the dialogue between the courts, in such a way that that dialogue may continue as long as the importance of the case requires. (31) Seen in that light, the fact of providing for a reference for a preliminary ruling to be made could be said to entail a sincere intention that the interpretation that may be given by the Court of Justice of EU law should serve as a sufficient basis for resolving the claims raised in the proceedings before the national court. It is to be hoped that, in the end, any subsequent review on the basis of the constitutional criteria would not, in the circumstances of the case, reach conclusions that were in open contradiction with the answer given by the Court of Justice.

64. Furthermore, it is clear that the principle of sincere cooperation also applies to courts and tribunals, including the two courts concerned in these important proceedings. (32) That mutual loyalty is all the more important in those cases in which the supreme court of a Member State, responsibly exercising its constitutional jurisdiction, and without going into other considerations, raises, in a spirit of sincere cooperation, its concern about a given decision of an EU body. The principle of sincere cooperation is of course binding on the national court, as it is part of its own responsibility to give that principle form and effect. As far as the Court of Justice is concerned, that principle, in the circumstances of this case, entails a two-fold obligation.

65. In the first place, substantively, that principle requires the Court of Justice to respond in the greatest spirit of cooperation possible to a question which has itself been referred to it in the same spirit; there cannot be the least doubt about that. In particular, if the national court, in explaining the extent to which the act in question causes it to have serious doubts as to validity or interpretation, has been particularly plain-spoken, that will have to be interpreted as an expression of its level of concern in that regard. I understand that that is the sense of the German Government’s appeal for ‘constructive’ treatment of the present case. (33)

66. In the second place, and this is above all what is in issue now, the principle of sincere cooperation requires a particular effort on the part of the Court of Justice to provide an answer on the substance to the questions referred, notwithstanding all the difficulties to which ample reference has been made here. That would require the Court of Justice to proceed on the basis of a particular assumption regarding the ultimate fate of its answer.

67. In concrete terms, that means that the Court of Justice, rather than immediately excluding such a possibility, would in fact trust the national court — once it has considered the answer provided by the Court of Justice to the question raised and without prejudice to the exercise of its own duties — to accept that answer as decisive in the proceedings before it. Sincere cooperation involves an element of trust and that trust may take on a particular meaning in this case. It must be borne in mind that the present request for a preliminary ruling appears to have been cast by the BVerfG in terms which permit the Court of Justice to expect, within the limits of what is reasonable, that the BVerfG will accept as sufficient and final the answer it receives and as providing it with sufficient criteria to enable it to decide on the claims raised in the main proceedings. (34) The ‘road map’ which the BVerfG itself outlined in *Honeywell* could support this approach. (35)

68. In so far as that analysis of the situation is acceptable, I take the view that the Court of Justice should, in approaching the functional problem to which this request for a preliminary ruling gives rise, disregard possibilities other than the one I have just outlined, inasmuch as they can only be regarded as extreme cases, scarcely conceivable, and, ultimately, an insufficient basis for refusing to give an answer on the substance in response to the questions raised in the present request for a preliminary ruling.

69. Accordingly, as an intermediate conclusion, I propose that the Court of Justice should declare that this request for a preliminary ruling may be answered on the substance.

V – Admissibility

70. A number of Member States, as well as the institutions which have submitted observations in the present case, have raised the issue of admissibility in relation to the BVerfG's principal questions, maintaining that they concern a question of validity that affects an act, the OMT programme, which does not have legal effects vis-à-vis third parties.

71. Stated very briefly, those interested parties emphasise the non-final, even 'preparatory', nature of the act of 6 September 2012, by which the Governing Council decided to adopt the essential criteria that would govern the OMT programme and whose final adoption is still pending. As the ECB has confirmed, certain criteria were decided upon at that meeting but not the OMT programme as such. It will be possible to review the validity of that programme only when the Governing Council formally adopts the programme and publishes it, in accordance with the rules pertaining to legal acts laid down in the Statute of the ESCB and of the ECB.

72. It is argued that the case-law of the Court of Justice lends support in principle to that interpretation. The case-law concerning actions for annulment precludes challenges to acts which have no legal effects. (36) In the precise context of references for preliminary rulings, the Court of Justice has in the past declared inadmissible references entailing a review of the validity of an 'atypical' act, which has not been published and which does not have binding effects. (37) Various parties participating in these proceedings submit that that is the case of the OMT programme, which was announced by the President of the ECB at the press conference on 6 September 2012 and whose principal technical features were subsequently described in a press release.

73. For the reasons which I shall set out below, it none the less seems to me that the OMT programme is an act whose validity may be examined in preliminary ruling proceedings. There are two separate reasons for that conclusion. In the first place, I believe that it is decisive that the act in question is one which sets out the broad features of a general programme for action by an EU institution. In the second place, it seems to me necessary to take into account the particular importance which public communication has assumed for the ECB in the implementation of monetary policy today.

74. From the very beginning the Court of Justice has required that, for an act to be actionable, two conditions must be met: the act must be binding and must be capable of producing legal effects. (38) Those conditions are cumulative, although sometimes, for example when the validity of recommendations is reviewed in preliminary ruling proceedings, they are presented as alternatives. (39)

75. I consider, however, that those two conditions are assessed differently depending on who is the direct addressee of the contested act. As I shall now explain, the case-law has, in the application of those conditions, adopted a more flexible approach where the impugned act is a measure outlining a general programme of action, intended to bind the actual authority which is the author of the decision, than where the act contains a measure which creates rights and obligations with regard to third parties. The reason for that is that general action programmes of public authorities may take atypical forms and yet still be capable of having a very direct impact on the legal situation of individuals. On the other hand, measures whose direct addressees are individuals must meet particular conditions as to substance and form if they are not to be treated as non-existent.

76. A general programme of action, such as that at issue here, may be presented using atypical techniques, it may be addressed to the authority which is itself the author of the act, it may be in formal terms non-existent so far as concerns the world outside the authority, but the fact that it is capable of having a decisive impact on the legal situation of third parties justifies taking a non-formalistic approach when considering whether it should be treated as an 'act'. Otherwise, there would be a risk that an institution could undermine the system of acts and the corresponding judicial safeguards by disguising acts that are intended to produce external effects as general programmes.

77. The case-law of the Court of Justice has been particularly flexible when dealing with general action programmes of this kind which are capable of producing external effects.

78. The judgment in *Commission v Council* ('ERTA'), (40) given in 1971, is an important starting point since it considers, inter alia, the status of the proceedings of the Council relating to the negotiation and conclusion by the Member States of an international agreement. In the Council's view, those proceedings did not constitute, either by their form or by their subject-matter or content, an act open to legal challenge but were nothing more than a coordination of policies amongst Member States within the framework of the Council, without any intention to create rights, impose obligations or alter any legal position.

79. When it analysed the Council's arguments the Court of Justice stated that judicial review must be available in the case of 'all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects'. (41) Having examined the decision in issue, the Court of Justice principally drew attention to two characteristics: first, it was not simply the expression of a voluntary coordination, but reflected a course of action that was binding; (42) and, second, the provisions adopted in that decision were capable of 'derogating ... from the procedure laid down by the Treaty'. (43)

80. Similarly, and as a supplement to its ruling on the substance in the *ERTA* judgment (EU:C:1971:32), the Court of Justice took particular account of the *circumstances* in which the contested act was adopted. In addition to the objective aspect referred to above, the context in which an act is adopted may provide further indications which confirm either the author's intention that the act should produce effects vis-à-vis third parties or the fact that the author was aware of the potential external impact of the measure. The significance of the surrounding circumstances was highlighted by the Court of Justice in *France v Commission*, (44) in which it was accepted that an action could be brought in respect of an internal Commission instruction because it was distinguished from an ordinary service instruction 'both by the circumstances in which it was adopted and by the conditions under which it was prepared, drawn up and published'. (45)

81. Against the background of that case-law, I shall now go on to consider whether the act whose validity is questioned by the referring court is open to legal challenge.

82. At least in terms of its formal presentation, the OMT programme is a measure with atypical features. It was drawn up in the Governing Council of the ECB on 5 and 6 September 2012 and was recorded in the minutes of that meeting, which indicated that a description of its technical features would subsequently be given in a press release. Thus, details of the programme's technical features were given at a press conference held by the President of the ECB and a press release was subsequently published in English on the ECB's website. The publication and disclosure of the programme on the internet is the only 'official' written text available about the OMT programme if one discounts the draft Decision and Guideline, which the ECB has produced to the Court in these proceedings but which are still internal Bank documents awaiting final adoption and subsequent publication in the *Official Journal*. Those drafts describe in detail what had been spelled out in general terms, albeit with considerable precision, in the press release.

83. There is no doubt that the OMT programme is a decision with specific content, which was the subject of discussion over two days, and that the principal features of the programme were adopted within the Governing Council. Furthermore, the fact that the basic features of the programme were made public, both at the press conference and in written form on the ECB's website, confirms the obvious willingness of the ECB to make public what had previously been decided upon within the Governing Council. The measure in question is a general programme of action since it lays down the conditions on which the ECB will act in a situation in which the monetary policy transmission channels have become blocked but it is also a measure which aims to have an immediate external effect. Otherwise, it would not have been announced with the widest publicity possible at a press conference and its technical features would not have been published on the ECB's website.

84. Moreover, the circumstances surrounding the OMT programme appear to confirm that the ECB's objective was to 'intervene' in the markets, perhaps in an unconventional way, solely by making an announcement about the programme. The speech given by the President of the ECB on 26 July 2012 in London, referred to above, which stated that all the necessary measures would be taken to 'save the common currency', the press conference on 2 August 2012 following the meeting of the Governing Council of the same day and the situation affecting the government bond markets of various Member States at that time all confirm that the ECB's intention in making an announcement about the OMT programme was not just to give an account of internal work on an initiative that was still at the discussion stage but also to produce an effect by making an announcement about the creation of a potentially ambitious programme intended, so it is claimed, to put an end to some of the difficulties that the monetary policy transmission mechanism was experiencing at that time. The proof of that is the significant impact

which there is every indication that that announcement of the programme had on the financial markets, an impact which, according to the ECB and the Commission, is still being felt more than two years later.

85. It is also important to point out that the OMT programme entailed not the publication of a simple individual act but rather the announcement of a full normative programme, for the future, which included relatively precise conditions and whose purpose was regulatory. In view of the content of the programme, it may be added that on 6 September 2012 the ECB was not making an announcement about some decision of little consequence. On the contrary, details were published on that day of a measure which was clearly of great significance for the euro area and which was intended, although it was not yet complete, to last over time.

86. At this point it is appropriate to refer to the second of the circumstances which seem to me relevant for the purpose of rejecting the objections to admissibility. Account must be taken of the fact that the present case concerns an act of public communication on the part of a central bank, under which approval is given to a monetary-policy programme. Central bank communications are not comparable to those of other institutions, whether they be political or technical. Over the last 30 years, central banks have undergone significant developments that have affected their instruments of monetary policy, which the experts all agree now include public communication.

87. It is a fact that the communications strategy of central banks has become one of the central pillars of contemporary monetary policy. Given the impossibility of predicting rational behaviour on the markets, an effective way of managing expectations and, therefore, of ensuring the effectiveness of monetary policy is to exploit all the possibilities of public communication (communications strategies) open to central banks. (46) Taking account not only of the reputation of central banks and the information available to them but also of the powers afforded them by conventional monetary policy instruments, announcements, opinions or statements by the representatives of central banks generally play a crucial role in the development of monetary policy today. (47)

88. There is no doubt that the ECB now also includes communication among its key monetary policy tools. The ECB has in the past acknowledged that itself and nobody would deny that the regular communication to the public by the ECB of the broad lines of its policy, or of particular opinions which may indicate future courses of action on its part, represents a central pillar of its activities. (48) To my mind, this element, which is very particular to the ECB and characteristic of it, plays a highly significant role in defining the nature of an act like the announcement of the OMT programme on 6 September 2012.

89. Finally, and in view of the great importance of the ECB's communication strategy, it is appropriate to bear in mind that the alternative — namely declaring an act such as the OMT programme not to be actionable — would entail the risk of excluding a significant number of decisions of the ECB from all judicial review merely on the ground that they have not been formally adopted and published in the Official Journal. If a measure does not need to be published officially in its standard form in order to produce effects — because it is enough to publicise it at a press conference or through a press release for it to have an impact outside the institution —, the system of acts and judicial review provided for in the Treaties could be seriously undermined if it were not possible to review the legality of that measure.

90. Accordingly, I take the view that, in the specific case of actions of this kind by the ECB, in which acts of public communication assume special significance for the effectiveness of monetary policy, an act such as the one called in question by the BVerfG, as it was announced on 6 September 2012, constitutes — having regard not only to its content and the actual effects that it may produce but also to the circumstances in which the measure was adopted — an act of an institution whose validity may be called in question in the framework of proceedings for a preliminary ruling under Article 267 TFEU.

91. I therefore consider that the objections to admissibility raised against the questions referred for a preliminary ruling on validity must be rejected. It will therefore not be necessary to rule on the question on interpretation which the referring court has put forward in the alternative.

VI – The questions referred for a preliminary ruling

A – The first question referred: Articles 119 TFEU and 127(1) and (2) TFEU and the limits of the ECB's monetary policy

92. By its first question, the BVerfG airs its doubts about the validity of the OMT programme announced by the ECB on 6 September 2012, specifically asking the Court of Justice whether it is a measure that is incompatible with Articles 119 TFEU and 127(1) and (2) TFEU and whether it encroaches upon the competence of the Member States.

93. In its order for reference, the BVerfG, after extensive and detailed reasoning, concludes that there are sufficient grounds to support the view that the ECB has adopted an economic policy measure rather than a monetary policy measure. The BVerfG also finds there to be an ultra vires act in breach of the principle of conferral, which must determine the ECB's conduct. The BVerfG points to four aspects of the OMT programme which, in its view, confirm the aforementioned ultra vires act: conditionality, selectivity, parallelism and circumvention. The concerns of the referring court highlight, in more general terms, the question of the limits to which the powers of the ECB are subject in exceptional circumstances such as those of the summer of 2012.

1. Position of the interested parties

94. All the applicants in the main proceedings in essence concur that the Treaties should be interpreted as meaning that a programme such as that announced by the ECB on 6 September 2012 constitutes a measure of economic policy. In their opinion, the OMT programme disregards the mandate which primarily constrains the ECB to the objective of maintaining price stability, since it is a measure that has a direct impact on the financing sources of the Member States concerned, which places it in the area of economic policy. In their submissions, they refer repeatedly to the judgment in *Pringle*, (49) in which the Court stated that the creation of the ESM was an economic policy measure and refused to classify it as a monetary policy. The applicants in the main proceedings submit that, in view of the features common to the ESM and a programme such as OMT, the latter must also be classified as an economic policy measure.

95. Both Mr Gauweiler and Mr Huber place particular emphasis on the fact that the true objective of the OMT programme is, in their view, not to re-establish the monetary policy transmission channels but rather to 'save the euro' by means of the 'communitisation' or pooling of the debt of certain Member States, which in their submission is incompatible with the Treaties since it puts some Member States at risk of assuming the debts of other Member States. They submit that such a measure clearly goes beyond the 'support' for the economic policies of the Union and the Member States which the ECB may give under the Treaties.

96. Mr von Stein rejects the proposition that interest rates on sovereign debt markets were at artificial levels in the months preceding the announcement about the OMT programme. He submits that those interest rates merely reflected a genuine market price, in respect of which the ECB intervened, manipulating that price artificially, by announcing its willingness to buy the bonds of certain Member States. He argues that distorting the market in that way is not consistent with the mandate which the Treaties confer on the ECB, which is to maintain price stability.

97. Mr Bandulet emphasises that the OMT programme cannot make up for the structural shortcomings in the design of monetary union. He argues that that is not at all a competence that has been conferred on the ECB since, if it were otherwise, the democratic principle and the principle of the sovereignty of the people would be infringed.

98. The parliamentary group Die Linke also disputes that the ECB is competent to adopt the OMT programme, although it deploys different arguments. Die Linke emphasises the economic consequences which have followed from the successive financial assistance programmes in various Member States. The group maintains that those effects confirm that the ECB, in supporting those rescue packages through the implementation of the OMT programme, is involving itself in the economic policy of the Member States. Die Linke also invokes various provisions of the Charter of Fundamental Rights of the European Union in order to challenge the intervention of the Union and the ECB in the States that are subject to financial assistance programmes.

99. All the States that have participated in these proceedings, together with the ECB and the Commission ('the States and the institutions'), submit, in variously nuanced ways, that the OMT programme, as it was made known through the press release, is a monetary policy measure that is compatible with the competences conferred on the ECB by the Treaties.

100. The States and the institutions are also agreed on the fact that the ECB enjoys a broad discretion in the definition and implementation of monetary policy. The Court of Justice should acknowledge that broad discretion and recognise the objectives which the ECB set forth when announcing its OMT programme. The States and the

institutions accept that, in the framework of those objectives, the ECB may adopt unconventional monetary policy measures, provided that that is strictly necessary to achieve the objectives set. Specifically, both the Republic of Poland and the Kingdom of Spain submit that the OMT programme is consistent with the various aspects of the principle of proportionality.

101. The States and the institutions also all deny, contrary to the view expressed by the referring court, that it follows from the judgment in *Pringle* (EU:C:2012:756) that the OMT programme is an economic policy measure. In their view, *Pringle* recognises that economic policy and monetary policy are closely linked, with the result that an economic policy measure may have an impact on monetary policy and vice versa, without that altering the nature of the measure. In the present case, the fact that the OMT programme may have an impact on economic policy does not, in itself, convert that programme into an economic policy measure.

102. As regards the fact that the OMT programme may bring about artificial changes in prices on the government bond market, the Government of the Republic of Poland, the Commission and the ECB submit that all monetary policy has the aim of altering prices since it is an inherent function of monetary policy to have an effect on the markets by means of measures that modify certain patterns of behaviour, although always with the objective of fulfilling the mandate conferred on the Bank, in this case the maintenance of price stability.

103. The Federal Republic of Germany defends in principle the position that the OMT programme in the terms in which it is known is lawful. It has, however, stressed that currently all that exists is an announcement giving notice of that programme and that it will be necessary to wait until the programme is actually implemented in order to determine whether it is in fact a measure of economic policy or monetary policy. In any event, the Federal Republic of Germany submits that the ECB enjoys a broad discretion and that a measure would transgress the boundaries set by the Treaties only if it was obviously an economic policy measure. It also suggests that it would be helpful if the Court of Justice were to provide criteria that would permit the OMT programme to be implemented in a way compatible with the Treaties and, so far as possible, with the fundamental constitutional structures of the Federal Republic of Germany.

104. The ECB defends the legality of the OMT programme by referring to the events that occurred in the summer of 2012. At that time fears that the euro was reversible were spreading among investors, bringing about a marked spike in the interest rates paid in respect of the government bonds of various Member States. In that situation the ECB argues that it had lost its ability to implement monetary policy through the usual channels for monetary policy transmission. The resulting fragmentation of the sovereign debt markets, together with the financing difficulties experienced by various Member States (and also, by extension, the financial institutions of those States), was preventing the proper transmission of the ‘impulses’ or signals which the ECB normally sends out. In the ECB’s submission, those circumstances were grounds for adopting an unconventional monetary policy measure, such as the OMT programme. In short, the aim of the programme, according to the ECB, is not to facilitate the financing conditions of certain Member States, or to determine their economic policies, but rather to ‘unblock’ the ECB’s monetary policy transmission channels.

105. The ECB denies that the technical features of the OMT programme mask an economic policy measure. The programme’s ‘conditionality’ is, in the Bank’s view, essential in order to prevent implementation of the programme providing an incentive to the States concerned to cease carrying out the structural reforms necessary to improve their economic fundamentals. Similarly, the ECB argues that the ‘selectivity’ of the measures is inherent in the OMT programme since the disruption of the monetary policy transmission channels arose as a result of increases in the interest rates for the government bonds of certain Member States. In short, the ECB submits that the OMT programme contains safeguards that ensure it is linked to monetary policy and remains within the scope of the powers which the Treaties confer on the Bank.

2. Analysis

a) Preliminary observations

106. Before embarking on the analysis specific to the question raised by the BVerfG, it is appropriate to pause to consider two decisive aspects of the present case: (i) the status and mandate of the ECB, as defined in the Treaties, and (ii) the concept of ‘unconventional monetary policy measures’. Those two areas will provide us with the basic elements for assessing the legality of a programme such like OMT, which, according to the ECB, is among those unconventional monetary policy measures.

i) The status and mandate of the ECB

107. The ECB is the institution on which the Treaties confer responsibility for the exercise of the Union's exclusive competence in respect of monetary policy. The ECB and the national central banks constitute the ESCB, whose principal task, notwithstanding any measures that may be taken in 'support of economic policy', is to ensure 'price stability'. (50) Therefore, unlike other central banks, the ECB is characterised by the fact that it is constrained to a clear mandate that is closely linked to anti-inflationary goals. Both the *travaux préparatoires* relating to the Treaty of Maastricht (51) and studies of the history of monetary policy (52) confirm the importance of that mandate in the negotiations that culminated in the creation of the ECB.

108. Besides the fact that it must strictly adhere to the objective of ensuring price stability, a further characteristic of the ECB is that it has a high degree of functional as well as organic independence. (53) The Treaties stress on numerous occasions the independent nature of all the actions undertaken by the ECB, which should be considered in conjunction with the fact that the Statute of the ESCB and of the ECB is very difficult to amend, something which differentiates the Bank from the central banks around it, whose regulatory framework may be amended by the relevant national Parliaments. (54) That is not the case of the ECB, since any amendment of its Statute requires amendment of the Treaties. (55)

109. Just as is the case with national central banks, the ECB's independence is also intended to ensure that it is kept away from the political debate, there being an absolute prohibition on any instructions from other institutions or from the Member States. (56) Moreover, that detachment from political activity is necessary because of the extremely technical nature and high degree of specialisation characteristic of monetary policy. (57)

110. In fact, the Treaties confer on the ECB sole responsibility for framing and implementing monetary policy, for which purpose it is given substantial resources with which to undertake its functions. On account of those resources the ECB also has access to knowledge and particularly valuable information, which permits it to perform its tasks more effectively whilst also, over time, bolstering its technical expertise and reputation. Those features are essential for ensuring that monetary policy signals actually reach the economy since, as has previously been stated, one of the functions of central banks today is the management of expectations, and technical expertise, reputation and public communication are basic tools for carrying out that function.

111. The ECB must accordingly be afforded a broad discretion for the purpose of framing and implementing the Union's monetary policy. (58) The Courts, when reviewing the ECB's activity, must therefore avoid the risk of supplanting the Bank, by venturing into a highly technical terrain in which it is necessary to have an expertise and experience which, according to the Treaties, devolves solely upon the ECB. Therefore, the intensity of judicial review of the ECB's activity, its mandatory nature aside, must be characterised by a considerable degree of caution. (59)

112. Finally, it is important to point out that the ECB's monetary policy is implemented, as has been noted, through various 'transmission channels or mechanisms', by means of which the Bank intervenes in the market and fulfils its mandate of ensuring price stability. (60) In order to carry out its monetary policy, the ECB controls the monetary base of the euro area economy, which it does by transmitting the appropriate 'impulses' or signals, chiefly through the setting of interest rates, which will subsequently pass from the financial sector to firms and households. (61)

113. In this respect, to ensure the proper functioning of these transmission channels, the Statute of the ESCB and of the ECB confers on the ESCB an express competence to adopt a set of 'monetary functions and operations'. Of those operations, the ones provided for in Article 18(1) of the Statute are particularly relevant for the purposes of this case: Article 18(1) permits the ECB and the national central banks to 'operate in the financial markets by buying and selling outright (spot and forward) or under repurchase agreement and by lending or borrowing claims and marketable instruments, whether in euro or other currencies, as well as precious metals'.

114. However, as will be seen, a programme like OMT cannot be said to be among the ECB's ordinary monetary policy instruments. The OMT programme formally deploys one of the monetary operations mentioned above, but does so in a sufficiently unusual manner to warrant classification as an 'unconventional monetary policy measure'. I shall explain below to what that concept more specifically refers, how it has been justified by the ECB and the extent to which it is a means duly provided for in the Treaties.

ii) Unconventional monetary policy measures and classification of the OMT programme as such

– The ECB's view of unconventional monetary policy measures

115. The ECB defends the lawfulness of the OMT programme on the basis that it is a measure intended to 'unblock' the Union's monetary policy transmission channels. As has been explained above, those monetary policy transmission channels do not function as mechanisms producing immediate effect but as a framework through which the ECB sends out a series of 'impulses' or signals with a view to them reaching the real economy. According to the ECB, monetary policy may be affected by factors external to the transmission channels, factors which are liable to disrupt the proper functioning of the signals sent out by the ECB: an international political or economic crisis, or a significant change in oil prices, amongst other factors, may severely interfere with the 'impulses' that the ECB sends out via the monetary policy transmission channels.

116. When a situation of that kind occurs, the ECB considers it has competence to intervene using its own instruments with the aim of 'unblocking' those channels. In such a case the actions it takes are different from those which are part of the ECB's normal practice, since they can be said not to involve so much a 'standard' operation but rather an operation to 'unblock' and subsequently restore monetary policy instruments properly so-called. (62)

117. Both the ECB and the Member States that have participated in these proceedings maintain that it is legitimate to have recourse to unconventional measures of this kind as part of monetary policy. In fact, according to the documents before the Court, intervention of this sort has been used by the majority of central banks throughout the international financial crisis that began in 2008, (63) including, as is apparent from the present proceedings, by the ECB itself. (64) In the view of the ECB and those Member States, the Treaties do not prevent the ECB from exercising its powers to restore its monetary policy instruments when circumstances arise which significantly disrupt the normal functioning of the transmission channels. In the Commission's submission, action of that kind is compatible with the Treaties, provided that it is carried out prudently and is subject to safeguards.

118. On the basis of the foregoing considerations, it is appropriate to consider the precise nature of the OMT programme, as it was announced in the press release of 6 September 2012.

– The OMT programme as an unconventional monetary policy measure

119. The OMT programme belongs, formally, among the operations provided for in Article 18.1 of the Statute of the ESCB and of the ECB. It is clear that, in conferring power on the ESCB to buy claims and marketable instruments, that provision seeks, first and foremost, to ensure that tools are available to the ECB for controlling the monetary base, as a conventional means of maintaining price stability.

120. It should, however, immediately be added that the OMT programme uses the powers set out in Article 18.1 of the Statute in a way which is at some remove from the ECB's standard practice in carrying out its operations. It is clear that a selective measure, which is directed at one or more States of the euro area and which entails purchasing their bonds, without any previous quantitative limit being set, in the expectation that market financing conditions will improve, is at some remove from the ECB's standard practice.

121. As is stated in the press release of 6 September 2012, the OMT programme provides for intervention by the ECB on the secondary government bond market, enabling the Bank to purchase government bonds of euro area States that are subject to a financial assistance programme and that are presumably experiencing difficulties in raising loans. The premiss on which the OMT programme is based is the occurrence of an exogenous shock that disrupts the monetary policy transmission channels. That disruptive factor comprises, so the ECB reasons, a relatively sudden and virtually unbearable increase in the risk premia of certain euro area States, an increase which in principle does not reflect the macroeconomic reality of those States and which, as a result, prevents the ECB from transmitting its signals effectively and, therefore, from fulfilling its price stability mandate.

122. In view of the foregoing, I therefore consider that the OMT programme may be classified as an unconventional monetary policy measure, with the consequences that that will entail for the purposes of reviewing the measure.

b) The ECB's competences and the OMT programme

123. Having made the foregoing observations, I shall focus on two matters to which consideration must be given if the first question raised by the BVerfG is to be answered comprehensively.

124. In the first place it is necessary to consider whether a programme such as OMT may be classified as a monetary policy measure or is, instead, an economic policy measure and, therefore, prohibited so far as the ECB is concerned. In undertaking that assessment, the technical features pointed out by the BVerfG will each be individually considered. Thereafter, if it is possible to classify the OMT programme as a monetary policy measure, as I shall propose, it will be necessary to examine the programme in the light of the principle of proportionality within the meaning of Article 5(4) TEU.

i) The OMT programme and the economic policies of the Union and the Member States as a limit on the ECB's competences

– The Union's economic and monetary policies

125. As I have indicated, the BVerfG is asking whether the ECB, in approving the OMT programme, adopted an economic rather than a monetary policy measure, thereby encroaching upon the competence which Article 119(1) TFEU confers on the Council and the Member States.

126. If we consider primary EU law, Article 119(1) TFEU gives a brief description of the main components of the economic policy of the Union, stating that it is to be based 'on the close coordination of Member States' economic policies, on the internal market and on the definition of common objectives, and conducted in accordance with the principle of an open market economy with free competition'. Although the provision is general and thus ambiguous, it none the less provides the basic, defining, elements of those aspects of economic policy which fall within the Union's competence.

127. The Treaties are silent, however, when it comes to defining the exclusive competence of the Union in relation to monetary policy. The Court of Justice established that in its judgment in *Pringle* when it found itself obliged to use, as the sole point of reference, the monetary policy objectives laid down by the FEU Treaty. (65) The primary objective of EU monetary policy, price stability, and support for the general economic policies in the Union, form the principal criterion for defining monetary policy (Articles 127(1) TFEU and 282(2) TFEU). The Court of Justice confirmed that this was so in *Pringle*, in which the objectives ascribed to that policy were the sole criterion it used when determining whether or not an amendment of the Treaty fell within the sphere of monetary policy.

128. Despite the fact that, on the face of it, the Treaties provide only limited criteria, EU law has a number of useful interpretative tools at its disposal for the purpose of determining whether a decision falls within the sphere of the Union's economic policy or its monetary policy.

129. Although it may appear self-evident, it is important to make the point that monetary policy forms part of general economic policy. The division that EU law makes between those policies is a requirement imposed by the structure of the Treaties and by the horizontal and vertical distribution of powers within the Union, but in economic terms it may be stated that any monetary policy measure is ultimately encompassed by the broader category of general economic policy. That connection between the two policies was highlighted by the Court of Justice itself, and by Advocate General Kokott in her View, in *Pringle*, when it was stated that an economic policy measure cannot be treated as equivalent to a monetary policy measure for the sole reason that it may have indirect effects on the euro. (66) That reasoning is entirely valid if turned around, as has been pointed out by the ECB, the Commission and the majority of the Member States that have participated in these proceedings, since a monetary policy measure does not become an economic policy measure merely because it may have indirect effects on the economic policy of the Union and the Member States.

130. The fact that the Treaty refrains from providing a precise definition of the monetary policy of the Union is consistent with a functional view of the role of monetary policy, according to which every measure that is given effect through monetary policy instruments constitutes monetary policy. Therefore, if a measure belongs to the category of instruments which the law provides for carrying out monetary policy, there is an initial presumption that such a measure is the result of the Union's monetary policy being carried out. That is clearly a presumption that could be rebutted if, for example, the measure were to pursue objectives other than those specifically listed in Articles 127(1) TFEU and 282(2) TFEU.

131. Similarly, other provisions of the Treaty that relate to monetary policy provide relevant indications which serve to define that policy more fully. Thus, Articles 123 TFEU and 125 TFEU, which I shall consider more closely when addressing the second question referred for a preliminary ruling, lay down strict prohibitions of the financing of States, whether by means of monetary financing measures or by means of transfers between Member States. Those prohibitions confirm that monetary union, although it is an integral part of a Union founded on the value of solidarity (Article 2 TEU), (67) also seeks to maintain financial stability, for which purpose it is based on a principle of fiscal discipline and the principle that there is no shared financial liability (the ‘no-bailout’ rule). (68)

132. Therefore, in order for a measure of the ECB actually to form part of monetary policy, it must specifically serve the primary objective of maintaining price stability and it must also take the form of one of the monetary policy instruments expressly provided for in the Treaties and not be contrary to the requirement for fiscal discipline and the principle that there is no shared financial liability. If there are isolated economic-policy aspects to the measure at issue, the latter will be compatible with the ECB’s mandate only as long as it serves to ‘support’ economic policy measures and is subordinate to the ECB’s overriding objective.

– The OMT programme in the light of the criteria for defining the Union’s economic and monetary policies

133. Focusing now on the criteria which have been discussed above, it is appropriate to consider whether the OMT programme is, in nature, a monetary policy measure or an economic policy measure. The referring court has drawn attention to a number of matters that could show that the measure in question is one of economic policy and I shall focus individually on each of them. However, as a preliminary point, it is important to consider the objectives which the ECB has advanced to justify the OMT programme and which have been called in question by the BVerfG and rejected by the applicants in the main proceedings. After considering those grounds and how they should be classified legally, I shall examine the matters singled out by the referring court: conditionality, parallelism, selectivity and circumvention.

– The objectives of the OMT programme

134. As the ECB has explained in detail in its written observations, in the summer of 2012 a number of exceptional circumstances converged in the euro area economy: excessive risk premia applied to various Member States, high volatility in government bond markets, fragmentation of credit on the interbank market and an increase in the financing costs of firms as a result of all the foregoing factors. Those events were also strongly influenced by the increased nervousness of the markets in the face of a possible disintegration of the single currency, whether as a result of one or more of the countries of the euro area leaving the currency or as a result of the direct dissolution of the euro and a return to national currencies. Those facts have not, in essence, been denied by the parties that have participated in these preliminary ruling proceedings.

135. According to the ECB, the circumstances described above disrupted the conventional instruments of monetary policy. Interest rates on government bonds were being set on the basis not of the quality of the security, but of the location of the debtor. Territorial fragmentation of the interest rates applied to bonds issued by States of the euro area, on conditions that in some cases did not reflect the underlying macroeconomic situation of the States concerned, was, so the ECB argues, a serious obstacle to its monetary policy, which depended on the use of various means or channels of transmission. When the sovereign debt market, one of the central monetary policy transmission channels, was so seriously disrupted, the ECB claims that it lost a lot of the scope available to it for carrying out the task conferred on it by the Treaties.

136. In view of the situation mentioned above, the OMT programme has, so the ECB continues, a two-fold objective, the first direct or immediate and the other indirect: in the first place the aim is to reduce the interest rates demanded for a Member State’s government bonds in order, subsequently, to ‘normalise’ the interest rate differentials and thus restore the ECB’s monetary policy instruments.

137. Some of the applicants in the main proceedings contend that the ECB’s objective was not as described above but was rather to ‘save the single currency’ by making the ECB into a lender of last resort for the Member States, thereby redressing some of the design faults of monetary union. I do not believe that there are conclusive arguments which support that contention. The fact that in the ECB’s *Monthly Bulletin* for August 2012, attention was drawn, in connection with the measures that were subsequently announced on 6 September 2012, to the relationship between the programme and the ‘irreversibility of the euro’ does not appear to me sufficient to call

in question the ECB's defence of the objectives of the OMT programme which it put forward when the programme was announced and which it has consistently restated up to the time of these proceedings. (69)

138. Consequently, in view of the facts and the objectives put forward by the ECB, there are, to my mind, sufficient grounds for considering that the stated objectives of the OMT programme may in principle be accepted as legitimate. Both the events of the summer of 2012 and the situation of various States on the sovereign debt markets appear to be beyond dispute: it should also be acknowledged that, in any evaluation of its assessments as to matters of fact, the ECB should be afforded a considerable degree of deference.

139. Accordingly, I take the view that the objectives of the OMT programme as they are explained by the ECB may be accepted, starting from the acknowledgement that, in announcing the OMT programme, it was the ECB's intention to pursue a monetary policy objective. Whether an analysis of the content of the OMT programme will lead to the opposite conclusion is another matter. The BVerfG draws attention in that regard to various matters which, in its view, mean that the OMT programme is an economic policy measure: I shall now turn my attention to those matters.

– Conditionality and parallelism

140. The BVerfG deals with two aspects that may be examined together. The fact that the OMT programme is made conditional upon the existence of a financial assistance programme of which one or more States whose bonds will be purchased on the secondary market are beneficiaries, with the ECB linking the objectives of the OMT programme to those of the financial assistance programme, confirms, according to the BVerfG, that the ECB's action falls within the sphere of economic policy and not that of monetary policy. (70) That is the stance taken by all the applicants in the main proceedings and although their reasoning is not always the same, they are agreed as to the conclusion.

141. The ECB argues that the OMT programme will be activated only if a euro area State is subject to an ESM or EFSF financial assistance programme, so that the conditionality imposed in that programme will ensure that implementation of the OMT programme does not lead Member States to be dilatory in adopting the necessary structural reforms, a phenomenon commonly described as 'moral hazard'. (71) According to the ECB, it will not be possible to interpret the purchase of government bonds in the secondary market as a measure offering unconditional support because, in essence, the ECB's intervention will take place only as long as the structural reforms prescribed by the relevant financial assistance programme are being undertaken. For the ECB, any risk of interference in economic policy is offset by the neutralising effect on the 'moral hazard' to which a substantial intervention by the ECB on the secondary government bond market might give rise.

142. The argument of the applicants in the main proceedings is not without merit. Although the ECB has argued that linking the OMT programme to compliance with the financial assistance programmes is a condition that is set by the ECB itself, from which it is possible to be released at any time, the applicants in the main proceedings, particularly Die Linke, have stressed that the ECB is not referring simply to compliance with an assistance programme from which it is wholly detached. On the contrary, the ECB actively takes part in those financial assistance programmes. Those applicants submit that the ECB's argument is seriously undermined by its 'dual role', as (i) holder of a claim the basis for which is a government bond issued by a State and (ii) supervisor and negotiator of a financial assistance programme applied to the same State, with macroeconomic conditionality included.

143. I am substantially in agreement with that position. Although in the press release of 6 September 2012 the ECB links implementation of the OMT programme to effective compliance with the obligations in the context of a financial assistance programme, the ECB's role in such programmes goes beyond its simply unilaterally endorsing them. The rules of the ESM, (72) but also the experience of financial assistance programmes which have been implemented or which are still ongoing, amply demonstrates that the ECB's role in the design, adoption and regular monitoring of those programmes is significant, not to say decisive. (73) Moreover, as Die Linke have submitted in their written and oral arguments, the conditionality imposed in the framework of the financial assistance programmes which have hitherto been granted and in which the ECB has been actively involved has had a considerable macroeconomic impact on the economies of the States concerned, as well as in the euro area as a whole. That finding confirms, so Die Linke argues, that the ECB, in participating in the assistance programmes concerned, has been actively involved in measures which, in certain circumstances, might be perceived as going beyond 'support' for economic policy.

144. The ESM Treaty does in fact confer multiple responsibilities on the ECB in the course of a financial assistance programme, including participation in negotiations and monitoring. (74) The ECB is therefore involved in the elaboration of the conditionality imposed on the State requesting assistance whilst, subsequently, it also takes part in the task of monitoring compliance with conditionality, which is crucial if the programme is actually to continue and eventually to come to an end. The ECB shares this task with the Commission, although it is the latter on which the ESM Treaty confers even more important functions.

145. For the OMT programme to be classified as a monetary policy measure, it is essential, as has already been pointed out, that the objectives come within the framework of that policy and that the instruments used are those proper to monetary policy. Linking the OMT programme to compliance with financial assistance programmes may be justified by the, undoubtedly legitimate, interest there is in eliminating any hint of ‘moral hazard’ that may result from a significant intervention by the ECB on the government bond market. However, the fact that the ECB plays an active part throughout the course of financial assistance programmes may make the OMT programme, inasmuch as it is unilaterally linked to those programmes, into something more than a monetary policy measure. Unilaterally making the purchase of government bonds subject to compliance with conditions when those conditions have been set by a third party is not the same as doing so when the ‘third party’ is not really a third party. In those circumstances, the purchase of debt securities subject to conditions may become another instrument for enforcing the conditions of the financial assistance programmes. The mere fact that the purchase may be perceived in that way — as an instrument which serves macroeconomic conditionality — may be sufficient in its impact to detract from or even distort the monetary policy objectives that the OMT programme pursues.

146. It is true that the ECB will always be able to bring pressure to bear on a State subject to a financial assistance programme by making, albeit unilaterally, the OMT programme subject to compliance with the conditionality agreed under the ESM. However, it is necessary to draw a distinction between (i) a measure intended to exclude ‘moral hazard’, such as a unilateral requirement to comply with the conditionality imposed in a financial assistance programme, and (ii) a measure which, when considered in its context, includes the ECB as one of the institutions negotiating and, above all, directly co-supervising that conditionality. (75)

147. In short, in so far as the OMT programme is part of the broader context in which the ECB participates in financial assistance programmes agreed under the ESM, I consider that the ECB, in creating and announcing the OMT programme, did not properly weigh up the impact of its involvement in those financial assistance programmes on the monetary nature of the OMT programme.

148. That being so, it is appropriate to consider what immediate consequences follow for the classification of the OMT programme as part of the monetary policy of the Union.

149. To my mind, the conclusion reached above does not prevent the ECB from regularly participating in financial assistance programmes as they are provided for in the ESM Treaty. The fact that a financial assistance programme is adopted in no way predetermines the future existence of the necessary conditions for the ECB to activate the OMT programme.

150. However, if exceptional circumstances were to arise which were grounds for activating the OMT programme, it would, for that programme to retain its function as a monetary policy measure, be essential for the ECB to detach itself thenceforth from all direct involvement in the monitoring of the financial assistance programme applied to the State concerned. Nothing would prevent the ECB from being kept informed and even from being heard, (76) but under no circumstances would it be possible for the ECB, in a situation in which a programme such as OMT is under way, to continue to take part in the monitoring of the financial assistance programme to which the Member State is subject when, at the same time, that State is the recipient of substantial assistance from the ECB on the secondary government bond market. Accordingly, it is my view that this functional distance between the two programmes must be maintained if the OMT programme is to retain its character of a monetary policy measure, aimed exclusively at restoring the monetary policy transmission channels.

151. In sum, and from the angle that has just been analysed, I consider that the OMT programme is to be regarded as a monetary policy measure, provided that the ECB refrains — once the time has come to put that programme into effect — from any direct involvement in the financial assistance programmes of the ESM or the EFSF.

– Selectivity

152. The second feature which casts doubt on the monetary nature of the OMT programme is, according to the BVerfG, the programme's so-called 'selectivity', which is taken to mean a measure that is applicable to one or more States, but in any event not to all the States of the euro area. This feature is not consistent with the usual practice of the ECB, whose measures are directed at the euro area as a whole and are not targeted at territorial segments of the economy. Moreover, selectivity, according to the BVerfG, will distort financing conditions on the market, which may place the government bonds of other Member States at a disadvantage.

153. I do not find that objection convincing since it does not demonstrate that selectivity in itself makes the OMT programme an economic policy measure. The ECB has argued persuasively that interest rate differentials with the capacity to block the monetary policy transmission channels were to be found in the government bonds of one group of States. That situation is at the basis of the OMT programme since otherwise it would not be necessary to link implementation of OMT to a financial assistance programme. Therefore, selectivity is merely the logical consequence of a programme seeking to remedy a situation in which the monetary policy transmission channels are blocked in various Member States. The fact that there may be changes in the market or that the government bonds of other States may be placed at a disadvantage does not affect the classification of the OMT programme as a monetary policy measure, since it is only by targeting the programme at the bonds of the States concerned that the efficacy of the programme can be ensured.

154. I therefore consider that the fact that the OMT programme applies selectively to one or more States of the euro area does not call in question the programme's classification as monetary policy within the meaning of Article 127(1) TFEU and Article 282(2) TFEU.

– Circumvention

155. Finally, the BVerfG considers that the OMT programme may circumvent the requirements and conditions laid down in the financial assistance programmes, since the requirements to which the ESM's purchase of government bonds in the secondary market are subject, which are laid down in Articles 18 and 14 of the ESM Treaty, are stricter than those imposed by the OMT programme. In the BVerfG's view, that permits the ECB to purchase government bonds in market conditions that are more advantageous for the State concerned, thereby circumventing the conditions to which the ESM is subject.

156. It is difficult to accept that argument in the wake of the examination of the objections relating to conditionality and parallelism that has been undertaken above. Once it has been shown, as I have done above, that the independence of the OMT programme vis-à-vis the financial assistance programmes, as described above, operates as an element guaranteeing the monetary-policy nature of the measure in question, it is logical, as a consequence of that guarantee, that it should be the ECB which establishes its own requirements in respect of the purchase of government bonds.

157. In my view, problems may arise not so much from the abstract fact that the requirements may be different for each institution but rather from the specific requirements that the ECB may establish. However, considered exclusively from the perspective which the BVerfG has adopted, it is my view that the fact that the ECB is not subject to the same requirements as those to which the ESM is subject does not convert the OMT programme, as a matter of principle, into an economic policy measure.

– Intermediate conclusion

158. In the light of the reasoning set out, I take the view that the OMT programme, as described in the press release of 6 September 2012, falls within the monetary policy for which the Treaty makes the ECB responsible and does not constitute an economic policy measure, provided that, throughout the whole period of implementation of any OMT programme, the ECB refrains from any direct involvement in the financial assistance programmes to which the OMT programme is linked.

ii) Review of the proportionality of the OMT programme (Article 5(4) TEU)

159. The conclusion that the OMT programme, as it has been announced, is an integral part of the ECB's monetary policy says nothing about whether the measure is proportionate. In that regard, a number of the parties taking part in these proceedings have defended the programme, referring to the constituent elements of the proportionality test.

160. Where a competence is exercised in a way that is recognised to be unconventional, two conditions, as a minimum, must be met. In the first place, that exercise, above all, must not infringe other provisions of primary law. The answer to the second question referred, which concerns the prohibition of monetary financing of the Member States, will focus on that issue.

161. In the second place, a review of whether the principle of conferral has been complied with from the perspective of the principle of proportionality (Article 5(4) TEU) is essential in the case of a measure which is presented as unconventional and as being justified on account of exceptional circumstances. Whilst the Union must always observe the principle of proportionality when exercising its competences deriving from the principle of conferral (Article 5(4) TEU), observance of the principle of proportionality is particularly important in a case which concerns the exercise of competences that are being exercised on account of exceptional circumstances.

162. That said, the point should be made here that the present case gives rise to a particular difficulty when it comes to assessing the proportionality of the measure at issue. As has been explained above, the OMT programme is a measure that is *incomplete*, not only because its formal adoption has been put off until an unspecified point in the future, but also because, apart from that consideration, the measure has not yet actually been implemented in an individual case. It is true that the basic features of the programme are available to us, but it is clear that they are far from achieving the degree of completeness that would be appropriate if they were regulated in a legal act. A full review of proportionality will be possible only in the light of any such regulation.

163. That being so, the review which the Court of Justice carries out in this regard will have to focus principally on the measure as it was announced in September 2012, although it may on occasion be necessary to give certain pointers, in relation to the technical features set out by the ECB, to address the possibility of the OMT programme actually being put into effect.

164. Having made those observations, I shall begin my analysis by drawing attention to a matter which to my mind is fundamental and must be addressed prior to the review of proportionality: the statement of reasons that is essential for the OMT programme. Only after that shall I conduct a thorough analysis of the technical features of the OMT programme in the light of the three components of the principle of proportionality: suitability, necessity and proportionality *stricto sensu*.

– Statement of the reasons concerning the circumstances justifying the OMT programme, the premiss of proportionality

165. All the EU institutions have a duty to state the reasons on which their legal acts are based (Article 296(2) TFEU). Underlying that duty are reasons of transparency but also reasons relating to judicial review: effective judicial review will be possible only if there is an explanation of the reasons on which a public decision is based. The Court of Justice has referred on many occasions to the dual purpose of the duty to state reasons, (77) which is also applicable in the case of a measure such as that in issue in these proceedings.

166. In fact, the ECB, if it is to apply a programme like OMT in conformity with the principle of proportionality, will have to present all the elements necessary to justify the Bank's intervention on the secondary government bond market. In other words, it is essential that the ECB starts by identifying the exceptional and extraordinary circumstances that led it to adopt an unconventional measure such as the one with which we are concerned here.

167. In that respect, the ECB will, in the first place, have to provide precise information showing there to be a significant change in market conditions giving rise to external disruption affecting the monetary policy transmission channels. Likewise, the ECB has to show to what extent its transmission channels have been blocked, it not being sufficient merely to make a statement to that effect. The ECB must put forward matters which show that such a blockage exists. Finally, it is necessary to make those reasons publicly known, ensuring that the aspects which are strictly necessary and whose disclosure might jeopardise the effectiveness of the programme remain confidential, but starting from the basis that, as a general rule, the reasoning will be fully transparent.

168. Those criteria will have to be scrupulously observed by the ECB, as they form the essential basis for any subsequent judicial review.

169. Applying those criteria, it is clear that the press release of 6 September 2012, which in essence is intended to describe the features of the OMT programme, includes almost no references to the specific circumstances that

justify adopting a programme such as OMT. It is only the introductory remarks with which the President of the ECB, Mr Draghi, opened the press conference on 6 September 2012 which make it possible to ascertain what the emergency is that might justify adopting the programme. (78) That means that, as regards the reasons stated for the measure as it was announced, we shall have to work with the data which were made available at that time. For the rest, the ECB has, in the context of the present proceedings, provided ample additional information on the emergency with which it claimed to be confronted, as has been described in points 115, 116, 117, 134, 135 and 136 of this Opinion.

170. Accordingly, for the purposes of the review of the proportionality of the OMT programme, I shall use the information that has been provided in these proceedings, subject to the important caveat that, should the programme be implemented, both the legal act which gives it form, and its implementation, must satisfy the requirements relating to the statement of reasons, as they have been described in points 166 and 167 of this Opinion.

– The suitability test

171. Turning now to the individual components of the principle of proportionality, it should first be ascertained whether an unconventional measure such as the OMT programme is, objectively, an appropriate measure for achieving the monetary policy aims which it pursues. It is therefore a question of examining the coherence of the measure, taking account of the causal connection between the means and the objectives. (79)

172. None of the parties that have participated in these proceedings has denied that the announcement of the OMT programme brought about a significant reduction in the interest rates for the bonds of certain Member States. That consequence confirms, in their view, the suitability of the programme, since, if the mere announcement of its existence produced an almost immediate effect in the markets, it is to be expected that implementation of the OMT programme in one or more Member States would have at least a similar impact. That assertion is obviously subject to all kinds of contingencies, which at this time it is impossible to predict, but, as a starting point, the effect of the announcement of the OMT programme is an indication of the effectiveness of the measure.

173. It is clear, however, that the effects of the announcement of the OMT programme cannot form the sole criterion by reference to which the appropriateness of the measure is to be assessed, since they are only indicative, although of some significance. It is therefore necessary to examine in greater detail (whilst recognising that the ECB has a broad discretion) whether the various components of the OMT programme are objectively appropriate for achieving the objectives sought.

174. While the immediate objective of the OMT programme is the reduction of the interest rates paid in respect of the government bonds of certain Member States, the means employed is a purchase of the government bonds of certain States of the euro area on the conditions set out in the press release of 6 September 2012. The purchase in question is subject to the precondition that either a full or a precautionary financial assistance programme is already in existence and the ECB restricts itself to buying bonds on the shorter part of the yield curve, in particular those with a maturity of between one and three years.

175. Looked at objectively, a programme like the OMT programme, which is centred on the purchase of government bonds, is, to my mind, appropriate for achieving a reduction in the interest rates on the government bonds of the States concerned. None of the parties taking part in these proceedings has denied that that is so. The reduction in question permits the States concerned to return to some degree of financial normality and, as a result, the ECB is able to carry out its monetary policy in conditions of greater certainty and stability. That finding does not mean that such financial normality does not entail risks, a matter which will be considered below. However, what falls to be analysed in the appropriateness test is the logical coherence between the means and the objective, something which, in my view, has been achieved in the present case.

176. I therefore consider that the OMT programme, as it was announced on 6 September 2012, is an appropriate measure for achieving the objectives pursued by the ECB.

– The necessity test

177. Although the measure under consideration here may pass the suitability test, the means used may none the less be excessive if compared with the other options that would have been available to the ECB. (80) Considered

from this angle, it is appropriate to examine whether the ECB has adopted a measure that was strictly necessary in order to achieve the objectives set by the OMT programme.

178. In the first place, the fact that the OMT programme is confined solely to those cases in which a Member State has had recourse to a financial assistance programme lends credence to the idea that the measure in question is limited and restricted to specific cases. The OMT programme is not a measure for intervening generally and in every circumstance in the secondary government bond market. Even when the monetary policy transmission channels have become blocked, it will be possible to activate the OMT programme only when a Member State is subject to a macroeconomic adjustment programme or a precautionary programme of the EFSF/ESM. That condition already considerably limits the number of possible cases in which the ECB will take action in the secondary government bond market: that is consistent with the fact that we are dealing here with an unconventional monetary policy measure, which is in itself exceptional and restricted to specific cases. The fact that the ECB has made activation of the programme conditional upon the previous adoption of a financial assistance programme confirms the exceptional nature of the measure and, moreover, makes it conditional — in my view correctly — upon a situation which is also exceptional.

179. Moreover, it is apparent from the documents before the Court that implementation of the OMT programme will, because of the very nature of the programme, be limited in time. As the French Republic has rightly pointed out, a programme such as OMT can only be short term in nature. (81) It is clear both from the press release and from the ECB's observations that the programme will apply, should the need arise, throughout the period of time necessary for the interest rates of the State or States concerned to return to the levels regarded as normal market levels. (82) The purpose of the OMT programme is not simply to reduce a State's financing costs but rather to return them to levels that reflect the macroeconomic reality of that State. Once that objective has been achieved, and once the transmission channels have been unblocked, implementation of the OMT programme comes to an end, in keeping with the fact that the measure is to be used only when strictly necessary.

180. Moreover, in a situation as delicate as the one in issue here, any change in the circumstances and, therefore, in their exceptional nature assumes significance for the purposes of the necessity test. In that respect, I take the view that the ECB's conduct in September 2012, which was limited to announcing the technical features of the programme, reflects an assessment of the development of the situation on the financial markets which is consistent with the requirements of the necessity test.

181. Finally, reference should be made to the possibility mentioned by the BVerfG that the OMT programme, if interpreted in conformity with EU law, could be subject to different technical characteristics from those set out in the press release of 6 September 2012, which could dispel the referring court's doubts as to the validity of the measure. It is appropriate to consider that possibility at this juncture, when applying the necessity test, since the existence of other, less restrictive, measures, such as those suggested by the referring court in point 100 of its order for reference, would result in the OMT programme failing that test.

182. It seems to me, however, that the other options suggested by the BVerfG would entail the risk of seriously calling into question the effectiveness of the OMT programme. As the ECB and the Commission have explained, it has to be accepted that setting an *ex ante* quantitative limit on purchases of government bonds would seriously undermine the effects which the intervention on the secondary market seeks to achieve, with the risk of triggering speculation.

183. Similarly, it seems to be correct that, if the status of preferential creditor were granted to the ECB, that would call into question the position of other creditors and, indirectly, the final impact on the value of the bonds on the secondary market. As the Commission has pointed out, the fact that the bonds of the State concerned are attractive to investors, rather than the opposite, would also increase demand for the bonds, with the resulting reduction in interest rates. Acknowledgment that the ECB does not have preferential creditor status contributes to ensuring a more effective normalisation of market prices for government bonds, which, in turn, contributes to ensuring their solvency in the medium and long term, with the resulting reduction in the risks entailed.

184. I therefore consider that the precautions introduced by the ECB are sufficient to support the conclusion that the OMT programme, in the terms described in the aforementioned press release, passes the necessity test, independently of the question whether the legal act that may ultimately adopt the programme confirms that finding.

– The test of proportionality *stricto sensu*

185. Lastly, it is appropriate to consider whether all the components of the measure at issue have been properly weighed up against one another, so as to ensure that the measure is not disproportionate.

186. In applying the test of proportionality *stricto sensu*, this third stage calls for a weighing-up exercise which, in the circumstances of the case, requires an analysis of whether the ‘benefits’ of the measure at issue outweigh the ‘costs’. (83) It obviously involves an examination that requires an assessment of all the benefits and costs, which may be represented as follows: on the one hand, the OMT programme permits the ECB to intervene in an exceptional situation in order to restore its monetary policy instruments and thus ensure that its mandate is effective; on the other hand, it is a measure which exposes the ECB to a financial risk, together with the moral hazard arising from the artificial alteration of the value of the bonds of the State concerned.

187. I would once again recall that the review of proportionality that is to be carried out in this case must acknowledge that the ECB enjoys a broad discretion. That means — particularly at the third stage of the review of proportionality — that the weighing-up exercise which the ECB is required to undertake in a situation such as that to which the OMT programme gives rise allows the ECB a broad margin of assessment, provided that no imbalance arises which is obviously disproportionate.

188. It must also be observed that it will be possible to make a definitive assessment of the proportionality *stricto sensu* of a programme such as OMT only once the programme has been activated and, in particular, in the light of the scale it may have. The observations made below are based on the information about the programme which was given in the press release.

189. The applicants in the main proceedings, like the BVerfG, have emphasised that implementation of the OMT programme exposes the ECB, and, in the last resort, the taxpayers of the Member States, to an excessive risk which could ultimately even lead to the institution becoming insolvent. That is obviously a high and extremely heavy cost which is capable of outweighing the benefits of the OMT programme.

190. As Mr Gauweiler’s representative has explained in some detail, implementation of the OMT programme would entail the ECB including in its balance sheet very large quantities of securities of dubious credit standing which, in the event of default, would lead to the ECB becoming insolvent. Thus, in placing no cap at all on the purchase of bonds, the OMT programme, so it is argued, makes that hypothesis into a real possibility, which confirms the disproportionate nature of the measure.

191. In that regard the ECB has argued in both its written and oral submissions that its intervention in the secondary government bond market will be subject to quantitative limits, albeit limits that are not set in advance or previously determined by law. According to the ECB, the OMT programme cannot be presented as a channel for limited purchases, since, if it were, that would contribute to provoking a bout of speculation which would severely undermine the programme’s objective. Likewise, if the ECB were to announce *ex ante* the exact volume of purchases, the measure would also be emasculated. Therefore, the ECB’s solution is to announce that no *ex ante* quantitative limits will be established as regards the volume of purchase, although without prejudice to the fact that it has its own quantitative limits internally, the amount of which cannot be disclosed for strategic reasons which, in essence, seek to ensure that the OMT programme is effective.

192. From the point of view of proportionality *stricto sensu*, I consider that the absence of any *ex ante* quantitative limit is not a factor which is sufficient in itself for the measure to be considered disproportionate.

193. Indeed, every transaction on a financial market involves a risk, which is assumed by all the actors taking part in the transaction. The returns which the financial markets offer investors are proportionate to the risks assumed, which are generally related to the scale of the likely success or failure of the investment. The government bond market, like any other financial market, is subject to the same logic. All the investors who are active on that market know that the success of their investment may depend on uncertain and unpredictable factors.

194. It is common knowledge that the central banks intervene in the sovereign debt market, since purchases of government bonds, or repurchase agreements in respect of those bonds, are among the monetary policy instruments which are a means of controlling the monetary base. When they intervene in that market, the central

banks always assume a degree of risk, a risk which was also assumed by the Member States when they decided to create the ECB.

195. On that basis, the objections concerning the excessive risk assumed by the ECB would be founded if the Bank were to undertake a volume of purchases that would *inevitably* lead it to a situation in which it is facing insolvency. However, for reasons which I shall now go on to explain, it does not seem that that is a situation to which the OMT programme will give rise.

196. As the OMT programme is designed, the ECB is admittedly exposed to a risk, but not necessarily to a risk of insolvency. A risk undoubtedly exists because the Bank will buy the bonds of a State which is in financial difficulties and whose capacity to meet the obligations on its debts is compromised. It is clear that the ECB assumes a risk when it acquires bonds from a State that is in such a situation but, to my mind, that risk is not, qualitatively, any different from other risks which the ECB may assume at other times in the course of its usual activity.

197. It is widely accepted that the fact that a State has liquidity problems does not necessarily mean that it is going to default on its debt. A State may be subject to temporary liquidity problems and, at the same time, be a solvent State. The successive crises throughout the 1980s and 1990s confirm that that is the case. (84) Therefore, the fact that the OMT programme is targeted at bonds issued by a State or States that are subject to a financial assistance programme does not automatically mean that those States are going to default, in full or in part, on their debt. The fact that the States concerned are subject to a conditionality intended to improve their macroeconomic fundamentals, together with the fact that they are integrated in an internal market in the framework of a Union based on a spirit of cooperation and loyalty amongst its members, rather tends to confirm that a financial assistance programme provides the State concerned with sufficient support to enable it to meet its obligations in the future.

198. Moreover, the indirect objective of the OMT programme, the repair of the monetary policy transmission mechanism, is achieved by the interest rates on government bonds being reduced to levels regarded as consistent with the market and the macroeconomic situation of the State concerned. The ECB has stated on many occasions that the objective of the OMT programme is not to reduce interest rates on government bonds to a point where they are on a par with those of other Member States but rather to reduce them to levels regarded as consistent with the market and the macroeconomic situation, which, in turn, will permit the ECB to make effective use of its monetary policy instruments. That means that, precisely because of activation of the OMT programme, it may be assumed that the State concerned will be able to issue debt on terms which are more sustainable for its finances and which, as a consequence, will increase its chances of meeting its obligations. In other words, the ECB's intervention should contribute, objectively, to ensuring that the State is able to meet its financial obligations in the future, thereby reducing the risk which the ECB assumes in activating the OMT programme.

199. Finally, the existence of objective quantitative limits on the volume of purchases would tend to confirm the limited scale of the risk. As the ECB itself has acknowledged, those limits will exist; they are not made public for strategic reasons but they serve to reduce the Bank's exposure. Similarly, the ECB has made clear that if it detects an excessive increase in the volume of debt issued by a Member State covered by the OMT programme, it will suspend operations under the programme. In other words, if a State decides to take advantage of the opportunity afforded it by the ECB's secondary-market bond purchases to take on excessive debt — albeit on conditions that are more advantageous than those obtaining before the ECB's intervention —, the Bank will not assume that risk. All that tends to confirm that, if the ECB itself were facing possible insolvency, the OMT programme would be discontinued. In other words, the ECB will not assume risks which expose it to the danger of insolvency.

200. Obviously that is an assessment that relates to a scenario in which the OMT programme is implemented. However, I consider it essential, if the strict proportionality of that programme is to be confirmed, that the limitation of risks as explained by the ECB should actually be put into practice once the time comes to implement the programme.

201. That said, and taking account of the reasoning set out above, I consider that the ECB, in announcing the OMT programme, weighed up the benefits and costs appropriately.

– Intermediate conclusion

202. In summary, and in view of the considerations set out above, the OMT programme decided upon by the ECB, as it results from the technical features described in the press release, does not infringe the principle of proportionality. Accordingly, the OMT programme may be considered lawful, provided that, should the programme be implemented, the requirements regarding the statement of reasons and proportionality are strictly complied with.

c) Answer to the first question referred for a preliminary ruling

203. Accordingly, in response to the first question referred by the BVerfG, I consider the OMT programme to be compatible with Article 119 TFEU and Article 127(1) and (2) TFEU, provided that, in the event of that programme being implemented, the ECB

– refrains from any direct involvement in the financial assistance programmes to which the OMT programme is linked, and

– complies strictly with the obligation to state reasons and with the requirements deriving from the principle of proportionality.

B – *The second question referred: compatibility of the OMT programme with Article 123(1) TFEU (prohibition of monetary financing of the States of the euro area)*

204. By its second question, the BVerfG asks whether the OMT programme, in authorising the purchase on the secondary market by the ECB of bonds of States that are members of the euro area, infringes the prohibition laid down in Article 123(1) TFEU, under which the purchase directly from the Member States of debt instruments is prohibited.

205. According to the BVerfG, although the OMT programme formally complies with the condition expressly set out in Article 123(1) TFEU, which concerns solely the purchase of debt instruments in the primary market, the programme none the less, in its view, may circumvent the prohibition concerned, since the ECB's interventions on the secondary market, just like purchases on the primary market, in fact represent financial assistance by means of monetary policy. In support of that view, the BVerfG refers to various technical features of the OMT programme: the waiver of rights, the risk of default, the retention of the bonds until maturity, the possible time of purchase and the encouragement to purchase in the primary market. According to the BVerfG, those are all clear indications that the effect is to circumvent the prohibition laid down in Article 123(1) TFEU.

1. Position of the parties taking part in these proceedings

206. The applicants in the main proceedings submit, deploying arguments which to a large extent coincide, that the OMT programme infringes Article 123(1) TFEU. In that respect, they share the doubts of the referring court concerning those specific aspects of the programme which are said to confirm that the programme circumvents the prohibition laid down in Article 123(1) TFEU.

207. Mr Huber's particular concern is that the purchase of government bonds on the secondary market gives rise to circumvention of the prohibition in Article 123(1) TFEU, specifically the prohibition in the last part of the provision. Mr Bandulet stresses what he regards as the excessive risk assumed by the ECB in making purchases such as those provided for in the OMT programme, whilst also criticising the 'collectivisation' of losses that it involves, which entails a breach of the Treaties and of the 'no bail-out principle'.

208. Mr von Stein also contends that the effect of the programme is to circumvent the prohibition, further pointing to the impact of a measure such as the OMT programme on the EU market. He submits that a massive purchase of government bonds would distort competition in the internal market and would also entail an infringement of Article 51 TFEU and of Protocol No 27 on the internal market and competition.

209. All the States that have participated in these proceedings, together with the Commission and the ECB, contend that the OMT programme is compatible with Article 123(1) TFEU, maintaining that purchases of government debt instruments are expressly provided for in the Treaties. They point out that Article 123(1) TFEU prohibits only purchases of government debt instruments directly from a Member State, whilst Article 18.1 of the

Protocol of the ESCB and of the ECB expressly empowers the ECB and the central banks of the Member States to carry out operations of that kind.

210. At the same time, however, the French Republic, the Italian Republic, the Kingdom of the Netherlands, the Republic of Poland and the Portuguese Republic, together with the Commission and the ECB, recognise that the final part of Article 123(1) TFEU also includes a prohibition on circumvention, in other words a prohibition on entering into transactions which have the same effect as a direct purchase of government bonds. That interpretation is confirmed, so they argue, by Regulation No 3603/93, specifically by the seventh recital in the preamble thereto.

211. In that respect, various States, such as the Republic of Poland, the French Republic and the Kingdom of the Netherlands, together with the Commission submit that the ECB would not circumvent the prohibition in Article 123(1) TFEU if it were guaranteed that the bond issued by the State concerned had reached a price under market conditions. In those circumstances, provided that the measure had a monetary policy objective, there would be no infringement of Article 123(1) TFEU.

212. In that respect, the States participating in these proceedings, the Commission and the ECB deny that the features of the OMT programme referred to result in the programme being incompatible with Article 123(1) TFEU. The terms in which those technical features are described in the press release and the drafts of a decision concerning the OMT programme which the ECB has drawn up but whose adoption is still pending, confirm the ECB's particular concern to avoid any distortion of the market contrary to Article 123(1) TFEU. Specifically, attention is drawn, as evidence of the precautions taken by the ECB, to the fact that the purchase of debt is subject to the requirements of monetary policy, to the fact that there is no prior announcement indicating the time or the volume of the purchase, to the fact that it is possible to suspend or limit purchases depending on the volume of debt issued by the State concerned, to the ECB's refusal to accept debt restructurings and to the existence of an 'embargo period' between the issue date and the date of purchase by the ECB on the secondary market.

213. Finally, the Federal Republic of Germany seeks from the Court of Justice an interpretation of Article 123(1) TFEU which may be reconciled with the constitutional identity of the Member States. After drawing attention to the context in which this reference has been made, the Federal Republic of Germany submits that the interpretation of Article 123(1) TFEU must also comply with the constitutional requirements of the Member States.

2. Analysis

214. Taking a similar approach to the one adopted in my answer to the previous question, I shall start by placing the prohibition in Article 123(1) TFEU in the broader context of its position in the scheme of economic and monetary union. I shall then address the question of the compatibility of the OMT programme with that provision, considering individually each of the technical features to which the referring court draws attention.

a) The prohibition of monetary financing of the Member States (Article 123(1) TFEU) and the purchase of government bonds by the ECB

215. The economic and monetary union which comprises the Union today is governed by a set of principles relating both to its objectives and to its boundaries, which overall represent its 'constitutional framework'. Because of the significance of those principles, the Treaties expressly entrench them, making them into mandatory provisions that are inviolable by the institutions and the Member States, which may be amended only by means of an ordinary Treaty-amendment procedure. Although, from among those objectives, attention should be drawn to the mandate of maintaining price stability and achieving financial stability (Articles 127(1) TFEU and 282 TFEU), the most relevant restrictions are the prohibition on assuming the commitments of Member States (Article 125 TFEU) and the prohibition of monetary financing of the Member States (Article 123 TFEU).

216. It is the second of those prohibitions with which we are concerned here but, obviously, a precise understanding of that prohibition can be achieved only if consideration is given to its origin, the system of which it forms part and the objectives which underlie it. I shall briefly consider matters below, while drawing for support on the findings which the Court of Justice and the Advocate General (EU:C:2012:675) have already made in respect of Article 123 TFEU in the *Pringle* case (EU:C:2012:756).

217. The preparatory documents which culminated in the Treaty of Maastricht, in which the provision that is now Article 123 TFEU (formerly Article 104 of the Treaty establishing the European Community) first appeared, show

that the main concern of the negotiators responsible for fashioning the institutional framework of economic and monetary union was the maintenance of sound budgetary discipline which would not undermine the smooth functioning of the single currency. (85) The possibility of there being Member States with very fragile public finances was regarded as a situation that was scarcely compatible either with stable growth in the euro area or with the limited monetary policy tools available to the ECB. As the States of the euro area transferred their monetary policy competences to a common institution whilst at the same time retaining their competences in economic matters, it was essential to provide for the means necessary to ensure strict financial discipline in the States of the euro area. (86) That concern gave rise to the rules on budgetary discipline provided for in Article 126 TFEU, whereby the Member States are subject to certain budgetary deficit objectives, and also to the prohibitions in Articles 125 TFEU and 123 TFEU, which prevent, respectively, the financing of Member States by other States or their financing by the ECB or the central banks of the Member States.

218. Article 123 TFEU therefore reflects a very real concern on the part of those who drew up the institutional framework for economic and monetary union, which is why it was decided to introduce into primary law an absolute prohibition on any forms of financing States which could jeopardise the objectives of fiscal discipline laid down in the Treaties. One of those prohibited forms is so-called 'monetary financing', whereby a central bank, the institution with power to issue money, purchases a State's debt instruments. It is clear that this form of financing may jeopardise that State's ability to meet its financial obligations in the medium and long term, while it may also be a significant source of price inflation. Since a common economic and monetary policy presupposes the existence of States with healthy public finances and a policy whose priority is the maintenance of price stability, it is obvious that, in such circumstances, a monetary financing mechanism significantly impairs those objectives.

219. The foregoing considerations lead me to think that the prohibition of monetary financing contributes, at Union level, as the Court of Justice has already stated in *Pringle* when referring to Article 125 TFEU, 'to the attainment of a higher objective, namely maintaining the financial stability of the monetary union'. (87) In short, the prohibition in question assumes the status of a fundamental rule of the constitutional framework that governs economic and monetary union, exceptions to which must be interpreted restrictively.

220. Similarly, a reading of Article 123 TFEU in its context confirms not only the importance of the principle underpinning the prohibition, but also its restrictive nature. In contrast with Article 125 TFEU, which prohibits Member States from being 'liable for' or 'assuming' the commitments of another Member State, Article 123 TFEU is drafted in stricter terms. That contrast between the two provisions was highlighted by the Court of Justice in *Pringle*, (88) which confirmed the compatibility with Article 125 TFEU of measures for the granting of credit between Member States, an activity which, by contrast, is expressly prohibited by Article 123 TFEU, as it rules out 'overdraft facilities or any other type of credit facility'.

221. However, when Article 123 TFEU is interpreted contextually, that also results in a significant qualification regarding the scope of the prohibition. That concerns, as will be explained below, the particular treatment prescribed for transactions whereby the ECB and the central banks of the Member States purchase government bonds of the Member States.

222. An issue of government securities is one of the principal financing sources available to a State. A person who acquires government bonds from an issuing State is, by definition, financing that State, directly or indirectly, and does so for consideration that makes the legal transaction into a sort of loan. The holder of the government bond has a right to seek repayment of a debt from the issuing State, thus converting it into a creditor of the State. The State issues the instrument subject to an interest rate initially set at the time of issue and determined on the basis of supply and demand. The transaction entered into by the two parties, the issuing State and the purchaser of the government bond, therefore has the same structure as the granting of a loan. All that explains sufficiently why Article 123(1) TFEU includes a final clause, which also prohibits 'the purchase directly from [the Member States] by the European Central Bank or national central banks of debt instruments'.

223. That part of the provision was originally added in the final stage of the drafting of the Treaty of Maastricht, (89) and its inclusion can be understood only if regard is had to Article 18.1 of the Statute of the ESCB and of the ECB. As has been explained above, that provision of the Statute enables the ECB and the central banks to operate in the financial markets by buying and selling outright or under repurchase agreement and by lending or borrowing claims and marketable instruments. Operations of that kind are fundamental and essentially serve the purpose of control by the ESCB of the monetary base of the euro area; they include operations relating to the purchase of government bonds in the secondary market. (90)

224. Therefore, the final part of Article 123(1) TFEU must — as the ECB affirmed in response to questions raised at the hearing — be interpreted in conjunction with Article 18.1 of the Statute of the ESCB and of the ECB, since only in that way is there legal cover for a traditional monetary policy measure consisting in the purchase of government bonds on the secondary market. Without the final part of Article 123(1) TFEU, Article 18.1 of the Statute of the ESCB and of the ECB would have to be interpreted as precluding transactions in government bonds on the secondary market, which would deprive the Eurosystem of a vital tool for the ordinary conduct of monetary policy.

225. That said however, it is clear that, given the importance of Article 123 TFEU, it would not be sufficient for the ECB to confine itself to purchasing government bonds on the secondary market in order to avoid infringing the prohibition in that provision. I rather take the view that, in the interpretation of Article 123 TFEU, the focus must be particularly on the substance of the measure. That approach, frequently used by the Court of Justice in interpreting provisions of the Treaties, should also be applied in the case of Article 123 TFEU, as has, moreover, been acknowledged by all the Member States participating in these proceedings, by the Commission and by the ECB itself.

226. That concern is also reflected in secondary legislation, specifically in Regulation No 3603/93, which was adopted before the establishment of the ECB and which makes express mention of the prohibition on circumventing the rule in the provision concerned. The seventh recital to Regulation No 3603/93 states that the Member States must take appropriate measures to ensure, in particular, that ‘purchases made on the secondary market [are not] used to circumvent the objective of that Article’. (91)

227. Accordingly, I take the view that Article 123(1) TFEU not only prohibits direct purchases on the primary market but also prevents the ECB and the national central banks from undertaking operations on the secondary market whose effect is to circumvent the abovementioned prohibition. In other words, the Treaty does not prohibit operations on the secondary market but it does require that, when the ECB intervenes on that market, it does so with sufficient safeguards to ensure that its intervention does not fall foul of the prohibition of monetary financing.

228. Having clarified those points, consideration should now be given to whether the OMT programme, under which the ECB intervenes on the secondary government bond market, may, despite observing the letter of the final part of Article 123(1) TFEU, entail a measure which circumvents the prohibition set out in that provision.

b) The OMT programme and its compatibility with the prohibition laid down in Article 123(1) TFEU

229. As a preliminary point, before examining the OMT programme specifically from the angle of the prohibition on monetary financing of the Member States laid down in Article 123(1) TFEU, I should like to make clear that this answer starts from the assumption that, in any future implementation of the OMT programme, the principle of proportionality will, as I have explained in my proposed answer to the first question, be observed. That is the basis on which a number of the considerations which I put forward below are to be understood.

230. As I have already noted, the BVerfG, like the applicants in the main proceedings, is of the view that the OMT programme infringes Article 123(1) TFEU since it circumvents the prohibition laid down therein. In that regard, the referring court points to a series of technical features which, in its view, bear out that conclusion. The States participating in these proceedings, the Commission and the ECB challenge the BVerfG’s assessment, relying on those very same technical features.

231. As will be seen below, the doubts of the BVerfG are based on a particular interpretation of the press release of 6 September 2012. The ECB has rejected that interpretation and has produced evidence in support of its arguments. In its view, the point of those technical features is in fact that they should operate as a set of guarantees intended to prevent circumvention of Article 123 TFEU.

232. Having made those points, I shall now examine individually the technical features to which the referring court has drawn attention.

i) Waiver of rights and *pari passu* status

233. The full or partial waiver of claims securitised in government bonds of the State subject to the OMT programme is the first feature which, according to the BVerfG, could render the programme contrary to

Article 123(1) TFEU. In the referring court's view, as in that of a number of the applicants in the main proceedings, the fact that the ECB and the central banks do not have the status of preferential creditor but rank *pari passu* and may be obliged to accept a full or partial waiver in the context of a restructuring agreement, (92) makes the measure into an indirect means of financing the debtor State.

234. I do not find that argument convincing. In the first place, it must be borne in mind that the risk of a full or partial waiver relates only to a future and hypothetical situation entailing the restructuring of the debtor State's debt and is not, so to speak, an intrinsic component of the OMT programme. As I have already explained in points 193 and 194 of this Opinion, the assumption of risk is inherent in a central bank's activity, so that an event such as that described by the referring court cannot become, merely because it might conceivably occur, a necessary consequence of implementation of the programme.

235. Moreover, the ECB has stated in its written observations that, in the context of a restructuring subject to CACs, it will always vote against a full or partial waiver of its claims. In other words, the ECB will not actively contribute to bringing about a restructuring but will seek to recover in full the claim securitised on the bond. The fact that the ECB acts with a view to preserving its claim in full confirms that the aim of its conduct is not to grant a financial advantage to the debtor State but to ensure that the latter meets the obligation it has entered into.

236. Finally, I think that the point should also be made that a purchase by the ECB, as a non-preferential creditor, of the debt securities of a Member State will inevitably involve a degree of distortion of the market, which appears to me, however, to be tolerable from the point of view of the prohibition in Article 123(1) TFEU. By contrast, as has been explained in point 183 of this Opinion, purchases made with the status of preferential creditor deter other investors, since they send out the message that a significant creditor, in this case a central bank, will be given preference over other creditors in the recovery, with the impact that that will have on demand for bonds. Accordingly, I take the view that *pari passu* clauses may be regarded as a means that seeks to ensure that the ECB disrupts the normal functioning of the market as little as possible, which, ultimately, involves a further guarantee of compliance with Article 123(1) TFEU.

237. I therefore consider that the fact that the ECB might be obliged — in the hypothetical event of a restructuring of a Member State's debt — to waive, in full or in part, its claims securitised in government bonds, as a result of the OMT programme being activated, does not mean that the programme amounts to a monetary financing measure contrary to Article 123(1) TFEU.

ii) Default risk

238. The BVerfG also points out that a purchase of government bonds with a, to some extent foreseeably, low credit rating exposes the ECB to an excessive default risk and is therefore incompatible with Article 123(1) TFEU. Although the referring court itself recognises that the assumption of risk is inherent to the activity of a central bank, it considers that the Treaties do not authorise exposure to losses of a significant amount.

239. Once again, I refer to the reasoning set out in points 193 to 198 of this Opinion, in which I dealt in some detail with the assumption of risks by the ECB. To my mind, that reasoning may perfectly well be applied to the present aspect of the case, since, as has been observed above, the fact that there is a possibility — which purely on principle cannot be discounted — of the ECB's insolvency or a Member State's default does not convert the risk, on that ground alone, into a certainty. The fact that a programme for the purchase of government bonds exposes the ECB to a risk is, as one might expect, inherent in this kind of operation and, consequently, doubts as to legality need arise only when the technical conditions of the programme, or its subsequent specific implementation, confirm that the ECB is clearly faced with a default scenario.

240. In fact, the technical features of the OMT programme do not suggest that the ECB is exposed, with any degree of foreseeability, to a scenario like the one depicted by the BVerfG. It should be recalled that the central objective of the OMT programme is to stabilise the interest rates applicable to certain government bonds with the ultimate aim of restoring the instruments of monetary policy. However, the immediate objective (the reduction of the financing costs of the State concerned) itself contributes to that State recovering its ability to meet its obligations in the medium and long term. The framework in which the OMT programme would be accorded is intended to eliminate or at least reduce such a risk. As I have already pointed out in point 197 of this Opinion, the fact that, considered as a whole, the transactions announced in the OMT programme confirm the ECB's intention of guarding against or preventing more or less irrational processes which generate or significantly increase risks,

tends to establish that a measure such as that at issue does not entail circumvention of the prohibition in Article 123 TFEU.

241. I consider, in short, that that intention on the part of the ECB has been sufficiently established for it to be concluded that a purchase of government bonds — even ones with a low credit rating — which may expose the ECB to a degree of risk of default, is not as such contrary, in the circumstances described, to the prohibition of monetary financing laid down in Article 123(1) TFEU.

iii) Holding the bonds until maturity

242. The BVerfG also asserts that holding government bonds until maturity may conflict with Article 123(1) TFEU, since it reduces the number of bonds circulating on the secondary market, thereby disrupting the normal development of market prices.

243. It is true, as the BVerfG has argued, that if the ECB were to purchase government bonds under an obligation to hold them until maturity, that would give rise to a significant distortion on the secondary market for government securities. The secondary government bond market would have to reckon with the presence of an investor — the ECB — holding a substantial portfolio of government bonds which would not circulate on that market, regardless of the way in which their market price developed.

244. The ECB has, in response, emphasised that at no point in the press release of 6 September 2012 is it stated that government bonds purchased under the OMT programme will be held until maturity. (93)

245. The ECB's arguments appear to me to be conclusive. That is not only because the Bank has declared that it is not its intention to hold the government bonds it purchases until maturity but also because it is established that that was the practice followed in earlier programmes in which the ECB was active on the secondary government bond market. (94) It is logical that that should be the case, since the ECB has explained that intervention on the secondary market must be characterised by a considerable degree of flexibility, which permits it to implement the OMT programme and, at the same time, carry out transactions which do not result in it making losses and which do not distort the market overmuch. To my mind, the flexibility with which the ECB wishes to proceed, as it is described in the draft Decision, is consistent with the requirements referred to above. Furthermore, the fact that the OMT programme concerns exclusively transactions in bonds with a maturity of between one and three years tends to confirm that the ECB has taken precautions to avoid both the risk of losses and the distortion of the market.

246. Finally, it is clear that the OMT programme in the form we know it does not contain anything which suggests that there is an express obligation, either in the press release of 6 September 2012 or in the event of the programme being implemented, to hold the government bonds until maturity. The BVerfG's misgivings in that regard are thus unfounded.

iv) Time of purchase

247. The referring court also points out that the fact that the ECB purchases government bonds on the secondary market on a large scale and only a short time after their issue has an effect similar to that of a direct purchase in the primary market: it submits that that is contrary to Article 123(1) TFEU.

248. Admittedly, a purchase on the secondary market that is made seconds after the issue of the bonds on the primary market could completely blur the distinction between the two markets, although, formally, the purchase has taken place on the secondary market. This is not a possibility that can entirely be ruled out, since, as has been explained in various written and oral observations submitted in these proceedings, a transaction on the secondary market may in fact take place barely moments after the purchase made directly from the issuing State.

249. The ECB has insisted that the BVerfG's concern in this regard is unfounded since transactions under the OMT programme will be subject to a so-called 'embargo period', by virtue of which the Eurosystem will not carry out any transactions until a given number of days have passed since the issue, although that number will not be announced in advance. The ECB argues that the embargo period permits a market price to form for the relevant bonds and that it will thus not intervene at the time of issue but some days later, once a market price has formed.

250. It seems to me that the BVerfG's concern is not unfounded in view of the possibility, to which Mr Bandulet alludes, of the transactions taking place at virtually the same time: proceeding in that way would, in practice, circumvent the prohibition in Article 123(1) TFEU. The ECB itself appears to share that view, as it has repeatedly asserted that it has not made purchases of that kind in the past and that it will not make them under the OMT programme. (95)

251. There is nothing in the press release, however, which permits the conclusion to be drawn that a particular 'embargo period' will be observed.

252. In my view, any implementation of the OMT programme must, if the substance of Article 123(1) TFEU is to be complied with, ensure that there is a real opportunity, even in the special circumstances in issue here, for a market price to form in respect of the government bonds concerned, in such a way that there continues to be a real difference between a purchase of bonds on the primary market and their purchase on the secondary market.

253. Lastly, however, the point should be made that it is not essential for the 'embargo period' in question to be precisely determined and publicised in advance. On the other hand, as the ECB has rightly pointed out, while it is necessary to avoid an extremely short period which would contravene Article 123(1) TFEU, it is also necessary to avoid a period that is too prolonged, which might result in an overlap with other ongoing operations, with the result that the OMT programme would be rendered much less effective. It seems permissible that the ECB should have a broad discretion with regard to the precise definition of those periods, provided that those periods actually provide an opportunity for the price of the bonds to be substantially in line with market values.

254. It is therefore my view that, if the OMT programme is to be compatible with Article 123(1) TFEU, it must, in the event of it being activated, be implemented in such a way that it is possible for a market price to form in respect of the government bonds concerned.

v) Encouragement to purchase newly issued bonds

255. Finally, the BVerfG points out that an announcement that the OMT programme is to be activated in a particular case will have the effect of encouraging purchases of newly issued bonds, thus acting as a magnet to investors, which would make the ECB into a 'lender of last resort', with the consequent assumption of the risks which that would entail.

256. Both the ECB and the Commission contend that this assessment is based on an incorrect premiss, since it presupposes that there will be a public announcement before the ECB starts buying bonds. The press release of 6 September 2012 does not indicate that the ECB will proceed in that way; it is rather the reverse, since a prior, detailed announcement specifying the exact point at which such purchases are to be undertaken would severely undermine the objectives of the OMT programme.

257. I concur with the position taken by the ECB and the Commission. There is nothing in the press release of 6 September 2012 which indicates that the ECB will give detailed notice in advance either of the features of the specific programme it intends to implement or of the exact point at which its operations will commence. On the contrary, the previous practice of the ECB in the context of similar programmes, as well as the part of the draft Decision on the OMT programme concerning 'embargo periods', show that the Bank will proceed with particular caution when intervening on the secondary market, in order to forestall speculative behaviour that would severely undermine the efficacy of the OMT programme.

258. The referring court's objection could be more readily accepted if the ECB were actually pursuing a strategy of detailed public communication which would provoke immediate changes on the market at a given time, as the result of the ECB's previous announcement. In my view it is unlikely that that course of action will be taken and the ECB's previous practice bears that out.

259. That said, it should, however, be pointed out again that it is almost inevitable, in view of the characteristics of the OMT programme, that implementation of the programme to some extent includes an incentive to investors to purchase bonds on the primary market. Although the immediate objective of the OMT programme is to reduce to normal levels the interest rates required of certain Member States, with the indirect aim, of course, of unblocking the monetary policy transmission channels, it is obvious that such normalisation presupposes an increased demand on the primary market. That is why the incentive to purchase is practically inherent in the OMT programme.

260. It is thus of fundamental importance that such effects on economic operators are compatible with the objective which the OMT programme, were it implemented, would be expected to achieve: that brings us once again to the importance of compliance with the principle of proportionality, including from the perspective of the prohibition under consideration here.

261. Accordingly, I consider that, on the basis of the press release of 6 September 2012, there are not sufficient grounds to suggest that putting the OMT programme into effect will, as a result of its activation and announcement, amount to a disproportionate encouragement to purchase newly issued bonds.

3. Answer to the second question referred for a preliminary ruling

262. In conclusion, and in response to the second question referred by the BVerfG, I consider that the OMT programme is compatible with Article 123(1) TFEU, provided that, in the event of the programme being implemented, the timing of its implementation is such as to permit the actual formation of a market price in respect of the government bonds.

VII – Conclusion

263. In the light of the foregoing, I propose that the Court of Justice answer the questions referred for a preliminary ruling by the Bundesverfassungsgericht as follows:

(1) The Outright Monetary Transactions (OMT) programme of the European Central Bank, announced on 6 September 2012, is compatible with Article 119 TFEU and Article 127(1) and (2) TFEU, provided that, in the event of that programme being implemented, the ECB

– refrains from any direct involvement in the financial assistance programmes to which the OMT programme is linked, and

– complies strictly with the obligation to state reasons and with the requirements deriving from the principle of proportionality.

(2) The OMT programme is compatible with Article 123(1) TFEU, provided that, in the event of the programme being implemented, the timing of its implementation is such as to permit the actual formation of a market price in respect of the government bonds.

1 Original language: Spanish.

2 Judgment 126, 286, pp. 303 and 304.

3 The actual wording of Mr Draghi's speech was as follows: 'When people talk about the fragility of the euro and the increasing fragility of the euro, and perhaps the crisis of the euro, very often non-euro area Member States or leaders underestimate the amount of political capital that is being invested in the euro.'

And so we view this, and I do not think we are unbiased observers, we think the euro is irreversible ...

But there is another message I want to tell you.

Within our mandate, the ECB is ready to do whatever it takes to preserve the euro. And believe me, it will be enough.'

For the full text of Mr Draghi's speech, see <http://www.ecb.europa.eu/press/key/date/2012/html/sp120726.en.html>.

4 Points 17 to 32.

5 BVerfGE, 89, 155 (1992).

6 123 BVerfGE 267 (2009).

7 2 BvR 2661/06.

8 It is enough to refer, by way of example, to the arguments explaining why the concept of ‘constitutional identity’ under national law cannot be equated with ‘national identity’ under Article 4(2) TEU (point 29 of the order for reference).

9 See the dissenting opinions of Judge Lübbe-Wolff and Judge Gerhardt in respect of the decision to make the present reference for a preliminary ruling. In particular, see the arguments of Judge Lübbe-Wolff (point 28) and those of Judge Gerhardt (points 14 to 18)

10 Point 25 of the order for reference.

11 Points 26 and 27 of the order for reference.

12 To this effect, see also the observation made in point 11 of the dissenting opinion of Judge Lübbe-Wolff, referred to above.

13 The Court of Justice has stated on many occasions that the preliminary ruling procedure cannot be used as a procedure for the delivery of advisory opinions. According to the case-law, the rationale for a request for a preliminary ruling is not that it enables advisory opinions on general or hypothetical questions to be delivered but rather that it is necessary for the effective resolution of a dispute (see, inter alia, judgments in *Djabali*, C-314/96, EU:C:1998:104, paragraph 19, *Alabaster*, C-147/02, EU:C:2004:192, paragraph 54, and *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraph 42).

14 See, inter alia, Craig, P., ‘The ECJ and ultra vires action: A conceptual analysis’, *Common Market Law Review* (2011) 48; Kumm, M., ‘Who Is the Final Arbiter of Constitutionality in Europe?’, *Common Market Law Review* (1999), 36; Millet, F.-X., ‘L’Union européenne et l’identité constitutionnelle des États membres’, LGDJ, Paris, 2013; Payandeh, M., ‘Constitutional review of EU law after Honeywell: Contextualizing the relationship between the German Constitutional Court and the EU Court of Justice’, *Common Market Law Review* (2011) 48.

15 See, inter alia, in addition to the decisions of the BVerfG cited above in footnotes 5 to 7, the judgments of the French Constitutional Council of 27 July 2006 and 9 June 2011 (Decisions Nos 2006-540 DC and 2011-631); the declaration of the Spanish Constitutional Court of 13 December 2004, 1/2004; the judgments of the Italian Constitutional Court 183/1973 and 168/1991; the judgment of the Danish Supreme Court of 6 April 1998 (I 361/1997); the judgment of 11 May 2005 of the Polish Constitutional Court (K 18/04) or the judgment of the Supreme Court of the United Kingdom of 22 January 2014 ([2014] UKSC 3).

16 Sunstein, C., *One Case at a Time. Judicial Minimalism on the Supreme Court*, Ed., Harvard University Press, Cambridge, 2001.

17 On this point, see Martinico, G., ‘Preliminary Reference and Constitutional Courts: Are You in the Mood for Dialogue?’, in Fontanelli, F., Martinico, G., and Carrozza, P., *Shaping Rule of Law through Dialogue: International and Supranational Experiences*, Europa Law Publishing, Groningen, 2010; Alonso García, R., *Justicia Constitucional y Unión Europea*, 2nd ed.,

Thomson-Civitas, Madrid, 2014; Ukrow, J., ‘Von Luxemburg lernen heißt Integrationsgrenzen bestimmen (Anmerkungen zur Vorlage-Entscheidung des Bundesverfassungsgerichts vom 14. Januar 2014)’, *Zeitschrift für Europarechtliche Studien*, 2014, p. 122; Mayer, F., ‘Multilevel Constitutional Jurisdiction’, in Bogdandy, A., and Bast, J. (ed.), *Principles of European Constitutional Law*, 2nd ed., Hart-Beck-Nomos, 2010; and Komárek, J., ‘The Place of Constitutional Courts in the EU’, (2013) *9 European Constitutional Law Review*.

18 See the case-law of the BVerfG cited in point 24 of the order for reference.

19 Point 33 of the order for reference.

20 Point 28 of the order for reference and the references therein to ‘constitutional identity’.

21 This is the literal wording of *Honeywell*, as reproduced by the referring court in point 24 of its order for reference.

22 *Honeywell*, paragraph 61.

23 On the reference for a preliminary ruling and its role in the EU judicial system, see Lecourt, R., *L’Europe des juges*, Bruylant, Brussels, 2008, and Ruiz-Jarabo Colomer, D., *La Justicia de la Unión Europea*, Thomson-Civitas, Madrid, 2011.

24 Points 5 to 12 of the Italian Government’s written observations.

25 See Funke, A., *Virtuelle verfassungsgerichtliche Kontrolle von EU-Rechtsakten: der Schlussstein?: Anmerkung zu BVerfGE 126, 286 (Honeywell bzw. Mangold-Urteil EuGH)*, *Zeitschrift für Gesetzgebung*, 26, No. 2, 2011, p. 172. See also Hobe, S., ‘Abkehr von Solange? — Die Entscheidungen des Bundesverfassungsgerichts zur Vorratsdatenspeicherung und zu Honeywell’, in Sachs, M., and Siekmann, H., *Der grundrechtsgeprägte Verfassungsstaat Festschrift für Klaus Stern zum 80. Geburtstag*, Duncker & Humblot, Berlin, 2012, p. 753.

26 Point 26 of the order for reference.

27 According to the BVerfG, in ‘borderline cases’ of transgressions of competence by the Union, the perspectives of each of those courts may not ‘fully’ coincide given that, on the one hand, the Member States remain the ‘masters of the Treaties’ and, on the other, EU law does not have a position (primacy or priority application) which is the same as that of the law of the Federal State vis-à-vis that of the Länder (supremacy).

28 Point 27 of the order for reference.

29 See Pizzorusso, A., *Il patrimonio costituzionale europeo*, Il Mulino, Bologna, 2012, Chapters IV and V.

30 See Vosskuhle, A., ‘Der Europäische Verfassungsgerichtsverbund’, TranState Working Papers No 16, Staatlichkeit im Wandel – Transformations of the State, Bremen, 2009, p. 22, citing Häberle, P., *Europäische Verfassungslehre*, 6th Ed., Nomos, Baden-Baden, 2009, p. 478 et seq.

31 See the initiative taken some months ago by a group of 35 lawyers proposing that a provision be included in the Law on the BVerfG as a reaction to the fact that no reference was made to the cooperative relationship in the judgment of 30 June 2009. That proposal is available at www.europa-union-de/fileadmin/files_eud/Appell_Vorlagepflicht_BVerfG.pdf.

32 See, to this effect, Streinz, R., 'Der Kontrollvorbehalt des BVerfG gegenüber dem EuGH nach dem Lissabon-Urteil und dem Honeywell-Beschluss', in Sachs, M., and Siekmann, H., *Der grundrechtsgeprägte Verfassungsstaat, Festschrift für Klaus Stern zum 80. Geburtstag*, Duncker & Humblot, Berlin, 2012, p. 978.

33 That is how the German Government has expressed itself in its written and oral submissions in these proceedings when emphasising the need for the Court of Justice to interpret the Treaties in this case in such a way that a conflict is avoided between the essential components of the constitutional order of the Member States and EU law.

34 The effects of the clause concerning respect for national identity (Article 4(2) TEU) in the context of a possible reference for a preliminary ruling from the BVerfG are a matter of debate (see Dederer, H.-G., 'Die Grenzen des Vorrangs des Unionsrechts', *JuristenZeitung*, 7/2014). See, in this regard, the Commission's suggestion concerning a precautionary extension of the European framework for review, perhaps by means of a further reference for a preliminary ruling in the unlikely event that the BVerfG, even if the legality of the EU act were confirmed by the Court of Justice's answer, should decide to declare that act ultra vires (point 37 of the Commission's observations).

35 In this regard, the BVerfG considers (point 66 of *Honeywell*) that the ultra vires review should not be detrimental to the principle of integration and should be exercised, to use its own words, 'cautiously' or 'moderately' ('zurückhaltend'). Above and beyond that, the particular nature of the interpretive methods of the Court of Justice should lead the national court itself not to substitute its own interpretive methods for those of the Court of Justice. That is the sense of the national court's statement that it would be legitimate for the Court of Justice to have an 'expectation' that possible mistakes should, to a certain degree, be tolerated ('Anspruch auf Fehlertoleranz').

36 See, inter alia, judgments in *CBR and Others v Commission* (8/66 to 11/66, EU:C:1967:7), paragraph 91; *Sucrimex and Westzucker v Commission* (133/79, EU:C:1980:104), paragraphs 12 to 19; and *Gauß Ingenieure v Commission* (182/80, EU:C:1982:78), paragraph 18.

37 Judgment in *Friesland Coberco Dairy Foods* (C-11/05, EU:C:2006:312), paragraphs 38 to 41.

38 See the case-law cited in footnote 36.

39 See the judgments in *Grimaldi* (322/88, EU:C:1989:646), paragraphs 8 and 9, and *Deutsche Shell* (C-188/91, EU:C:1993:24), paragraph 18.

40 22/70, EU:C:1971:32.

41 *Ibid.*, paragraph 42.

42 *Ibid.*, paragraph 53.

43 *Ibid.*, paragraph 54.

44 C-366/88, EU:C:1990:348.

45 *Ibid.*, paragraph 10.

46 See Blinder, A.S., Ehrmann, M., Fratzscher, M., de Hann, J., Jansen, D.-J., *Central Bank Communication and Monetary Policy. A Survey of Theory and Evidence*, and Woodford, M., *FedSpeak: Does It Matter How Central Bankers Explain Themselves?*, Columbia University, April 2013.

47 In the opinion of the current Chairman of the United States Federal Reserve, Ms Yellen, ‘The effects of monetary policy depend critically on the public getting the message about what policy will do months or years in the future’. Speech at the Society of American Business Editors and Writers 50th Anniversary Conference, Washington D.C., available at <http://www.federalreserve.gov/newsevents/speech/yellen20130404a.htm>.

48 Central European Bank, *The Monetary Policy of the ECB*, Frankfurt, 2011, p. 94 et seq.

49 C-370/12, EU:C:2012:756.

50 Articles 119(2) TFEU, 127(1) TFEU and 282(2) TFEU and Articles 2 and 3, paragraph 3.3, of the Statute of the ESCB and of the ECB.

51 In particular, see the *Report on Economic and Monetary Union in the European Community*, better known as the *Delors Report*, of 17 April 1989, in particular point 32.

52 See, inter alia, Dyson, K., and Featherstone, K., *The Road to Maastricht. Negotiating Economic and Monetary Union*, Oxford University Press, Oxford, 1999, p. 378 et seq., Ungerer, H., *A Concise History of European Monetary Integration. From EPU to EMU*, Quorum Books, Westport-London, 1997, p. 209 et seq., and Viebig, J., *Der Vertrag von Maastricht. Die Positionen Deutschlands und Frankreichs zur Europäischen Wirtschafts- und Währungsunion*, Schäffer-Poeschel, 1999, p. 150 et seq.

53 Article 282(3) TFEU: ‘The European Central Bank shall have legal personality. It alone may authorise the issue of the euro. It shall be independent in the exercise of its powers and in the management of its finances. Union institutions, bodies, offices and agencies and the governments of the Member States shall respect that independence.’

54 De Grauwe, P., *Economics of Monetary Union*, 10th ed., Oxford University Press, Oxford, 2014, pp. 156 to 159.

55 See Sparve, R., ‘Central bank Independence under European Union and other international standards’ in *Legal Aspects of the European System of Central Banks. Liber Amicorum Paolo Zamboni Garavelli*, ECB, Frankfurt am Main, 2005.

56 Ibid.

57 Concerning the independence of the ECB and its limits, see, in particular, Zilioli, C., and Selmayr, M., ‘The European Central Bank: An Independent Specialised Organisation of Community Law’, *Common Market Law Review*, No 37, 3, 2000, p. 591 et seq.; Dervedde, I., *Autonomie der Europäische Zentralbank. Im Spannungsfeld zwischen demokratischer Legitimation der Europäischen Union und Währungsstabilität*, Dr. Kovac, Hamburg, 2002; and, for a comparative perspective, Amtenbrink, F., *The Democratic Accountability of Central Banks. A Comparative Study of the European Central Bank*, Hart, Oxford-Portland, 1999.

58 See, although in different spheres from monetary policy, the judgments in *Sison v Council* (C-266/05 P, EU:C:2007:75), paragraphs 32 to 34, *Arcelor Atlantique et Lorraine and Others* (C-127/07, EU:C:2008:728), paragraph 57, and *Vodafone and Others* (C-58/08, EU:C:2010:321), paragraph 52.

59 In this regard, see Louis, J.-V., *L’Union européenne et sa monnaie, Commentaire J. Mégret*, 3rd ed., Université de l’Université de Bruxelles, Brussels, 2009, p. 211; Craig, P., ‘EMU, the European Central Bank and Judicial Review’, in Beaumont, P., and Walker, N. (eds.), *Legal Framework of the Single European Currency*, Hart, Oxford-Portland, 1999, pp. 97 to 114, and Malatesta, A., *La Banca Centrale Europea*, Giuffrè, Milan, 2003, p. 183 et seq.

⁶⁰ ‘The process through which monetary policy decisions affect the economy in general, and the price level in particular, is known as the transmission mechanism of monetary policy.’ *The Monetary Policy of the ECB*, ECB, Frankfurt am Main, 2011, p. 62. In this respect, see Angeloni, I., Kashyap, A., and Mojon, B. (eds.), *Monetary Policy Transmission in the Euro Area*, Cambridge University Press, Cambridge, 2003, and Suardi, M., ‘Monetary Policy Transmission in EMU’, in: Buti, M., and Sapir, A., *EMU and Economic Policy In Europe. The Challenge of the Early Years*, E. Elgar, Cheltenham-Northampton, 2002.

⁶¹ ‘The transmission of monetary impulses to the real sector involves a number of different mechanisms and actions by economic agents at various stages of the process. As a result, monetary policy action usually takes a considerable time to affect price developments. Furthermore, the size and strength of the different effects can vary according to the state of the economy, which makes the precise impact difficult to estimate. Taken together, central banks typically see themselves confronted with long, variable and uncertain lags in the conduct of monetary policy’, *The Monetary Policy of the ECB*, ECB, Frankfurt am Main, 2011, pp. 62 and 63. See also Angeloni, I., Kashyap, A. and Mojon, B. (eds.), *op. cit.*

⁶² On this point, see Cour-Thimann, P., and Winkler, B., ‘The ECB’s Non-Standard Monetary Policy Measures. The Role of Institutional Factors and Financial Structure’, *Oxford Review of Economic Policy*, 2012, 28, p. 72 et seq.

⁶³ See the comparison carried out by Lenza, M., Pill, H., and Reichlin, L., ‘Monetary Policy in Exceptional Times’, *Economic Policy* (62) 2010, and García-Andrade, J., ‘El sistema Monetario en una Unión Europea de Derecho’, in Salvador Armendáriz, M.A. (Ed.), *Regulación bancaria: transformación y Estado de Derecho*, Aranzadi, Cizur Menor, 2014.

⁶⁴ The ECB has used various unconventional measures in the past, such as a fixed-rate liquidity injection with full allotment, extension of the list of assets accepted as a guarantee, a longer-term liquidity injection or the purchase of specific debt securities. Concerning these measures, see Hinarejos, A., *The Euro Area Crisis in Constitutional Perspective*, Oxford University Press, Oxford, 2014, Chapter 3, point 3.1.

⁶⁵ *Pringle* (EU:C:2012:756), paragraph 55.

⁶⁶ *Pringle* (EU:C:2012:756), paragraph 56, and View of Advocate General Kokott (EU:C:2012:675), point 85.

⁶⁷ View of Advocate General Kokott in *Pringle* (EU:C:2012:675), points 142 and 143.

⁶⁸ *Pringle* (EU:C:2012:756), paragraph 135, states that ‘[c]ompliance with [budgetary] discipline contributes at Union level to the attainment of a higher objective, namely maintaining the financial stability of the monetary union’.

⁶⁹ As the Commission points out in its written observations, the ECB’s *Monthly Bulletins* for September and October 2012 affirm on more than one occasion that the ultimate objective of the OMT programme is to restore the monetary policy transmission channels.

⁷⁰ In so far as the conditions to which the purchase of bonds is subject may not be the same as those set by the EFSF/ESM, the programme is said to operate as a sort of ‘parallel rescue’. It is therefore my understanding that the two areas of uncertainty may be examined together.

⁷¹ According to Krugman and Wells, the expression ‘moral hazard’ refers to how, when making decisions, individuals are prepared to take greater risks when a third party, rather than they themselves, assumes responsibility for the possible negative consequences of their acts. On this point and in greater detail, see Krugman, P. and Wells, R., *Microeconomics*, 3rd ed., Worth Publishers, 2012.

⁷² See, specifically, Articles 4(4), 5(3) and (5)(g), 6(2), 13(1), (3) and (7) and 14(6) of the Treaty establishing the ESM.

73 For the ECB's institutional role in bailouts, see Beukers, T., 'The new ECB and its relationship with the eurozone Member States: Between central bank independence and central bank intervention', *Common Market Law Review* (2013) 50, Issue 6, p. 1588 et seq.

74 See, specifically, Article 13(3) and (7) of the ESM Treaty.

75 See, by way of example, the general terms for financial assistance agreements, adopted by the ESM Board of Directors on 22 November 2012 (available at www.esm.europa.eu), confirming the ECB's supervisory role in financial assistance programmes (see, specifically, Articles 3.3.2, 3.4.2, 5.3.4, 5.12.1, 6.2.6, 9.6, 9.8.2 and 12.2).

76 In fact, the literal wording of the ESM Treaty would permit action of that kind. The words 'in liaison with the ECB', used by the ESM Treaty in Articles 13 and 14, would allow the ECB to undertake a wide range of actions in the course of a financial assistance programme, including the 'passive' ones advocated here.

77 According to the case-law of the Court of Justice, the obligation to state reasons provided for in the Treaty does not entail 'merely taking formal considerations into account, but seeks to give an opportunity to the parties of defending their rights, to the Court of Justice of exercising its supervisory function, and to Member States and all interested nationals of ascertaining the circumstances in which the [institution] has applied the Treaty'. See, inter alia, judgments in *Germany v Commission* (24/62, EU:C:1963:14), p. 69, and *DIR International Film and Others v Commission* (C-164/98 P, EU:C:2000:48), paragraph 33.

78 Statement by the President of the ECB, Mr Draghi, at the press conference on 6 September 2012, available at <http://www.ecb.europa.eu/press/pressconf/2012/html/is120906.en.html>.

79 See, to this effect, judgments in *National Panasonic v Commission* (136/79, EU:C:1980:169), paragraphs 28 to 30, and *Roquette Frères* (C-94/00, EU:C:2002:603), paragraph 77.

80 See, inter alia, judgments in *Fédesa and Others* (C-331/88, EU:C:1990:391), paragraph 13, and *Netherlands v Commission* (C-180/00, EU:C:2005:451), paragraph 103.

81 Written observations of the French Republic, which refer to the 'targeted and provisional' ('*ciblée et provisoire*') nature of the OMT programme (point 40).

82 The press release of 6 September 2012, as well as referring to the conditionality attached to the financial assistance programmes as a 'necessary condition', draws attention to the fact that suspension of the OMT programme will be decided upon by the Governing Council 'in full discretion' but 'in accordance with its monetary policy mandate'.

83 See Tridimas, T., *The General Principles of EU Law*, 2nd ed., Oxford University Press, Oxford, 2010, Chapter 3.

84 In that regard, see Sunkel, O., and Griffith-Jones, S., *Debt and Development Crises in Latin America: The End of an Illusion*, Oxford University Press, Oxford, 1989.

85 See the Delors Report, cited in footnote 51, in particular point 30.

86 See Siekmann, H., 'Law and Economics of Monetary Union', in Eger, T., and Schäfer, H.-B., *Research Handbook, on the Economics of European Union Law*, E. Elgar, Cheltenham-Northampton, 2012, p. 370 et seq.

87 *Pringle* (EU:C:2012:756), paragraph 135.

88 Ibid., paragraph 132.

89 Compare the proposed wording of what was then Article 104a(1)(a) of the draft Treaty amending the Treaty establishing the European Economic Community with a view to establishing economic and monetary union, *Bulletin of the European Communities*, supplement 2/91, with the final wording of the provision, which is the same as the wording currently in force in Article 123 TFEU. Concerning the negotiations that culminated in the wording of the current Article 123 TFEU, see Conthe, M., ‘El Tratado de la Unión Europea: la Unión Económica y Monetaria’, in VVAA, *España y el Tratado de la Unión Europea. Una aproximación al Tratado elaborada por el equipo negociador en las Conferencias Intergubernamentales sobre la Unión Política y la Unión Económica y Monetaria*, Colex, 1994, pp. 295 to 297.

90 Concerning open market operations authorised by Article 18.1 of the Statute, see the Guideline of the ECB of 20 September 2011 on monetary policy instruments and procedures of the Eurosystem (recast) (ECB/2011/14).

91 Article 1(1)(b) of Regulation No 3603/93 adds, in point (ii), that ‘other type of credit facility’ is also to include ‘any financing of the public sector’s obligations vis-à-vis third parties’.

92 Under the collective action clauses (‘CAC’) provided for in the event of restructuring, the restructuring is subject to the approval of a majority of the creditors. See, concerning CACs and the role of the ECB, Hofmann, C., ‘Enfranchisement and Disenfranchisement in Collective Action Clauses’, in Bauer, K-A., Cahn, A., and Kenadjian, S. (eds.), *Collective Action Clauses and the Restructuring of Sovereign Debt*, Institute for Law and Finance Series, De Gruyter, 2013, p. 56 et seq.

93 According to the ECB, not only is no obligation to hold the bonds until maturity laid down but, rather, the draft Decision relating to OMTs expressly provides for the possibility of the ECB selling the bonds at an earlier point.

94 That is the case, according to the ECB, of the *Securities Market Programme* (‘SMP’), under which securities were not necessarily held until maturity.

95 The ECB has stated in its written observations that the SMP programme, which predates the OMT programme, also provided for an embargo period.

Case C-62/14, *Peter Gauweiler and others v. Deutsche Bundestag*

In Case C-62/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesverfassungsgericht (Germany), made by decision of 14 January 2014, received at the Court on 10 February 2014, in the proceedings

Peter Gauweiler,

Bruno Bandulet and Others,

Roman Huber and Others,

Johann Heinrich von Stein and Others,

Fraktion DIE LINKE im Deutschen Bundestag

v

Deutscher Bundestag,

intervener:

Bundesregierung,

THE COURT (Grand Chamber),

composed of V. Skouris, President, K. Lenaerts, Vice-President, A. Tizzano, L. Bay Larsen (Rapporteur), T. von Danwitz, A. Ó Caoimh and J.-C. Bonichot, Presidents of Chambers, J. Malenovský, E. Levits, A. Arabadjiev, M. Berger, A. Prechal, E. Jarašiūnas, C.G. Fernlund and J.L. da Cruz Vilaça, Judges,

Advocate General: P. Cruz Villalón,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 14 October 2014,

after considering the observations submitted on behalf of:

- Mr Gauweiler, by W.-R. Bub, Rechtsanwalt, and D. Murswiek,
- Mr Bandulet and Others, by K.A. Schachtschneider,
- Mr Huber and Others, by H. Däubler-Gmelin, Rechtsanwältin, and by C. Degenhart and B. Kempen,
- Mr von Stein and Others, by M.C. Kerber, Rechtsanwalt,
- Fraktion DIE LINKE im Deutschen Bundestag, by H.-P. Schneider and A. Fisahn and by G. Gysi, Rechtsanwalt,
- the Deutscher Bundestag, by C. Calliess,
- the German Government, by T. Henze and J. Möller, acting as Agents, and by U. Häde,

- Ireland, by E. Creedon, G. Hodge and T. Joyce, acting as Agents, and by M. Cush and N.J. Travers, Senior Counsels, and M.J. Dunne and D. Moloney, Barristers-at-Law,
- the Greek Government, by S. Charitaki, S. Lekkou and M. Skorila, acting as Agents,
- the Spanish Government, by A. Rubio González, A. Sampol Pucurull and E. Chamizo Llatas, acting as Agents,
- the French Government, by F. Alabrune, G. de Bergues, D. Colas and F. Fize, acting as Agents,
- the Italian Government, by G. Palmieri, acting as Agent, and by P. Gentili, avvocato dello Stato,
- the Cypriot Government, by K.K. Kleanthous and N. Ioannou, acting as Agents,
- the Netherlands Government, by M. Bulterman and J. Langer, acting as Agents,
- the Polish Government, by B. Majczyna, C. Herma and K. Maćkowska, acting as Agents,
- the Portuguese Government, by L. Inez Fernandes, P. Machado and M.L. Duarte, acting as Agents,
- the Finnish Government, by J. Heliskoski and H. Leppo, acting as Agents,
- the European Parliament, by A. Neergaard, U. Rösslein and E. Waldherr, acting as Agents,
- the European Commission, by B. Martenczuk, C. Ladenburger, B. Smulders and J.-P. Keppenne, acting as Agents,
- the European Central Bank (ECB), by C. Zilioli and C. Kroppenstedt, acting as Agents, and H.-G. Kamann, Rechtsanwalt,

after hearing the Opinion of the Advocate General at the sitting on 14 January 2015,

gives the following

Judgment

1 This request for a preliminary ruling concerns the validity of the decisions of the Governing Council of the European Central Bank (ECB) of 6 September 2012 on a number of technical features regarding the Eurosystem’s outright monetary transactions in secondary sovereign bond markets (‘the OMT decisions’) and the interpretation of Articles 119 TFEU, 123 TFEU and 127 TFEU and of Articles 17 to 24 of Protocol (No 4) on the Statute of the European System of Central Banks and of the European Central Bank (OJ 2012, C 326, p. 230; ‘the Protocol on the ESCB and the ECB’).

2 The request has been made in the context of a series of constitutional actions and dispute resolution proceedings between constitutional bodies, which concern the participation of the Deutsche Bundesbank (German Central Bank) in the implementation of the OMT decisions and the alleged failure, of the Bundesregierung (Federal Government) and the Deutscher Bundestag (Lower House of the German Federal Parliament), to act with regard to those decisions.

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

The OMT decisions

3 According to the minutes of the 340th meeting of the Governing Council of the ECB (‘the Governing Council’) on 5 and 6 September 2012, that body ‘approved the main parameters of Outright Monetary

Transactions (OMT), which would be set out in a press release [“(the press release”)”] to be published after the meeting’.

4 The press release is worded as follows:

‘As announced on 2 August 2012, the [Governing Council] has today taken decisions on a number of technical features regarding the Eurosystem’s [OMTs] in secondary sovereign bond markets that aim at safeguarding an appropriate monetary policy transmission and the singleness of the monetary policy. These will be known as [OMTs] and will be conducted within the following framework:

Conditionality

A necessary condition for [OMTs] is strict and effective conditionality attached to an appropriate European Financial Stability Facility/European Stability Mechanism (EFSF/ESM) programme. Such programmes can take the form of a full EFSF/ESM macroeconomic adjustment programme or a precautionary programme (Enhanced Conditions Credit Line), provided that they include the possibility of EFSF/ESM primary market purchases. The involvement of the IMF shall also be sought for the design of the country-specific conditionality and the monitoring of such a programme.

The Governing Council will consider [OMTs] to the extent that they are warranted from a monetary policy perspective as long as programme conditionality is fully respected, and terminate them once their objectives are achieved or when there is non-compliance with the macroeconomic adjustment or precautionary programme.

Following a thorough assessment, the Governing Council will decide on the start, continuation and suspension of [OMTs] in full discretion and acting in accordance with its monetary policy mandate.

Coverage

[OMTs] will be considered for future cases of EFSF/ESM macroeconomic adjustment programmes or precautionary programmes as specified above. They may also be considered for Member States currently under a macroeconomic adjustment programme when they will be regaining bond market access.

Transactions will be focused on the shorter part of the yield curve, and in particular on sovereign bonds with a maturity of between one and three years.

No *ex ante* quantitative limits are set on the size of [OMTs].

Creditor treatment

The Eurosystem intends to clarify in the legal act concerning [OMTs] that it accepts the same (*pari passu*) treatment as private or other creditors with respect to bonds issued by euro area countries and purchased by the Eurosystem through [OMTs], in accordance with the terms of such bonds.

Sterilisation

The liquidity created through [OMTs] will be fully sterilised.

Transparency

Aggregate [OMT] holdings and their market values will be published on a weekly basis. Publication of the average duration of [OMT] holdings and the breakdown by country will take place on a monthly basis.

Securities Markets Programme

Following today's decision on [OMTs], the Securities Markets Programme (SMP) is herewith terminated. The liquidity injected through the SMP will continue to be absorbed as in the past, and the existing securities in the SMP portfolio will be held to maturity.'

The main proceedings and the order for reference

5 Several groups of individuals, including a group supported by more than 11 000 signatories, have brought various constitutional actions concerning the OMT decisions and the alleged failure of the Bundesregierung and the Deutscher Bundestag to act with regard to those decisions. In addition the Fraktion DIE LINKE im Deutschen Bundestag (The Left Party Parliamentary Group in the German Bundestag) has made an application, in dispute resolution proceedings between constitutional bodies, for a declaration that the Deutscher Bundestag is under certain obligations with regard to the OMT decisions.

6 In support of those actions, the applicants in the main proceedings submit (i) that the OMT decisions form, overall, an ultra vires act inasmuch as they are not covered by the mandate of the ECB and infringe Article 123 TFEU and (ii) that those decisions breach the principle of democracy entrenched in the German Basic Law (Grundgesetz) and thereby impair German constitutional identity.

7 The Bundesverfassungsgericht (Federal Constitutional Court) states that if the OMT decisions exceed the mandate of the ECB or infringe Article 123 TFEU it will have to uphold these various actions.

8 In that regard the referring court observes in particular, alluding to the principle of conferral of powers provided for in Article 5(1) and (2) TEU, that the mandate assigned to the ESCB must be strictly limited in order to meet democratic requirements and that compliance with the limits concerned must be subject to comprehensive judicial review. The referring court observes that the Court of Justice has held that the independence of the ECB does not preclude such review since that independence relates only to the powers that the Treaties confer on the ECB, but not to the definition of the extent and scope of its mandate.

9 The referring court further observes that even if it were established that the OMT decisions are to be regarded as merely an announcement of the adoption of future acts, that would not of itself render the proceedings brought before it inadmissible, since preventive legal protection may be necessary, pursuant to national procedural rules, in order to avoid irreparable consequences.

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

'(1) (a) Is the decision of the Governing Council of the ECB of 6 September 2012 on Technical features of Outright Monetary Transactions incompatible with Article 119 TFEU and Article 127(1) and (2) TFEU and with Articles 17 to 24 of the Protocol on the ESCB and the ECB because it exceeds the monetary policy mandate of the ECB laid down in the abovementioned provisions and encroaches upon the competence of the Member States?

Is the mandate of the ECB exceeded in particular because the decision of the Governing Council of the ECB of 6 September 2012:

- (i) is linked to economic assistance programmes of the EFSF or of the ESM (conditionality)?
- (ii) provides for the purchase of government bonds of selected Member States only (selectivity)?
- (iii) provides for the purchase of government bonds of programme countries in addition to assistance programmes of the EFSF or of the ESM (parallelism)?
- (iv) could undermine the limits and conditions laid down by assistance programmes of the EFSF or of the ESM (circumvention)?

(b) Is the decision of the Governing Council of the ECB of 6 September 2012 on Technical features of Outright Monetary Transactions incompatible with the prohibition of monetary financing enshrined in Article 123 TFEU?

Is compatibility with Article 123 TFEU precluded in particular by the fact that the decision of the Governing Council of the ECB of 6 September 2012:

- (i) does not provide for quantitative limits for government bond purchases (volume)?
- (ii) does not provide for a time gap between the issue of government bonds on the primary market and their purchase by the European System of Central Banks (ESCB) on the secondary market (market pricing)?
- (iii) allows all purchased government bonds to be held to maturity (interference with market logic)?
- (iv) does not contain any specific requirements for the credit standing of the government bonds to be purchased (default risk)?
- (v) provides for the same treatment of the ESCB as private or other holders of government bonds (debt cut)?

(2) In the alternative, in the event that the Court does not consider the decision of the Governing Council of the ECB of 6 September 2012 on Technical features of Outright Monetary Transactions, qua act of an EU institution, to be an appropriate object for a request pursuant to point (b) of the first paragraph of Article 267 TFEU:

(a) Are Article 119 TFEU and Article 127 TFEU and Articles 17 to 24 of the Protocol on the ESCB and the ECB to be interpreted as permitting the Eurosystem, alternatively or cumulatively,

- (i) to make government bond purchases conditional on the existence of and compliance with economic assistance programmes of the EFSF or of the ESM (conditionality)?
- (ii) to purchase government bonds of selected Member States only (selectivity)?
- (iii) to purchase government bonds of programme countries in addition to assistance programmes of the EFSF or of the ESM (parallelism)?
- (iv) to undermine the limits and conditions laid down by assistance programmes of the EFSF or of the ESM (circumvention)?

(b) Having regard to the prohibition of monetary financing, is Article 123 TFEU to be interpreted as permitting the Eurosystem, alternatively or cumulatively,

- (i) to purchase government bonds without quantitative limits (volume)?
- (ii) to purchase government bonds without a minimum time gap from their issue on the primary market (market pricing)?
- (iii) to hold all purchased government bonds to maturity (interference with market logic)?
- (iv) to purchase government bonds without minimum credit standing requirements (default risk)?
- (v) to accept the same treatment of the ESCB as private and other holders of government bonds (debt cut)?
- (vi) to influence pricing, by communicating the intention to purchase or otherwise, coinciding with the issue of government bonds by Member States of the euro area (encouragement to purchase newly issued bonds)?

Consideration of the questions referred for a preliminary ruling

Preliminary observations

11 The Italian Government submits that the present request for a preliminary ruling may not be examined by the Court of Justice, since the referring court does not accept the binding and definitive interpretative value that the answer given by the Court in response to that request has. It argues that the referring court considers that it has ultimate responsibility for ruling on the validity of the decisions in question in the light of the conditions and limits imposed by the German Basic Law.

12 It may be observed in this regard that in *Kleinwort Benson* (C-346/93, EU:C:1995:85) the Court declared that it does not have jurisdiction to give a ruling where the court making the reference is not bound by the Court's interpretation. Indeed, the Court does not have jurisdiction to provide, in preliminary ruling proceedings, answers which are purely advisory (see, to that effect, judgment in *Kleinwort Benson*, C-346/93, EU:C:1995:85, paragraphs 23 and 24).

13 However, in that case an interpretation of EU law was not called for because the Court was asked to interpret an act of EU law in order to enable the national court to decide on the application of national law in a situation where the national law contained no direct and unconditional renvoi to EU law but was limited to taking an act of EU law as a model and only partially reproduced the terms thereof (see, to that effect, judgments in *Confederación Española de Empresarios de Estaciones de Servicio*, C-217/05, EU:C:2006:784, paragraph 21, and *Les Vergers du Vieux Tauves*, C-48/07, EU:C:2008:758, paragraph 24).

14 It must be stated that the circumstances of the present case differ significantly from those of the case that gave rise to the judgment in *Kleinwort Benson* (C-346/93, EU:C:1995:85), since, here, the request for a preliminary ruling concerns directly the interpretation and application of EU law, which means that the present judgment will have definitive consequences as regards the resolution of the main proceedings.

15 In that regard, it should be observed that, according to settled case-law of the Court of Justice, Article 267 TFEU establishes a procedure for direct cooperation between the Court and the courts of the Member States (see, inter alia, judgments in *SAT Fluggesellschaft*, C-364/92, EU:C:1994:7, paragraph 9, and *ATB and Others*, C-402/98, EU:C:2000:366, paragraph 29). In that procedure, which is based on a clear separation of functions between the national courts and the Court, any assessment of the facts of the case is a matter for the national court, which must determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court (see, to that effect, inter alia, judgments in *WWF and Others*, C-435/97, EU:C:1999:418, paragraph 31, and *Lucchini*, C-119/05, EU:C:2007:434, paragraph 43), whilst the Court is empowered to give rulings on the interpretation or the validity of an EU provision only on the basis of the facts which the national court puts before it (judgment in *Eckelkamp and Others*, C-11/07, EU:C:2008:489, paragraph 52).

16 It must also be borne in mind that it is settled case-law of the Court that a judgment in which the latter gives a preliminary ruling is binding on the national court, as regards the interpretation or the validity of the acts of the EU institutions in question, for the purposes of the decision to be given in the main proceedings (see, inter alia, judgments in *Fazenda Pública*, C-446/98, EU:C:2000:691, paragraph 49, and *Elchinov*, C-173/09, EU:C:2010:581, paragraph 29).

17 It follows that the Court must reply to the referring court's request for a preliminary ruling.

Admissibility

18 Ireland, the Greek, Spanish, French, Italian, Netherlands, Portuguese and Finnish Governments, the European Parliament, the European Commission and the ECB challenge, on various grounds, the admissibility of the request for a preliminary ruling or of certain of the questions it includes.

19 First, the Italian Government maintains that the dispute in the main proceedings is contrived and artificial. The actions before the referring court are, in its submission, devoid of purpose since it has not been shown that the applicants in the main proceedings are in need of preventive protection or at risk of damage, but also because the alleged lack of action on the part of the Deutscher Bundestag is not per se amenable to any form of legal classification. Those actions should, moreover, have been declared inadmissible by the referring court since they concern EU measures that are not legal acts. The Italian Government further submits that the case in the main proceedings does not actually give rise to a question of obviously ultra vires acts which is connected to German constitutional identity.

20 The Italian Government also argues that the questions are abstract and hypothetical inasmuch as they are based on a series of assumptions, in particular with regard to the links between purchases of government bonds and compliance with economic assistance programmes, the lack of any quantitative limit on the volume of those purchases or the failure to take account of the risk of losses for the ECB.

21 The Greek Government also maintains that the questions raised are hypothetical, basing its argument on the fact that the ECB has not, in its view, adopted any measure which directly affects the rights conferred by EU law on the applicants in the main proceedings. The Finnish Government submits that the second question is inadmissible given that it relates to hypothetical actions on the part of the ECB and the national central banks of the euro area.

22 Next, although it does not expressly raise an objection to admissibility, the Spanish Government asserts that the national proceedings which have given rise to the reference for a preliminary ruling are not compatible with the system for reviewing the validity of EU acts established by Articles 263 TFEU and 267 TFEU given that they create a direct action against the validity of an EU act without complying with the conditions for admissibility laid down by Article 263 TFEU in respect of actions for annulment.

23 Finally, Ireland, the Greek, Spanish, French, Italian, Netherlands and Portuguese Governments, the Parliament, the Commission and the ECB submit that the first question is inadmissible since a question concerning validity cannot, in their submission, be directed at an act which, like the OMT decisions, is preparatory or does not have legal effects.

24 In the first place, as regards the argument that the dispute in the main proceedings is contrived and artificial and that the questions referred are hypothetical, it should be observed that, as is apparent from paragraph 15 of this judgment, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation or the validity of a rule of EU law, the Court is in principle bound to give a ruling (see, to that effect, judgment in *Melloni*, C-399/11, EU:C:2013:107, paragraph 28 and the case-law cited).

25 Accordingly, questions concerning EU law enjoy a presumption of relevance. The Court may refuse to give a ruling on a question referred by a national court only where it is quite obvious that the interpretation, or the determination of validity, of a rule of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, to that effect, judgment in *Melloni*, C-399/11, EU:C:2013:107, paragraph 29 and the case-law cited).

26 In the present case, the arguments which the Italian Government puts forward to establish the contrived and artificial nature of the dispute in the main proceedings and the hypothetical nature of the questions raised are based on a critical analysis of the admissibility of the actions at issue in the main proceedings and of the assessment of the facts undertaken by the referring court for the purpose of applying the criteria laid down by national law. It is not, however, for the Court to call that assessment into question since it falls, in the framework of these proceedings, within the jurisdiction of the national court (see, to that effect, judgment in *Lucchini*, C-119/05, EU:C:2007:434, paragraph 43); nor is it for the Court to determine whether a decision whereby a matter is brought before it was taken in accordance with the rules of national law governing the organisation of the courts and legal proceedings (judgment in *Schnorbus*, C-79/99, EU:C:2000:676, paragraph 22 and the case-law cited). Those arguments are therefore not sufficient to rebut the presumption of relevance mentioned in the previous paragraph.

27 As to the fact, to which the Greek and Finnish Governments draw attention, that the programme for purchasing government bonds announced in the press release has not been implemented and that its implementation will be possible only after further legal acts have been adopted, it does not — as the referring court states — render the actions in the main proceedings devoid of purpose since under German law preventive legal protection may be granted in such a situation if certain conditions are met.

28 Although the main actions — since they seek to avoid the infringement of rights that are under threat — must necessarily be based on hypotheses which are by their nature uncertain, they are, according to the referring court, none the less permitted under German law. Since, in proceedings of the kind provided for in Article 267

TFEU, the interpretation of national law falls exclusively to the referring court (judgment in *Križan and Others*, C-416/10, EU:C:2013:8, paragraph 58), the fact that the OMT decisions have not yet been implemented and that their implementation will be possible only after further legal acts have been adopted is not a ground for denying that the request for a preliminary ruling meets an objective need for resolving the cases brought before that court (see, by analogy, judgment in *Bosman*, C-415/93, EU:C:1995:463, paragraph 65).

29 In the second place, as regards the alleged incompatibility between the national proceedings and the system established by Articles 263 TFEU and 267 TFEU, the Court has, on a number of occasions, ruled on the admissibility of requests for a preliminary ruling concerning the validity of secondary legislation which have been made in judicial review proceedings brought under United Kingdom law. The Court, relying on the fact that, under national law, the persons concerned were able to make an application for judicial review of the legality of the intention or obligation of the United Kingdom Government to comply with EU legislation, has concluded that the opportunity open to individuals to plead the invalidity of an EU act of general application before national courts is not conditional upon that act actually having been the subject of implementing measures adopted pursuant to national law. In that respect, it is sufficient if the national court is seized of a genuine dispute in which the question of the validity of such an act is raised on indirect grounds (see, to that effect, judgments in *British American Tobacco (Investments) and Imperial Tobacco*, C-491/01, EU:C:2002:741, paragraphs 36 and 40, and *Intertanko and Others*, C-308/06, EU:C:2008:312, paragraphs 33 and 34). It is clear from the order for reference that that is indeed the case here.

30 As regards, in the third place, the arguments, set out in paragraph 23 of this judgment, which relate specifically to the first question, it should be observed that, in the present case, the referring court has brought the matter before the Court in order that the latter determine whether Articles 119 TFEU, 123(1) TFEU and 127(1) and (2) TFEU and Articles 17 to 24 of the Protocol on the ESCB and the ECB must be interpreted as permitting the ESCB to adopt a programme for the purchase of government bonds on secondary markets, such as the programme announced in the press release.

31 In the light of the foregoing, the request for a preliminary ruling must be declared admissible.

Substance

32 By its questions, which it is appropriate to consider together, the referring court asks, in essence, whether Articles 119 TFEU, 123(1) TFEU and 127(1) and (2) TFEU and Articles 17 to 24 of the Protocol on the ESCB and the ECB must be interpreted as permitting the ESCB to adopt a programme for the purchase of government bonds on secondary markets, such as the programme announced in the press release.

Articles 119 TFEU and 127(1) and (2) TFEU, and Articles 17 to 24 of the Protocol on the ESCB and the ECB

33 The referring court raises the question of whether a programme for the purchase of government bonds on secondary markets, such as the programme announced in the press release, can be covered by the powers of the ESCB, as defined by primary law.

– Powers of the ESCB

34 It should be noted as a preliminary point that under Article 119(2) TFEU, the activities of the Member States and the Union are to include a single currency, the euro, as well as the definition and conduct of a single monetary policy and exchange-rate policy (judgment in *Pringle*, C-370/12, EU:C:2012:756, paragraph 48).

35 As regards more particularly monetary policy, Article 3(1)(c) TFEU states that the Union is to have exclusive competence in that area for the Member States whose currency is the euro (see, to that effect, judgment in *Pringle*, C-370/12, EU:C:2012:756, paragraph 50).

36 Under Article 282(1) TFEU, the ECB and the central banks of the Member States whose currency is the euro, which constitute the Eurosystem, are to conduct the monetary policy of the Union (judgment in *Pringle*, C-370/12, EU:C:2012:756, paragraph 49). Under Article 282(4) TFEU, the ECB is to adopt such measures as are necessary to carry out its tasks in accordance with Articles 127 TFEU to 133 TFEU, with Article 138 TFEU and with the conditions laid down in the Statute of the ESCB and of the ECB.

37 Within that framework, it is for the ESCB, pursuant to Article 127(2) TFEU, to define and implement that policy.

38 More specifically, it follows from Article 129(1) TFEU, read in conjunction with Article 12.1 of the Protocol on the ESCB and the ECB, that the Governing Council is to formulate the monetary policy of the Union and that the Executive Board of the ECB is to implement that policy in accordance with the guidelines and decisions laid down by the Governing Council.

39 It also follows, from the third subparagraph of Article 12.1 of the Protocol that, to the extent deemed possible and appropriate, the ECB is to have recourse to the national central banks to carry out operations which form part of the tasks of the ESCB, those banks being obliged, under Article 14.3 of the Protocol, to act in accordance with the guidelines and instructions of the ECB.

40 Furthermore, it is apparent from Article 130 TFEU that the ESCB is to be independent when carrying out its task of formulating and implementing the Union's monetary policy. It can be seen from the wording of that Article that it is intended to shield the ESCB and its decision-making bodies from external influences which would be likely to interfere with the performance of the tasks which the FEU Treaty and the Protocol on the ESCB and the ECB assign to the ESCB. Thus, Article 130 TFEU is, in essence, intended to shield the ESCB from all political pressure in order to enable it effectively to pursue the objectives attributed to its tasks, through the independent exercise of the specific powers conferred on it for that purpose by primary law (see, to that effect, judgment in *Commission v ECB*, C-11/00, EU:C:2003:395, paragraph 134).

41 In accordance with the principle of conferral of powers set out in Article 5(2) TEU, the ESCB must act within the limits of the powers conferred upon it by primary law and it cannot therefore validly adopt and implement a programme which is outside the area assigned to monetary policy by primary law. In order to ensure that the principle of conferral is complied with, the acts of the ESCB are, on the conditions laid down by the Treaties, subject to review by the Court (see, to that effect, judgment in *Commission v ECB*, C-11/00, EU:C:2003:395, paragraph 135).

42 It must be pointed out in this regard that the FEU Treaty contains no precise definition of monetary policy but defines both the objectives of monetary policy and the instruments which are available to the ESCB for the purpose of implementing that policy (see, to that effect, *Pringle*, C-370/12, EU:C:2012:756, paragraph 53).

43 Thus, under Articles 127(1) TFEU and 282(2) TFEU, the primary objective of the Union's monetary policy is to maintain price stability. The same provisions further stipulate that, without prejudice to that objective, the ESCB is to support the general economic policies in the Union, with a view to contributing to the achievement of its objectives, as laid down in Article 3 TEU (see, to that effect, judgment in *Pringle*, C-370/12, EU:C:2012:756, paragraph 54).

44 The Protocol on the ESCB and the ECB is thus characterised by a clear mandate, which is directed primarily at the objective of ensuring price stability. The tightly drawn nature of that mandate is further reinforced by the procedures for amending certain parts of the Statute of the ESCB and of the ECB.

45 As to the means assigned to the ESCB by primary law for the purpose of achieving those objectives, Chapter IV of the Protocol on the ESCB and the ECB, which describes the monetary functions and operations assured by the ESCB, sets out the instruments to which the ESCB may have recourse in the framework of monetary policy.

– The delimitation of monetary policy

46 The Court has held that in order to determine whether a measure falls within the area of monetary policy it is appropriate to refer principally to the objectives of that measure. The instruments which the measure employs in order to attain those objectives are also relevant (see, to that effect, judgment in *Pringle*, C-370/12, EU:C:2012:756, paragraphs 53 and 55).

47 In the first place, as regards the objectives of a programme such as that at issue in the main proceedings, it can be seen from the press release that the aim of the programme is to safeguard both 'an appropriate monetary policy transmission and the singleness of the monetary policy'.

48 First, the objective of safeguarding the singleness of monetary policy contributes to achieving the objectives of that policy inasmuch as, under Article 119(2) TFEU, monetary policy must be ‘single’.

49 Secondly, the objective of safeguarding an appropriate transmission of monetary policy is likely both to preserve the singleness of monetary policy and to contribute to its primary objective, which is to maintain price stability.

50 The ability of the ESCB to influence price developments by means of its monetary policy decisions in fact depends, to a great extent, on the transmission of the ‘impulses’ which the ESCB sends out across the money market to the various sectors of the economy. Consequently, if the monetary policy transmission mechanism is disrupted, that is likely to render the ESCB’s decisions ineffective in a part of the euro area and, accordingly, to undermine the singleness of monetary policy. Moreover, since disruption of the transmission mechanism undermines the effectiveness of the measures adopted by the ESCB, that necessarily affects the ESCB’s ability to guarantee price stability. Accordingly, measures that are intended to preserve that transmission mechanism may be regarded as pertaining to the primary objective laid down in Article 127(1) TFEU.

51 The fact that a programme such as that announced in the press release might also be capable of contributing to the stability of the euro area, which is a matter of economic policy (see, to that effect, judgment in *Pringle*, C-370/12, EU:C:2012:756, paragraph 56), does not call that assessment into question.

52 Indeed, a monetary policy measure cannot be treated as equivalent to an economic policy measure merely because it may have indirect effects on the stability of the euro area (see, by analogy, judgment in *Pringle*, C-370/12, EU:C:2012:756, paragraph 56).

53 In the second place, as regards the means to be used for achieving the objectives sought by a programme such as that announced in the press release, it is not disputed that the implementation of such a programme will entail outright monetary transactions on secondary sovereign debt markets.

54 It is clear from Article 18.1 of the Protocol on the ESCB and the ECB, which forms part of Chapter IV thereof, that in order to achieve the objectives of the ESCB and to carry out its tasks, as provided for in primary law, the ECB and the national central banks may, in principle, operate in the financial markets by buying and selling outright marketable instruments in euro. Accordingly, the transactions which the Governing Council has in mind in the press release use one of the monetary policy instruments provided for by primary law.

55 As regards the selective nature of the programme announced in the press release, it should be borne in mind that the programme is intended to rectify the disruption to the monetary policy transmission mechanism caused by the specific situation of government bonds issued by certain Member States. In those circumstances, the mere fact that the programme is specifically limited to those government bonds is thus not of a nature to imply, of itself, that the instruments used by the ESCB fall outside the realm of monetary policy. Moreover, no provision of the FEU Treaty requires the ESCB to operate in the financial markets by means of general measures that would necessarily be applicable to all the States of the euro area.

56 In the light of those considerations, it is apparent that a programme such as that announced in the press release, in view of its objectives and the instruments provided for achieving them, falls within the area of monetary policy.

57 The fact that the implementation of such a programme is made conditional upon full compliance with EFSF or ESM macroeconomic adjustment programmes does not alter that conclusion.

58 It is, of course, possible that a government bond-buying programme may, indirectly, increase the impetus to comply with those adjustment programmes and thus, to some extent, further the economic-policy objectives of those programmes.

59 However, such indirect effects do not mean that such a programme must be treated as equivalent to an economic policy measure, since it is apparent from Articles 119(2) TFEU, 127(1) TFEU and 282(2) TFEU that, without prejudice to the objective of price stability, the ESCB is to support the general economic policies in the Union.

60 The point should also be made that the ESCB, in a wholly independent manner, made implementation of the programme announced in the press release conditional upon full compliance with EFSF or ESM macroeconomic adjustment programmes, thereby ensuring that its monetary policy will not give the Member States whose sovereign bonds it purchases financing opportunities which would enable them to depart from the adjustment programmes to which they have subscribed. The ESCB thus ensures that the monetary policy measures it has adopted will not work against the effectiveness of the economic policies followed by the Member States.

61 Furthermore, since the ESCB is obliged, under Article 127(1) TFEU, read in conjunction with Article 119(3) TFEU, to comply with the guiding principle that public finances must be sound, the conditions included in a programme such as that announced in the press release, which prevent that programme from acting as an incentive to Member States to allow their financial situation to deteriorate, cannot be regarded as taking the programme beyond the confines of the monetary policy framework laid down by primary law.

62 It should be added that full compliance of the Member State concerned with the obligations arising under an adjustment programme to which it has subscribed is not, in any event, a sufficient condition to trigger intervention by the ESCB in the framework of a programme such as that announced in the press release, since such intervention is made strictly conditional upon there being disruptions of the monetary policy transmission mechanism or the singleness of monetary policy.

63 Accordingly, the fact that the purchase of government bonds on the secondary market subject to a condition of compliance with a macroeconomic adjustment programme could be regarded as falling within economic policy when the purchase is undertaken by the ESM (see, to that effect, judgment in *Pringle*, C-370/12, EU:C:2012:756, paragraph 60) does not mean that this should equally be the case when that instrument is used by the ESCB in the framework of a programme such as that announced in the press release.

64 In that regard, the difference between the objectives of the ESM and those of the ESCB is decisive. Whilst it can be seen from paragraphs 48 to 52 of this judgment that a programme such as that at issue in the main proceedings may be implemented only in so far as is necessary for the maintenance of price stability, the ESM's intervention is intended to safeguard the stability of the euro area, that objective not falling within monetary policy (see, to that effect, judgment in *Pringle*, C-370/12, EU:C:2012:756, paragraph 56).

65 That analysis also leads the Court to exclude the possibility that a programme such as that announced in the press release may serve to circumvent the conditions circumscribing the ESM's activity on the secondary market, since the ESCB's intervention is not intended to take the place of that of the ESM in order to achieve the latter's objectives but must, on the contrary, be implemented independently on the basis of the objectives particular to monetary policy.

– Proportionality

66 It follows from Articles 119(2) TFEU and 127(1) TFEU, read in conjunction with Article 5(4) TEU, that a bond-buying programme forming part of monetary policy may be validly adopted and implemented only in so far as the measures that it entails are proportionate to the objectives of that policy.

67 In that regard, it should be borne in mind that, according to the settled case-law of the Court, the principle of proportionality requires that acts of the EU institutions be appropriate for attaining the legitimate objectives pursued by the legislation at issue and do not go beyond what is necessary in order to achieve those objectives (see, to that effect, judgment in *Association Kokopelli*, C-59/11, EU:C:2012:447, paragraph 38 and the case-law cited).

68 As regards judicial review of compliance with those conditions, since the ESCB is required, when it prepares and implements an open market operations programme of the kind announced in the press release, to make choices of a technical nature and to undertake forecasts and complex assessments, it must be allowed, in that context, a broad discretion (see, by analogy, judgments in *Afton Chemical*, C-343/09, EU:C:2010:419, paragraph 28, and *Billerud Karlsborg and Billerud Skärblacka*, C-203/12, EU:C:2013:664, paragraph 35).

69 Nevertheless, where an EU institution enjoys broad discretion, a review of compliance with certain procedural guarantees is of fundamental importance. Those guarantees include the obligation for the ESCB to

examine carefully and impartially all the relevant elements of the situation in question and to give an adequate statement of the reasons for its decisions.

70 In that regard, the Court has consistently held that, although the statement of reasons for an EU measure, which is required by Article 296(2) TFEU, must show clearly and unequivocally the reasoning of the author of the measure in question, so as to enable the persons concerned to ascertain the reasons for the measure and to enable the Court to exercise its power of review, it is not required to go into every relevant point of fact and law. In addition, the question whether the obligation to provide a statement of reasons has been satisfied must be assessed with reference not only to the wording of the measure but also to its context and the whole body of legal rules governing the matter in question (see, to that effect, judgment in *Commission v Council*, C-63/12, EU:C:2013:752, paragraphs 98 and 99 and the case-law cited).

71 Although an examination of whether the obligation to provide a statement of reasons has been satisfied may be undertaken only on the basis of a decision that has been formally adopted, in this case it must none the less be found that the press release, together with draft legal acts considered during the meeting of the Governing Council at which the press release was approved, make known the essential elements of a programme such as that announced in the press release and are such as to enable the Court to exercise its power of review.

72 As regards, in the first place, the appropriateness of a programme such as that announced in the press release for achieving the ESCB's objectives, it is apparent from the press release and from the explanations provided by the ECB that the programme is based on an analysis of the economic situation of the euro area, according to which, at the date of the programme's announcement, interest rates on the government bonds of various States of the euro area were characterised by high volatility and extreme spreads. According to the ECB, those spreads were not accounted for solely by macroeconomic differences between the States concerned but were caused, in part, by the demand for excessive risk premia for the bonds issued by certain Member States, such premia being intended to guard against the risk of a break-up of the euro area.

73 According to the ECB, that special situation severely undermined the ESCB's monetary policy transmission mechanism in that it gave rise to fragmentation as regards bank refinancing conditions and credit costs, which greatly limited the effects of the impulses transmitted by the ESCB to the economy in a significant part of the euro area.

74 Having regard to the information placed before the Court in the present proceedings, it does not appear that that analysis of the economic situation of the euro area as at the date of the announcement of the programme in question is vitiated by a manifest error of assessment.

75 In that regard, the fact, mentioned by the referring court, that that reasoned analysis has been subject to challenge does not, in itself, suffice to call that conclusion into question, since, given that questions of monetary policy are usually of a controversial nature and in view of the ESCB's broad discretion, nothing more can be required of the ESCB apart from that it use its economic expertise and the necessary technical means at its disposal to carry out that analysis with all care and accuracy.

76 In the situation described in paragraphs 72 and 73 of this judgment, the purchase, on secondary markets, of government bonds of the Member States affected by interest rates considered by the ECB to be excessive is likely to contribute to reducing those rates by dispelling unjustified fears about the break-up of the euro area and thus to play a part in bringing about a fall in — or even the elimination of — excessive risk premia.

77 In those circumstances, the ESCB was entitled to take the view that such a development in interest rates is likely to facilitate the ESCB's monetary policy transmission and to safeguard the singleness of monetary policy.

78 Thus, it is undisputed that interest rates for the government bonds of a given State play a decisive role in the setting of the interest rates applicable to the various economic actors in that State, in the value of the portfolios of financial institutions holding such bonds and in the ability of those institutions to obtain liquidity. Therefore, eliminating or reducing the excessive risk premia demanded in respect of the government bonds of a Member State is likely to avoid the volatility and level of those premia from hindering the transmission of the effects of the ESCB's monetary policy decisions to the economy of that State and from jeopardising the singleness of monetary policy.

79 Moreover, the ECB's assertion that the mere announcement of the programme at issue in the main proceedings was sufficient to achieve the effect sought — namely to restore the monetary policy transmission mechanism and the singleness of monetary policy — has not been challenged in these proceedings.

80 It follows from the foregoing that, in economic conditions such as those described by the ECB at the date of the press release, the ESCB could legitimately take the view that a programme such as that announced in the press release is appropriate for the purpose of contributing to the ESCB's objectives and, therefore, to maintaining price stability.

81 Accordingly, it should, in the second place, be established whether such a programme does not go manifestly beyond what is necessary to achieve those objectives.

82 It must be noted in that regard that the wording of the press release makes quite clear that, under the programme at issue in the main proceedings, the purchase of government bonds on secondary markets is permitted only in so far as it is necessary to achieve the objectives of that programme and that such purchases will cease as soon as those objectives have been achieved.

83 It should also be noted that the announcement made in the press release about the programme at issue in the main proceedings will be followed, if necessary, by a second phase, namely implementation of the programme, which will be dependent upon an in-depth assessment of the requirements of monetary policy.

84 Moreover, more than two years after the programme at issue in the main proceedings was announced, that programme has not been implemented, the Governing Council taking the view that its activation was not justified by the economic situation of the euro area.

85 In addition to the fact that implementation of a programme such as that announced in the press release is strictly subject to the objectives of that programme, the Court notes that the potential scale of the programme is limited in a number of ways.

86 It is thus apparent that, in the context of such a programme, the ESCB may purchase only the government bonds of Member States which are undergoing a macroeconomic adjustment programme and which have access to the bond market again. Furthermore, a programme such as that at issue in the main proceedings is concentrated on government bonds with a maturity of up to three years, the ESCB reserving the right to sell at any time the bonds it has purchased.

87 It follows from those considerations, first, that a programme such as that announced in the press release ultimately concerns only a limited part of the government bonds issued by the States of the euro area, so that the commitments which the ECB is liable to enter into when such a programme is implemented are, in fact, circumscribed and limited. Secondly, such a programme can be put into effect only when the situation of certain of those States has already justified EMS intervention which is still under way.

88 In those circumstances, a programme whose volume is thus restricted could legitimately be adopted by the ESCB without a quantitative limit being set prior to its implementation, such a limit being likely, moreover, to reduce the programme's effectiveness.

89 Furthermore, in so far as the referring court raises the question of the selectivity of such a programme, it should be recalled that this programme is intended to rectify the disruption of the ESCB's monetary policy which arose as a result of the particular situation of government bonds issued by certain Member States. In those circumstances, the ESCB was fully entitled to take the view that a selective bond-buying programme may prove necessary in order to rectify that disruption, concentrating the ESCB's activity on the parts of the euro area which are particularly affected by that disruption and thereby preventing the scale of that programme from being needlessly increased, beyond what is necessary to achieve its objectives, or the programme's effectiveness from being diminished.

90 It must also be stated that a programme such as that announced in the press release identifies the Member States whose bonds may be purchased on the basis of criteria linked to the objectives pursued and not by means of an arbitrary selection.

91 In the third place, the ESCB weighed up the various interests in play so as to actually prevent disadvantages from arising, when the programme in question is implemented, which are manifestly disproportionate to the programme's objectives.

92 It follows from the foregoing considerations that a programme such as that announced in the press release does not infringe the principle of proportionality.

Article 123(1) TFEU

93 The referring court raises the issue of the compatibility with Article 123(1) TFEU of a programme for the purchase of government bonds on secondary markets, such as the programme announced in the press release.

94 It is clear from its wording that Article 123(1) TFEU prohibits the ECB and the central banks of the Member States from granting overdraft facilities or any other type of credit facility to public authorities and bodies of the Union and of Member States and from purchasing directly from them their debt instruments (judgment in *Pringle*, C-370/12, EU:C:2012:756, paragraph 123).

95 It follows that that provision prohibits all financial assistance from the ESCB to a Member State (see, to that effect, judgment in *Pringle*, C-370/12, EU:C:2012:756, paragraph 132), but does not preclude, generally, the possibility of the ESCB purchasing from the creditors of such a State, bonds previously issued by that State.

96 Thus, Article 18.1 of the Protocol on the ESCB and the ECB permits the ESCB, in order to achieve its objectives and to carry out its tasks, to operate in the financial markets, inter alia, by buying and selling outright marketable instruments, which include government bonds, and does not make that authorisation subject to particular conditions as long as the nature of open market operations is not disregarded.

97 Nevertheless, the ESCB does not have authority to purchase government bonds on secondary markets under conditions which would, in practice, mean that its action has an effect equivalent to that of a direct purchase of government bonds from the public authorities and bodies of the Member States, thereby undermining the effectiveness of the prohibition in Article 123(1) TFEU.

98 In addition, in order to determine which forms of purchases of government bonds are compatible with Article 123(1) TFEU, it is necessary to take account of the objective pursued by that provision (see, by analogy, judgment in *Pringle*, C-370/12, EU:C:2012:756, paragraph 133).

99 To that end, it must be recalled that the origin of the prohibition laid down in Article 123 TFEU is to be found in Article 104 of the EC Treaty (which became Article 101 EC), which was inserted in the EC Treaty by the Treaty of Maastricht.

100 It is apparent from the preparatory work relating to the Treaty of Maastricht that the aim of Article 123 TFEU is to encourage the Member States to follow a sound budgetary policy, not allowing monetary financing of public deficits or privileged access by public authorities to the financial markets to lead to excessively high levels of debt or excessive Member State deficits (see the Draft Treaty amending the Treaty establishing the European Economic Community with a view to achieving economic and monetary union, *Bulletin of the European Communities*, Supplement 2/91, pp. 24 and 54).

101 Thus, as is stated in the seventh recital in the preamble to Council Regulation (EC) No 3603/93 of 13 December 1993 specifying definitions for the application of the prohibitions referred to in Articles [123 TFEU] and [125(1) TFEU] (OJ 1993 L 332, p. 1), purchases made on the secondary market may not be used to circumvent the objective of Article 123 TFEU.

102 It follows that, as the Advocate General has observed in point 227 of his Opinion, when the ECB purchases government bonds on secondary markets, sufficient safeguards must be built into its intervention to ensure that the latter does not fall foul of the prohibition of monetary financing in Article 123(1) TFEU.

103 As regards a programme such as that announced in the press release, it must in the first place be stated that, in the framework of such a programme, the ESCB is entitled to purchase government bonds — not directly, from

public authorities or bodies of the Member States — but only indirectly, on secondary markets. Intervention by the ESCB of the kind provided for by a programme such as that at issue in the main proceedings thus cannot be treated as equivalent to a measure granting financial assistance to a Member State.

104 That said, the point should be made, in the second place, that the ESCB's intervention could, in practice, have an effect equivalent to that of a direct purchase of government bonds from public authorities and bodies of the Member States if the potential purchasers of government bonds on the primary market knew for certain that the ESCB was going to purchase those bonds within a certain period and under conditions allowing those market operators to act, de facto, as intermediaries for the ESCB for the direct purchase of those bonds from the public authorities and bodies of the Member State concerned.

105 However, the explanations provided by the ECB in these proceedings have made clear that the implementation of a programme such as that announced in the press release must be subject to conditions intended to ensure that the ESCB's intervention on secondary markets does not have an effect equivalent to that of a direct purchase of government bonds on the primary market.

106 In this respect, the draft decision and draft guideline produced by the ECB in these proceedings indicate that the Governing Council is to be responsible for deciding on the scope, the start, the continuation and the suspension of the intervention on the secondary market envisaged by such a programme. The ECB has also made clear before the Court that the ESCB intends, first, to ensure that a minimum period is observed between the issue of a security on the primary market and its purchase on the secondary market and, secondly, to refrain from making any prior announcement concerning either its decision to carry out such purchases or the volume of purchases envisaged.

107 Inasmuch as those safeguards prevent the conditions of issue of government bonds from being distorted by the certainty that those bonds will be purchased by the ESCB after their issue, they ensure that implementation of a programme such as that announced in the press release will not, in practice, have an effect equivalent to that of a direct purchase of government bonds from public authorities and bodies of the Member States.

108 It is true that, despite those safeguards, the ESCB's intervention remains capable of having, as the referring court points out, some influence on the functioning of the primary and secondary sovereign debt markets. However, that fact is not decisive since such influence constitutes, as the Advocate General has observed in point 259 of his Opinion, an inherent effect in purchases on the secondary market which are authorised by the FEU Treaty. That effect is, moreover, essential if those purchases are to be used effectively in the framework of monetary policy.

109 In the third place, a programme such as that announced in the press release would circumvent the objective of Article 123(1) TFEU, recalled in paragraph 100 of this judgment, if that programme were such as to lessen the impetus of the Member States concerned to follow a sound budgetary policy. In fact, since it follows from Articles 119(2) TFEU, 127(1) TFEU and 282(2) TFEU that, without prejudice to the objective of price stability, the ESCB is to support the general economic policies in the Union, the action taken by the ESCB on the basis of Article 123 TFEU cannot be such as to contravene the effectiveness of those policies by lessening the impetus of the Member States concerned to follow a sound budgetary policy.

110 Moreover, the conduct of monetary policy will always entail an impact on interest rates and bank refinancing conditions, which necessarily has consequences for the financing conditions of the public deficit of the Member States.

111 In any event, the Court finds that the features of a programme such as that announced in the press release exclude the possibility of that programme being considered of such a kind as to lessen the impetus of the Member States to follow a sound budgetary policy.

112 In that regard, it must be borne in mind, first, that the programme provides for the purchase of government bonds only in so far as is necessary for safeguarding the monetary policy transmission mechanism and the singleness of monetary policy and that those purchases will cease as soon as those objectives are achieved.

113 That limitation on the ESCB's intervention means (i) that the Member States cannot, in determining their budgetary policy, rely on the certainty that the ESCB will at a future point purchase their government bonds on

secondary markets and (ii) that the programme in question cannot be implemented in a way which would bring about a harmonisation of the interest rates applied to the government bonds of the Member States of the euro area regardless of the differences arising from their macroeconomic or budgetary situation.

114 The adoption and implementation of such a programme thus do not permit the Member States to adopt a budgetary policy which fails to take account of the fact that they will be compelled, in the event of a deficit, to seek financing on the markets, or result in them being protected against the consequences which a change in their macroeconomic or budgetary situation may have in that regard.

115 Secondly, a programme such as that at issue in the main proceedings is accompanied by a series of guarantees that are intended to limit its impact on the impetus to follow a sound budgetary policy.

116 Thus, by limiting that programme to certain types of bonds issued only by those Member States which are undergoing a structural adjustment programme and which have access to the bond market again, the ECB has, de facto, restricted the volume of government bonds eligible to be purchased in the framework of the programme and, accordingly, has limited the scale of the programme's impact on the financing conditions of the States of the euro area.

117 Moreover, the impact of a programme such as that announced in the press release on the impetus to follow a sound budgetary policy is also limited by the fact that the ESCB has the option of selling the purchased bonds at any time. It follows that the consequences of withdrawing those bonds from the markets may be temporary. That option also means that the ESCB is able to adapt its programme in the light of the attitude of the Member States concerned, in particular with a view to limiting or suspending purchases of government bonds if a Member State changes its issuance behaviour by issuing more short-maturity bonds in order to finance its budget by means of bonds that are eligible for ESCB intervention.

118 The fact that the ESCB also has the possibility of holding the bonds it has purchased until maturity does not play a decisive role in this regard, since that possibility depends on such action being necessary to achieve the objectives sought and, in any event, the market operators involved cannot be certain that the ESCB will make use of that option. It should also be observed that such a practice is in no way precluded by Article 18.1 of the Protocol on the ESCB and the ECB and that it does not imply that the ESCB waives its right to payment of the debt, by the issuing Member State, once the bond matures.

119 In addition, by providing only for the purchase of government bonds issued by Member States that have access to the bond market again, the ESCB in practice excludes from the programme it intends to implement the Member States whose financial situation has deteriorated so far that they are no longer in a position to secure financing on the market.

120 Finally, the fact that the purchase of government bonds is conditional upon full compliance with the structural adjustment programmes to which the Member States concerned are subject precludes the possibility of a programme, such as that announced in the press release, acting as an incentive to those States to dispense with fiscal consolidation, relying on the financing opportunities to which the implementation of such a programme could give rise.

121 It follows from the foregoing that a programme such as that announced in the press release does not lessen the impetus of the Member States concerned to follow a sound budgetary policy. Accordingly, Article 123(1) TFEU does not prevent the ESCB from adopting such a programme and implementing it under conditions which do not result in the ESCB's intervention having an effect equivalent to that of a direct purchase of government bonds from the public authorities and bodies of the Member States.

122 The features of such a programme to which the referring court has specifically drawn attention and which have not been mentioned in the analysis in the previous paragraphs do not call that conclusion into question.

123 Thus, even if it were established that that programme could expose the ECB to a significant risk of losses, that would in no way weaken the guarantees which are built into the programme in order to ensure that the Member States' impetus to follow a sound budgetary policy is not lessened.

124 In this regard, the Court observes that those guarantees are also likely to reduce the risk of losses to which the ECB is exposed.

125 It should also be borne in mind that a central bank, such as the ECB, is obliged to take decisions which, like open market operations, inevitably expose it to a risk of losses and that Article 33 of the Protocol on the ESCB and the ECB duly provides for the way in which the losses of the ECB must be allocated, without specifically delimiting the risks which the Bank may take in order to achieve the objectives of monetary policy.

126 Furthermore, although the lack of privileged creditor status may mean that the ECB is exposed to the risk of a debt cut decided upon by the other creditors of the Member State concerned, it must be stated that such a risk is inherent in a purchase of bonds on the secondary markets, an operation which was authorised by the authors of the Treaties, without being conditional upon the ECB having privileged creditor status.

127 In view of all the foregoing considerations, the answer to the questions referred is that Articles 119 TFEU, 123(1) TFEU and 127(1) and (2) TFEU and Articles 17 to 24 of the Protocol on the ESCB and the ECB must be interpreted as permitting the ESCB to adopt a programme for the purchase of government bonds on secondary markets, such as the programme announced in the press release.

Costs

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

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

Articles 119 TFEU, 123(1) TFEU and 127(1) and (2) TFEU and Articles 17 to 24 of Protocol (No 4) on the Statute of the European System of Central Banks and of the European Central Bank must be interpreted as permitting the European System of Central Banks (ESCB) to adopt a programme for the purchase of government bonds on secondary markets, such as the programme announced in the press release to which reference is made in the minutes of the 340th meeting of the Governing Council of the European Central Bank (ECB) on 5 and 6 September 2012.

Bundesverfassungsgericht, Gauweiler Press Release 21 June 2016

Press Release No. 34/2016 of 21 June 2016

Judgment of 21 June 2016 - 2 BvR 2728/13, 2 BvR 2729/13, 2 BvR 2730/13, 2 BvR 2731/13, 2 BvE 13/13

If the conditions formulated by the Court of Justice of the European Union in its judgment of 16 June 2015 (C-62/14) and intended to limit the scope of the OMT programme are met, the complainants' rights under Art. 38 sec. 1 sentence 1, Art. 20 secs. 1 and 2 in conjunction with Art. 79 sec. 3 of the Basic Law (*Grundgesetz* – GG) are not violated by the fact that the Federal Government and the *Bundestag* have not taken suitable steps to revoke or limit the effect of the policy decision of the European Central Bank of 6 September 2012 concerning the OMT programme. Furthermore, if these conditions are met, the OMT programme does not currently impair the *Bundestag's* overall budgetary responsibility. Such was the decision of the Second Senate of the Federal Constitutional Court in a judgment pronounced today. If interpreted in accordance with the Court of Justice's judgment, the policy decision on the OMT programme does not "manifestly" exceed the competences attributed to the European Central Bank. Moreover, if interpreted in accordance with the Court of Justice's judgment, the OMT programme does not present a constitutionally relevant threat to the German *Bundestag's* right to decide on the budget.

Facts of the Case:

The constitutional complaints and the application for *Organstreit* proceedings [*proceedings relating to disputes between constitutional organs*] challenge two programmes aimed at the purchase of government bonds of Member States of the Euro zone on the secondary market by the European System of Central Banks ("ESCB"). For further information please refer to press releases [nos. 29/2013](#) of 19 April 2013 (available in German), [9/2014](#) of 7 February 2014, and [3/2016](#) of 15 January 2016.

Key Considerations of the Senate:

1. The constitutional complaints and the *Organstreit* proceedings are partially inadmissible. In particular, the constitutional complaints are inadmissible to the extent that they directly challenge acts of the European Central Bank. To that extent those acts cannot be challenged before the *Bundesverfassungsgericht* (German Federal Constitutional Court).

2. To the extent that the constitutional complaints and the application for *Organstreit* proceedings are admissible, they are unfounded.

a) By empowering the Federation to transfer sovereign powers to the European Union (Art. 23 sec. 1 sentence 2 GG), the Basic Law also accepts a precedence of application of European Union law (*Anwendungsvorrang des Unionsrechts*). The legislature deciding on European integration matters may not only exempt institutions, bodies, offices and agencies of the European Union from being comprehensively bound by the guarantees of the Basic Law but also German entities that implement European Union law.

However, the precedence of application of European Union law only extends as far as the Basic Law and the relevant Act of Approval permit or envisage the transfer of sovereign powers. Therefore, limits for the opening of German statehood derive from the constitutional identity of the Basic Law guaranteed by Art. 79 sec. 3 GG and from the European integration agenda (*Integrationsprogramm*), which is laid down in the Act of Approval and vests European Union law with the necessary democratic legitimacy for Germany.

b) The fundamental elements of the principle of democracy (Art. 20 secs. 1 and 2 GG) are part of the constitutional identity of the Basic Law, which has been declared to be beyond the reach both of constitutional amendment (Art. 79 sec. 3 GG) and European integration (Art. 23 sec. 1 sentence 3 in conjunction with Art. 79 sec. 3 GG). Therefore, the legitimacy given to state authority by elections may not be depleted by transfers of powers and tasks to the European level. Thus, the principle of sovereignty of the people (*Volkssouveränität*) (Art. 20 sec. 2 sentence 1 GG) is violated if institutions, bodies, offices and agencies of the European Union that are not adequately democratically legitimised through the European integration agenda laid down in the Act of Approval exercise public authority.

c) When conducting its identity review, the Federal Constitutional Court examines whether the principles declared by Art. 79 sec. 3 GG to be inviolable are affected by transfers of sovereign powers by the German legislature or by acts of institutions, bodies, offices and agencies of the European Union. This concerns the protection of the fundamental rights' core of human dignity (Art. 1 GG) as well as the fundamental principles that characterise the principles of democracy, of the rule of law, of the social state, and of the federal state within the meaning of Art. 20 GG.

When conducting its *ultra vires* review, the Federal Constitutional Court (merely) examines whether acts of institutions, bodies, offices and agencies of the European Union are covered by the European integration agenda (Art. 23 sec. 2 sentence 2 GG), and thus by the precedence of application of European Union law. Finding an act to be *ultra vires* requires – irrespective of the area concerned – that it manifestly exceed the competences transferred to the European Union.

d) Similar to the duties to protect (*Schutzpflichten*) mandated by the fundamental rights, the re-responsibility with respect to European integration (*Integrationsverantwortung*) requires the constitutional organs to protect and promote the citizens' rights protected by Art. 38 sec. 1 sentence 1 in conjunction with Art. 20 sec. 2 sentence 1 GG if the citizens are not themselves able to ensure the integrity of their rights. Therefore, the constitutional organs' obligation to fulfil their responsibility with respect to European integration is paralleled by a right of the voters enshrined in Art. 38 sec. 1 sentence 1 GG. This right requires the constitutional organs to ensure that the drop in influence (*Einflussknick*) and the restrictions on the voters' "right to democracy" that come with the implementation of the European integration agenda do not extend further than is justified by the transfer of sovereign powers to the European Union.

In principle, duties to protect are violated only if no protective measures are taken at all, if measures taken are manifestly unsuitable or completely inadequate, or if they fall considerably short of the protection's aim. This means for the responsibility with respect to European integration (*Integrationsverantwortung*) that, if institutions, bodies, offices and agencies of the European Union exceed their competences in a manifest and structurally relevant manner or violate the constitutional identity in other ways, the constitutional organs must actively work towards respect of the European integration agenda. They may – within the scope of their competences – be required to use legal or political means to work towards revocation of measures that are not covered by the European integration agenda as well as – as long as the measures continue to have effect – to take suitable measures to restrict the national effects of such measures as far as possible. Just like the duties of protection inherent in fundamental rights, the responsibility with respect to European integration (*Integrationsverantwortung*) may in certain legal and factual circumstances concretise in such a way that a specific duty to act results from it.

3. According to these standards and if the conditions listed below are met, the inaction on the part of the Federal Government and of the *Bundestag* with regard to the policy decision of the European Central Bank of 6 September 2012 does not violate the complainants' rights under Art. 38 sec. 1 sentence 1, Art. 20 secs. 1 and 2 in conjunction with Art. 79 sec. 3. Furthermore, the *Bundestag*'s rights and obligations with regard to European integration (*Integrationsverantwortung*) – including its overall budgetary responsibility – are not impaired.

a) The Federal Constitutional Court bases its review on the interpretation of the OMT decision formulated by the Court of Justice in its judgment of 16 June 2015. The Court of Justice's finding that the policy decision on the OMT programme is within the bounds of the respective competences and does not violate the prohibition of monetary financing of the budget still remains within the mandate of the Court of Justice (Art. 19 sec. 1 sentence 2 TEU).

The Court of Justice bases its view to a large extent on the objectives of the OMT programme as indicated by the European Central Bank, on the means employed to achieve those objectives, and on the programme's effects on economic policy, which – according to the Court of Justice – are only indirect in nature. It bases its review not only on the policy decision of 6 September 2012 concerning the technical details, but derives further framework conditions – in particular from the principle of proportionality –, which set binding limits for any implementation of the OMT programme. Furthermore, the Court of Justice affirms that acts of the European Central Bank are not exempt from judicial review, in particular regarding whether the principles of conferral and proportionality are complied with.

b) Nevertheless, the manner of judicial specification of the Treaty (Treaty on the Functioning of the European Union) evidenced in the judgment of 16 June 2015 meets with serious objections on the part of the Senate. These objections concern the way the facts of the case were established, the way the principle of conferral was discussed,

and the way the judicial review of acts of the European Central Bank that relate to the definition of its mandate was conducted.

Firstly, the Court of Justice accepts the assertion that the OMT programme pursues a monetary policy objective without questioning or at least discussing and individually reviewing the soundness of the underlying factual assumptions, and without testing these assumptions with regard to the indications that evidently argue against a character of monetary policy.

Furthermore, – despite its own belief that economic and monetary policy overlap – the Court of Justice essentially relies on the objectives of the measure as indicated by the organ on review as well as on the recourse to the instrument of the purchase of government bonds enshrined in Art. 18 of the ESCB Statute when qualifying the OMT programme as an instrument belonging to the field of monetary policy.

Lastly, the Court of Justice provides no answer to the following issue: that the independence granted to the European Central Bank leads to a noticeable reduction in the level of democratic legitimation of its actions and should therefore give rise to restrictive interpretation and to particularly strict judicial review of the mandate of the European Central Bank. This holds all the more true if the principles of democracy and sovereignty of the people (*Volkssouveränität*) are affected – and thereby the constitutional identity of a Member State, which the European Union is required to respect.

c) Despite these concerns, if interpreted in accordance with the Court of Justice’s judgment, the policy decision on the OMT programme does not – within the meaning of the competence retained by the Federal Constitutional Court to review *ultra vires* acts – “manifestly” exceed the competences attributed to the European Central Bank. Although – unlike the Senate – the Court of Justice does not question the indicated objectives and evaluates each of the signs that the Senate holds to argue against the alleged objectives in an isolated manner instead of performing an overall evaluation, this is acceptable because on the level of the exercise of competences the Court of Justice has essentially performed the restrictive interpretation of the policy decision that the Senate’s request for a preliminary ruling of 14 January 2014 held to be possible.

The Court of Justice differentiates between the policy decision of 6 September 2012 on the one hand and the implementation of the programme on the other. With a view to the proportionality of the OMT programme and the fulfilment of the obligations to state reasons, it specifies additional compelling restrictions that apply to any implementation of the OMT programme and exceed the framework conditions indicated in the policy decision. Against this backdrop, one must assume that the Court of Justice considers the conditions it specified to be legally binding. In using procedural means to limit the ECB’s competences by reviewing whether the principle of proportionality has been observed, the Court of Justice takes up the issue of the nearly unlimited potential of the decision of 6 September 2012. The restrictive parameters developed by the Court of Justice do not completely remove the character of the OMT programme insofar as it encroaches upon economic policy. However, together with the conditions prescribed by the decision of 6 September 2012 – in particular the participation of Member States in adjustment programmes, Member States’ access to the bond market, and the focus on bonds with a short maturity – they make it appear acceptable to assume that the character of the OMT programme is at least to the largest extent monetary in kind.

d) If interpreted in accordance with the Court of Justice’s judgment, the policy decision on the technical framework conditions of the OMT programme as well as its possible implementation also do not manifestly violate the prohibition of monetary financing of the budget. Although the Court of Justice considers the policy decision to be permissible even without further specifications, its implementation must fulfil further conditions in order for the purchase programme to not violate Union law. Thusly interpreted, and when comprehensively assessed and evaluated, the OMT programme fulfils the requirements formulated by the Senate’s order of 14 January 2014 requesting a preliminary ruling by the Court of Justice.

e) Since, against this backdrop, the OMT programme constitutes an *ultra vires* act if the framework conditions defined by the Court of Justice are not met, the German *Bundesbank* may only participate in the programme’s implementation if and to the extent that the prerequisites defined by the Court of Justice are met; i.e. if

- purchases are not announced,
- the volume of the purchases is limited from the outset,

- there is a minimum period between the issue of the government bonds and their purchase by the ESCB that is defined from the outset and prevents the issuing conditions from being distorted,
- the ESCB purchases only government bonds of Member States that have bond market access enabling the funding of such bonds,
- purchased bonds are only in exceptional cases held until maturity and
- purchases are restricted or ceased and purchased bonds are remarketed should continuing the intervention become unnecessary.

f) Their responsibility with respect to European integration does not require the Federal Government and the *Bundestag* to take action against the OMT programme in order to protect the overall budgetary responsibility of the *Bundestag*. If interpreted in accordance with the Court of Justice's judgment, the OMT programme does not present a constitutionally relevant threat to the *Bundestag's* right to decide on the budget. Therefore, it can currently also not be established that implementation of the OMT programme would pose a threat to the overall budgetary responsibility.

g) However, due to their responsibility with respect to European integration (*Integrationsverantwortung*), the Federal Government and the *Bundestag* are under a duty to closely monitor any implementation of the OMT programme. This compulsory monitoring shall determine not only whether the abovementioned conditions are met, but also whether there is a specific threat to the federal budget – deriving in particular from the volume and the risk structure of the purchased bonds, which may change even after their purchase.

Bundesverfassungsgericht, Order of 18 July 2017, press release

In an order published today, the Second Senate of the Federal Constitutional Court stayed the proceedings concerning the question whether the Public Sector Purchase Programme (PSPP) of the European Central Bank (ECB) for the purchase of public sector securities is compatible with the Basic Law, and referred several questions to the Court of Justice of the European Union for a preliminary ruling. In the view of the Senate, significant reasons indicate that the ECB decisions governing the asset purchase programme violate the prohibition of monetary financing and exceed the monetary policy mandate of the European Central Bank, thus encroaching upon the competences of the Member States. The Senate requests an expedited procedure pursuant to Art. 105 of the Rules of Procedure of the Court of Justice as the nature of the case requires that it be dealt with within a short time.

Facts of the Case:

The PSPP is part of the Expanded Asset Purchase Programme (EAPP), a framework programme of the European Central Bank (ECB) for the purchase of financial assets. The PSPP accounts for – by far – the largest share of the EAPP's total volume. As of 12 May 2017, the EAPP had reached a total volume of EUR 1,862.1 billion, of which EUR 1,534.8 billion were allotted to the PSPP alone.

With their constitutional complaints, the complainants claim that, by way of launching the programme for the purchase of public sector securities, the European System of Central Banks (ESCB) violates the prohibition of monetary financing (Art. 123 of the Treaty on the Functioning of the European Union – TFEU) and the principle of conferral (Art. 5 of the Treaty on European Union – TEU, in conjunction with Arts. 119, 127 et seq. TFEU). Accordingly, the complainants submit that the German *Bundesbank* (Federal Central Bank) may not participate in the asset purchase programme and that the German *Bundestag* and the Federal Government are obliged to take suitable measures against the challenged programme.

Key Considerations of the Senate:

1. Art. 38(1) first sentence of the Basic Law (*Grundgesetz* – GG) guarantees, to the extent protected by Art. 79(3) GG, German citizens a right to democratic self-determination; this right can be enforced by way of a constitutional complaint. Due to their responsibility with respect to European integration (*Integrationsverantwortung*), the constitutional organs are obliged to use the means at their disposal to ensure within the scope of their competences that the European integration agenda (*Integrationsprogramm*) is respected. Insofar, it is the task of the Federal Constitutional Court to review whether acts adopted by institutions, bodies, offices, and agencies of the European Union evidently exceed competences, or whether they touch upon the inalienable part of the constitutional identity; as a consequence, German state organs would neither be allowed to participate in the development nor in the implementation of such acts.

2. It is doubtful whether the PSPP decision is compatible with the prohibition of monetary financing.

a) Art. 123(1) TFEU bars the ECB and the central banks of the Member States from purchasing bonds directly from institutions of the European Union or the Member States. It is also not permissible to resort to purchases on the secondary market in order to circumvent the objective pursued by Art. 123 TFEU. Therefore, any programme relating to the purchase of government bonds on the secondary market must provide sufficient guarantees to effectively ensure observance of the prohibition of monetary financing. The Senate presumes that the Court of Justice of the European Union deems the conditions which it developed, and which limit the scope of the ECB policy decision on the Outright Monetary Transactions (OMT) programme of 6 September 2012, to be legally binding criteria. Against that background, the Senate further presumes that contempt of these criteria would amount to a violation of competences also with regard to other programmes relating to the purchases of government bonds.

b) The PSPP concerns government bonds issued by Member States, state-owned enterprises and other state institutions as well as debt securities issued by European institutions. Even though these bonds are purchased exclusively on the secondary market, several factors indicate that the PSPP decision nevertheless violates Art. 123 AEUV, namely the fact that details of the purchases are announced in a manner that could create a *de facto* certainty on the markets that issued government bonds will, indeed, be purchased by the Eurosystem; that it is not

possible to verify compliance with certain minimum periods between the issuing of debt securities on the primary market and the purchase of the relevant securities on the secondary market; that to date all purchased bonds were – without exception – held until maturity; and furthermore that the purchases include bonds that carry a negative yield from the outset.

3. Moreover, it appears that the PSPP decision may not be covered by the ECB's mandate.

a) The wording and systematic concept as well as the spirit and purpose of the Treaties suggest that it is necessary to delineate matters of a monetary policy nature from economic policy matters, the latter being primarily the responsibility of the Member States. In this regard, decisive factors include the aim of a measure which is to be determined objectively, the means chosen with a view to achieving this aim as well as their connection to other provisions.

b) In the view of the Senate, based on an overall assessment of the relevant criteria of delimitation, the PSPP decision can no longer be qualified as a monetary policy measure but instead must be deemed to constitute a measure that is primarily of an economic policy nature. It is true that the PSPP officially pursues a monetary policy objective and that monetary policy instruments are used to achieve this objective; however, the economic policy impacts stemming from the volume of the PSPP and the resulting foreseeability of purchases of government bonds are integral features of the programme which are already inherent in its design. As far as the underlying monetary policy objective is concerned, the PSPP could thus prove to be disproportionate. In addition, the decisions on which the programme is based are lacking comprehensible reasons that would allow for an ongoing review, during the multi-year period envisaged for the implementation of these decisions, as to whether there remains a continued need for the programme.

4. Currently it is not possible to determine with certainty whether, based on the risk sharing between the ECB and the *Bundesbank*, the *Bundestag's* right to decide on the budget (*Budgetrecht*) protected under Art. 20(1) and (2) GG in conjunction with Art. 79(3) GG as well as its overall budgetary responsibility could be affected by the PSPP decision and its implementation in terms of potential losses to be borne by the *Bundesbank*.

a) An unlimited risk sharing within the Eurosystem and the resulting risks for the profit and loss account of the national central banks would amount to a violation of the constitutional identity within the meaning of Art. 79(3) GG if it became necessary to provide recapitalisation for the national central banks through budgetary resources to such extent that approval by the German *Bundestag* would be required in accordance with the principles established by the Senate in the its case-law on the EFSF and the ESM. Therefore, the success of the constitutional complaint at hand is contingent upon whether this form of a risk sharing can be ruled out under primary law.

b) The primary law of the Union provides but little guidance on the decision-making of the ECB Governing Council concerning the manner and scope of risk sharing between the members of the European System of Central Banks. Consequently, the ECB Governing Council may be able to modify the rules on risk sharing within the Eurosystem in a way that would result in risks for the profit and loss accounts of the national central banks and also threaten the overall budgetary responsibility of national parliaments. Against that background, the question arises whether an unlimited distribution of risks between the national central banks of the Eurosystem regarding bonds in default where such bonds were issued by central governments or by issuers of equivalent status would violate Art. 123 and Art. 125 TFEU as well as Art. 4(2) TEU (in conjunction with Art. 79(3) GG).

LECTURE 10: SAVING THE ECONOMIC AND MONETARY UNION OUTSIDE AND INSIDE THE EU LEGAL ORDER

The interventions by the ECB aimed at restoring confidence in European markets and sovereign debt of Eurozone Member States have never been considered sufficient to mitigate the negative effects of the Eurozone crisis. In order to do so, intervention mechanisms had to be created that would help in preventing a next crisis of the same kind. In the EU's system of conferred competences, however, the principle of conferral did not allow those intervention mechanisms to be created as a matter of EU law. As a result, new institutional frameworks have seen the light of day outside the EU legal order. The establishment of a European Stability Mechanism (ESM) constitutes a prime example of this. At the same time, the EU legal order also wanted to strengthen its regulatory framework, creating a capital markets union founded on a single rulebook. In the end, a hybrid legal framework emerges, containing both classical EU law instruments and tools created outside the formal scope of the EU legal order. In this lecture, we will explore those mechanisms and the interaction between new frameworks and the EU legal order.

Materials to read:

- Treaty establishing the European Stability Mechanism, signed on 29 February 2012, available on www.esm.europa.eu/pdf/ESM%20Treaty%20consolidated%2013-03-2014.pdf (via eCampus)
- Court of Justice, 27 November 2012, Case C-370/12, *Thomas Pringle v Government of Ireland, Ireland and The Attorney General*, ECLI:EU:C:2012:756.
- Communication from the Commission to the European Parliament, the Council and the European Central Bank, On steps towards Completing Economic and Monetary Union (COM/2015/0600 final).

Lecture 10 outline:

- a. Strengthening the Eurozone for the future: the ESM
 1. Bailing out Member States and the no-bail out clause
 2. Public international law solutions
 3. A temporary European Financial Stability Mechanism
 4. A temporary European Financial Stability Facility
 5. Modifying the Treaty framework
 6. Establishing a European Stability Mechanism
 7. The functioning of the European Stability Mechanism
 8. The future of the European Stability Mechanism
- b. Beyond the ESM: a stronger EMU
 1. Lack of sufficiently powerful budgetary control as reason for the crisis
 2. More convergence and stability in the Eurozone: an ex-ante focus
 3. A strict and clear 'European semester' and tight budgetary control
 4. Towards a dense single rulebook for financial market operators
 5. A Capital Markets Union
- c. A hybrid legal framework?

1. Inside and outside the EU legal order
 2. Pragmatism over principles?
 3. Living with hybridity: practical problems
- d. Enhancing coherence within hybridity
1. Treaty modifications
 2. Public international law techniques
 3. Pragmatism over coherence?
 4. The role of law in the setup of post-crisis rescue, resolution and stability mechanisms

Questions for discussion:

- Distinguish between different interpretations of the *Pringle* judgment. What did motivate the Court of Justice to consider the ESM Treaty to be adopted on a correct legal basis? Did the Court's reasoning strike you as convincing?
- How does EU law ensure coherence with the extra-legal ESM frameworks? What legal tools could be relied on to enhance such coherence?

Case C-370/12, *Thomas Pringle v Government of Ireland, Ireland and The Attorney General*

In Case C-370/12,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Supreme Court (Ireland), made by decision of 31 July 2012, received at the Court on 3 August 2012, in the proceedings

Thomas Pringle

v

Government of Ireland,

Ireland,

The Attorney General,

THE COURT (Full Court),

[...]

gives the following

Judgment

1 This reference for a preliminary ruling concerns, first, the validity of European Council Decision 2011/199/EU of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro (OJ 2011 L 91, p. 1), and, secondly, the interpretation of Articles 2 TEU, 3 TEU, 4(3) TEU, 13 TEU, Articles 2(3) TFEU, 3(1)(c) and (2) TFEU, 119 TFEU to 123 TFEU and 125 TFEU to 127 TFEU, and the general principles of effective judicial protection and legal certainty.

2 The reference was made in an appeal against a judgment of the High Court (Ireland) in proceedings brought by Mr Pringle, a member of the Irish Parliament, against the Government of Ireland, Ireland and the Attorney General seeking a declaration, first, that the amendment of Article 136 TFEU by Article 1 of Decision 2011/199 constitutes an unlawful amendment of the FEU Treaty and, secondly, that by ratifying, approving or accepting the Treaty establishing the European stability mechanism between the Kingdom of Belgium, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Grand Duchy of Luxembourg, Malta, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Slovenia, the Slovak Republic and the Republic of Finland, concluded in Brussels on 2 February 2012 ('the ESM Treaty'), Ireland would undertake obligations incompatible with the Treaties on which the European Union is founded.

I – Legal context

A – Decision 2011/199

3 On 16 December 2010 the Belgian Government submitted, in accordance with the first subparagraph of Article 48(6) TEU, a proposal for the revision of Article 136 TFEU which consisted of adding a paragraph 3 to that article.

4 The European Parliament, the European Commission and the European Central Bank ('the ECB') each issued an opinion on the proposal, on 23 March, 15 February and 17 March 2011 respectively. Decision 2011/199 was adopted on 25 March 2011.

5 Recitals 2, 4 and 5 of the preamble to that decision are as follows:

‘(2) At the meeting of the European Council of 28 and 29 October 2010, the Heads of State or Government agreed on the need for Member States to establish a permanent crisis mechanism to safeguard the financial stability of the euro area as a whole and invited the President of the European Council to undertake consultations with the members of the European Council on a limited treaty change required to that effect.

...

(4) The stability mechanism will provide the necessary tool for dealing with such cases of risk to the financial stability of the euro area as a whole as have been experienced in 2010, and hence help preserve the economic and financial stability of the Union itself. At its meeting of 16 and 17 December 2010, the European Council agreed that, as this mechanism is designed to safeguard the financial stability of the euro area as [a] whole, Article 122(2) of the [FEU Treaty] will no longer be needed for such purposes. The Heads of State or Government therefore agreed that it should not be used for such purposes.

(5) On 16 December 2010, the European Council decided to consult, in accordance with Article 48(6), second subparagraph, of the TEU, the European Parliament and the Commission, on the proposal. It also decided to consult the [ECB]. ...’

6 Article 1 of Decision 2011/199 provides:

‘The following paragraph shall be added to Article 136 of the [FEU] Treaty:

“3. The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality.”’

7 Under Article 2 of Decision 2011/199:

‘Member States shall notify the Secretary-General of the European Council without delay of the completion of the procedures for the approval of this Decision in accordance with their respective constitutional requirements.

This Decision shall enter into force on 1 January 2013, provided that all the notifications referred to in the first paragraph have been received, or, failing that, on the first day of the month following receipt of the last of the notifications referred to in the first paragraph.’

B – *The ESM Treaty*

8 The contracting parties to the ESM Treaty are the Member States whose currency is the euro.

9 Recitals 1 and 16 of the preamble to the ESM Treaty are as follows:

‘(1) The European Council agreed on 17 December 2010 on the need for euro area Member States to establish a permanent stability mechanism. This European Stability Mechanism (“ESM”) will assume the tasks currently fulfilled by the European Financial Stability Facility (“EFSF”) and the European Financial Stabilisation Mechanism (“EFSM”) in providing, where needed, financial assistance to euro area Member States.

...

(16) Disputes concerning the interpretation and application of this Treaty arising between the Contracting Parties or between the Contracting Parties and the ESM should be submitted to the jurisdiction of the Court of Justice of the European Union, in accordance with Article 273 [TFEU].’

10 Article 1 of the ESM Treaty, headed ‘Establishment and members’ provides:

‘1. By this Treaty, the Contracting Parties establish among themselves an international financial institution, to be named the “European Stability Mechanism” (“ESM”).

2. The Contracting Parties are ESM Members.’

11 Article 3 of the ESM Treaty describes the purpose of the ESM, whose maximum lending capacity is initially to be fixed by Article 39 of that treaty at EUR 500 000 million, as follows:

‘The purpose of the ESM shall be to mobilise funding and provide stability support under strict conditionality, appropriate to the financial assistance instrument chosen, to the benefit of ESM Members which are experiencing, or are threatened by, severe financing problems, if indispensable to safeguard the financial stability of the euro area as a whole and of its Member States. For this purpose, the ESM shall be entitled to raise funds by issuing financial instruments or by entering into financial or other agreements or arrangements with ESM Members, financial institutions or other third parties.’

12 Article 4(1), (3) and (4), first subparagraph, of the ESM Treaty state:

‘1. The ESM shall have a Board of Governors and a Board of Directors, as well as a Managing Director and other dedicated staff as may be considered necessary.

...

3. The adoption of a decision by mutual agreement requires the unanimity of the members participating in the vote. Abstentions do not prevent the adoption of a decision by mutual agreement.

4. By way of derogation from paragraph 3, an emergency voting procedure shall be used where the Commission and the ECB both conclude that a failure to urgently adopt a decision to grant or implement financial assistance, as defined in Articles 13 to 18, would threaten the economic and financial sustainability of the euro area. ...’

13 Article 5(3) of the ESM Treaty provides that ‘the Member of the European Commission in charge of economic and monetary affairs and the President of the ECB, as well as the President of the Euro Group (if he or she is not the Chairperson or a Governor) may participate in the meetings of the Board of Governors [of the ESM] as observers’.

14 Under Article 5(7)(m) of the ESM Treaty, the Board of Governors is to take decisions by qualified majority ‘on a dispute, in accordance with Article 37(2)’.

15 Article 6(2) of the ESM Treaty states that ‘the Member of the European Commission in charge of economic and monetary affairs and the President of the ECB may appoint one observer each [to the ESM Board of Directors]’.

16 Article 8(5) of the ESM Treaty provides:

‘The liability of each ESM Member shall be limited, in all circumstances, to its portion of the authorised capital stock at its issue price. No ESM Member shall be liable, by reason of its membership, for obligations of the ESM. ...’

17 Article 12 of the ESM Treaty defines the principles governing the provision of stability support and states in paragraph 1:

‘If indispensable to safeguard the financial stability of the euro area as a whole and of its Member States, the ESM may provide stability support to an ESM Member subject to strict conditionality, appropriate to the financial assistance instrument chosen. Such conditionality may range from a macro-economic adjustment programme to continuous respect of pre-established eligibility conditions.’

18 The procedure for granting stability support to an ESM Member is described in Article 13 the ESM Treaty as follows:

‘1. An ESM Member may address a request for stability support to the Chairperson of the Board of Governors. Such a request shall indicate the financial assistance instrument(s) to be considered. On receipt of such a request, the Chairperson of the Board of Governors shall entrust the European Commission, in liaison with the ECB, with the following tasks:

(a) to assess the existence of a risk to the financial stability of the euro area as a whole or of its Member States, unless the ECB has already submitted an analysis under Article 18(2);

(b) to assess whether public debt is sustainable. Wherever appropriate and possible, such an assessment is expected to be conducted together with the [International Monetary Fund (IMF)];

(c) to assess the actual or potential financing needs of the ESM Member concerned.

2. On the basis of the request of the ESM Member and the assessment referred to in paragraph 1, the Board of Governors may decide to grant, in principle, stability support to the ESM Member concerned in the form of a financial assistance facility.

3. If a decision pursuant to paragraph 2 is adopted, the Board of Governors shall entrust the European Commission – in liaison with the ECB and, wherever possible, together with the IMF – with the task of negotiating, with the ESM Member concerned, a memorandum of understanding (an “MoU”) detailing the conditionality attached to the financial assistance facility. The content of the MoU shall reflect the severity of the weaknesses to be addressed and the financial assistance instrument chosen. In parallel, the Managing Director of the ESM shall prepare a proposal for a financial assistance facility agreement, including the financial terms and conditions and the choice of instruments, to be adopted by the Board of Governors.

The MoU shall be fully consistent with the measures of economic policy coordination provided for in the [FEU Treaty], in particular with any act of European Union law, including any opinion, warning, recommendation or decision addressed to the ESM Member concerned.

4. The European Commission shall sign the MoU on behalf of the ESM, subject to prior compliance with the conditions set out in paragraph 3 and approval by the Board of Governors.’

5. The Board of Directors shall approve the financial assistance facility agreement detailing the financial aspects of the stability support to be granted and, where applicable, the disbursement of the first tranche of the assistance.

6. The ESM shall establish an appropriate warning system to ensure that it receives any repayments due by the ESM Member under the stability support in a timely manner.

7. The European Commission – in liaison with the ECB and, wherever possible, together with the IMF – shall be entrusted with monitoring compliance with the conditionality attached to the financial assistance facility.’

19 The ESM may grant support to an ESM Member by means of the instruments provided for in Articles 14 to 18 of the ESM Treaty, namely financial assistance in the form of a precautionary credit line (Article 14) and in the form of loans (Articles 15 and 16), purchase of bonds issued by an ESM Member on the primary market (Article 17) and operations on the secondary market in relation to bonds issued by an ESM Member (Article 18).

20 In accordance with Article 20(1) of the ESM Treaty, ‘[w]hen granting stability support, the ESM shall aim to fully cover its financing and operating costs and shall include an appropriate margin’.

21 Article 25(2) of the ESM Treaty provides:

‘If an ESM Member fails to meet the required payment under a capital call made pursuant to Article 9(2) or (3), a revised increased capital call shall be made to all ESM Members with a view to ensuring that the ESM receives the total amount of paid-in capital needed. The Board of Governors shall decide an appropriate course of action for ensuring that the ESM Member concerned settles its debt to the ESM within a reasonable period of time. The Board of Governors shall be entitled to require the payment of default interest on the overdue amount.’

22 Under Article 32(2) of the ESM Treaty, the ESM is to have full legal personality.

23 Article 37 of the ESM Treaty, headed ‘Interpretation and dispute settlement’, states:

‘1. Any question of interpretation or application of the provisions of this Treaty and the by-laws of the ESM arising between any ESM Member and the ESM, or between ESM Members, shall be submitted to the Board of Directors for its decision.

2. The Board of Governors shall decide on any dispute arising between an ESM Member and the ESM, or between ESM Members, in connection with the interpretation and application of this Treaty, including any dispute about the compatibility of the decisions adopted by the ESM with this Treaty. The votes of the member(s) of the Board of Governors of the ESM Member(s) concerned shall be suspended when the Board of Governors votes on such decision and the voting threshold needed for the adoption of that decision shall be recalculated accordingly.

3. If an ESM Member contests the decision referred to in paragraph 2, the dispute shall be submitted to the Court of Justice of the European Union. The judgement of the Court of Justice of the European Union shall be binding on the parties in the procedure, which shall take the necessary measures to comply with the judgment within a period to be decided by said Court.’

II – The background to the main proceedings and the questions referred for a preliminary ruling

24 On 13 April 2012 Mr Pringle brought before the High Court (Ireland) an action against the defendants in the main proceedings in support of which he claimed, first, that Decision 2011/199 was not lawfully adopted pursuant to the simplified revision procedure provided by Article 48(6) TEU because it entails an alteration of the competences of the European Union contrary to the third paragraph of Article 48(6) TEU and that Decision 2011/199 is inconsistent with provisions of the EU and FEU Treaties concerning economic and monetary union and with general principles of European Union law.

25 Mr Pringle further claimed that Ireland, by ratifying, approving or accepting the ESM Treaty, would undertake obligations which would be in contravention of provisions of the EU and FEU Treaties concerning economic and monetary policy and would directly encroach on the exclusive competence of the Union in relation to monetary policy. He claimed that by establishing the ESM the Member States whose currency is the euro are creating for themselves an autonomous and permanent international institution with the objective of circumventing the prohibitions and restrictions laid down by the provisions of the FEU Treaty in relation to economic and monetary policy. Further, he claimed that the ESM Treaty confers on the Union’s institutions new competences and tasks which are incompatible with their functions as defined in the EU and FEU Treaties. Lastly, he claimed that the ESM Treaty was incompatible with the general principle of effective judicial protection and with the principle of legal certainty.

26 By a judgment of 17 July 2012 the High Court dismissed Mr Pringle’s action in its entirety.

27 On 19 July 2012 Mr Pringle brought an appeal against that judgment before the referring court.

28 In those circumstances the Supreme Court decided to stay proceedings and to refer to the Court the following questions for a preliminary ruling:

‘(1) Is ... Decision 2011/199... valid:

– having regard to the use of the simplified revision procedure pursuant to Article 48(6) TEU and, in particular, whether the proposed amendment to Article 136 TFEU involved an increase in the competences conferred on the Union in the Treaties?

– having regard to the content of the proposed amendment, in particular whether it involves any violation of the Treaties or of the general principles of law of the Union?

(2) Is a Member State of the European Union whose currency is the euro, having regard to

- Articles 2 and 3 TEU and the provisions of Part Three, Title VIII, TFEU, and in particular Articles 119, 120, 121, 122, 123, 125, 126, and 127 TFEU;
- the exclusive competence of the Union in monetary policy as set out in Article 3(1)(c) TFEU and in concluding international agreements falling within the scope of Article 3(2) TFEU;
- the competence of the Union in coordinating economic policy, in accordance with Article 2(3) TFEU and Part Three, Title VIII, TFEU;
- the powers and functions of Union institutions pursuant to principles set out in Article 13 TEU;
- the principle of sincere cooperation laid down in Article 4(3) TEU;
- the general principles of Union law including in particular the general principle of effective judicial protection and the right to an effective remedy as provided under Article 47 of the Charter of Fundamental Rights of the European Union [‘the Charter’] and the general principle of legal certainty,

entitled to enter into and ratify an international agreement such as the ESM Treaty?

(3) If ... Decision [2011/199] is held valid, is the entitlement of a Member State to enter into and ratify an international agreement such as the ESM Treaty subject to the entry into force of that Decision?’

III – Consideration of the questions referred for a preliminary ruling

A – *The first question*

29 By its first question, the referring court seeks to ascertain whether Decision 2011/199 is valid in so far as it amends Article 136 TFEU by providing for the insertion, on the basis of the simplified revision procedure under Article 48(6) TEU, of an Article 136(3) relating to the establishment of a stability mechanism.

1. The jurisdiction of the Court

30 Ireland, the governments of the Kingdom of Belgium, the Federal Republic of Germany, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Kingdom of the Netherlands, the Republic of Austria and the Slovak Republic, the European Council and the Commission submit that the jurisdiction of the Court to examine the first question is limited, if not excluded, because the question relates to the validity of primary law. They contend that the Court has no power under Article 267 TFEU to assess the validity of provisions of the Treaties.

31 In that regard, first, it must be borne in mind that the question of validity concerns a decision of the European Council. Since the European Council is one of the Union’s institutions listed in Article 13(1) TEU and since the Court has jurisdiction, under indent (b) of the first paragraph of Article 267 TFEU ‘to give preliminary rulings concerning ... the validity ... of acts of the institutions’, the Court has, in principle, jurisdiction to examine the validity of a decision of the European Council.

32 Next, it must be stated that Decision 2011/199 concerns the insertion of a new provision of primary law in the FEU Treaty, namely paragraph 3 of Article 136 TFEU.

33 As submitted by Ireland and the governments and institutions mentioned in paragraph 30 of this judgment, it is true that, in accordance with indent (a) of the first paragraph of Article 267 TFEU, the examination of the validity of primary law does not fall within the Court’s jurisdiction. Nonetheless, after the entry into force of the Treaty of Lisbon, which introduced, in addition to the ordinary procedure for the revision of the FEU Treaty, a simplified revision procedure under Article 48(6) TEU, the question arises whether the Court is required to ensure that the Member States, when they undertake a revision of the FEU Treaty using that simplified procedure, comply with the conditions laid down by that provision.

34 In that regard, it must be recalled that, under the first subparagraph of Article 48(6) TEU, the simplified revision procedure concerns ‘revising all or part of the provisions of Part Three of the [FEU] Treaty, relating to the internal policies and actions of the Union’. The second subparagraph of Article 48(6) confirms that ‘[t]he European Council may adopt a decision amending all or part of the provisions of Part Three of the [FEU] Treaty’. Under the third subparagraph of Article 48(6), such a decision ‘shall not increase the competences conferred on the Union in the Treaties’.

35 Since it is necessary that compliance with those conditions be monitored in order to establish whether the simplified revision procedure is applicable, it falls to the Court, as the institution which, under the first subparagraph of Article 19(1) TEU, is to ensure that the law is observed in the interpretation and application of the Treaties, to examine the validity of a decision of the European Council based on Article 48(6) TEU.

36 To that end, it is for the Court to verify, first, that the procedural rules laid down in Article 48(6) TEU were followed and, secondly, that the amendments decided upon concern only Part Three of the FEU Treaty, which implies that they do not entail any amendment of provisions of another part of the Treaties on which the European Union is founded, and that they do not increase the competences of the Union.

37 It follows from the foregoing that the Court has jurisdiction to examine the validity of Decision 2011/199 in the light of the conditions laid down in Article 48(6) TEU.

2. Admissibility

38 Ireland claims that the question referred for a preliminary ruling is inadmissible because, first, in accordance with the case-law established in Case C-188/92 *TWD Textilwerke Deggendorf* [1994] ECR I-833, the applicant in the main proceedings should have brought a direct action under Article 263 TFEU for the annulment of Decision 2011/199 within the time-limit for proceedings laid down in the sixth paragraph of that article and, secondly, he should in any event have brought his action to challenge the validity of that decision before the national courts within a reasonable time. Mr Pringle did not commence the main proceedings until 13 April 2012, although Decision 2011/199 was adopted on 25 March 2011.

39 In that regard, it must be recalled that any party has the right, in proceedings before the national courts, to plead, before the court hearing the case, the invalidity of an act of the Union and to ask that court, which has no jurisdiction itself to declare the act invalid, to put that question to the Court by means of a reference for a preliminary ruling (see Case C-239/99 *Nachi Europe* [2001] ECR I-1197, paragraph 35; Case C-50/00 P *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677, paragraph 40, and Case C-550/09 *E and F* [2010] ECR I-6213, paragraph 45). It must be emphasised that under indent (b) of the first paragraph of Article 267 TFEU the admissibility of a reference for a preliminary ruling made on the basis of that provision is not subject to a condition that such a party has complied with a time-limit within which a case challenging the validity of the Union act concerned must be brought before the national court or tribunal with jurisdiction. In the absence of regulation by the Union, time-limits for the introduction of actions before national courts are to be determined by the national rules of procedure and it is exclusively for the courts and tribunals of the Member States to assess whether such time-limits have been respected in the main proceedings.

40 It is clear from the order for reference both that the High Court rejected Ireland’s argument that the action brought before it was out of time and that the referring court found it unnecessary to re-consider the matter.

41 Nonetheless, the point must be made that the recognition of a party’s right to plead the invalidity of an act of the Union presupposes that that party did not have the right to bring, under Article 263 TFEU, a direct action for the annulment of that act (see, to that effect, *TWD Textilwerke Deggendorf*, paragraph 23; *E and F*, paragraph 46, and Case C-494/09 *Bolton Alimentari* [2011] ECR I-647, paragraph 22). Were it to be accepted that a party who beyond doubt had standing to institute proceedings under the fourth paragraph of Article 263 TFEU for the annulment of an act of the Union could, after the expiry of the time-limit for bringing proceedings laid down in the sixth paragraph of Article 263 TFEU, challenge before the national courts the validity of that act, that would amount to enabling the person concerned to circumvent the fact that that act is final as against him once the time-limit for his bringing an action has expired (see, to that effect, *TWD Textilwerke Deggendorf*, paragraphs 18 and 24; *E and F*, paragraphs 46 and 48, and *Bolton Alimentari*, paragraphs 22 and 23).

42 In the present case, it is not evident that the applicant in the main proceedings had beyond doubt standing to bring an action for the annulment of Decision 2011/199 under Article 263 TFEU.

43 Accordingly, Ireland's argument that the first question should be declared to be inadmissible cannot be accepted.

44 It follows from the foregoing that the first question is admissible.

3. Substance

45 It is necessary to examine, first, whether the amendment of the FEU Treaty envisaged by Decision 2011/199 concerns solely provisions of Part Three of the FEU Treaty and, secondly, whether it increases the competences conferred on the Union in the Treaties.

a) Whether the revision of the FEU Treaty concerns solely provisions of Part Three of that treaty

46 It must be stated that Decision 2011/199 amends a provision of Part Three of the FEU Treaty, namely Article 136 TFEU, and thereby formally satisfies the condition stated in the first and second subparagraphs of Article 48(6) TEU that the simplified revision procedure may concern solely provisions of that Part Three.

47 However, the referring court is unsure whether the revision of the FEU Treaty does not also affect provisions of Part One of that treaty. It seeks to ascertain whether Decision 2011/199 encroaches on the competence of the Union in the area of monetary policy and in the area of the coordination of the economic policies of the Member States.

48 In that regard, it must be recalled that, under Article 119(2) TFEU, the activities of the Member States and the Union are to include a single currency, the euro, and the definition and conduct of a single monetary policy and exchange-rate policy. The monetary policy of the Union is the subject of, inter alia, Article 3(1)(c) TFEU and Articles 127 TFEU to 133 TFEU.

49 Further, under Article 282(1) TFEU, the ECB and the central banks of the Member States whose currency is the euro, which constitute the Eurosystem, are to conduct the monetary policy of the Union.

50 Article 3(1)(c) TFEU states that the Union is to have exclusive competence in the area of monetary policy for the Member States whose currency is the euro.

51 Moreover, under Article 119(1) TFEU, the activities of the Member States and the Union are to include the adoption of an economic policy based on the close coordination of Member States' economic policies, on the internal market and on the definition of common objectives, conducted in accordance with the principle of an open market economy with free competition. The Union's economic policy is the subject of Articles 2(3) TFEU, 5(1) TFEU and 120 TFEU to 126 TFEU.

52 It must therefore be determined, first, whether Decision 2011/199, in so far as it amends Article 136 TFEU by adding a paragraph 3 which provides that '[t]he Member States whose currency is the euro may establish a stability mechanism', grants to Member States a competence in the area of monetary policy for the Member States whose currency is the euro. If that were the case, the Treaty amendment concerned would encroach on the Union's exclusive competence as laid down in Article 3(1)(c) TFEU and, since the latter provision is to be found in Part One of the FEU Treaty, such an amendment could be made only by using the ordinary revision procedure provided for in Article 48(2) to (5) TEU.

53 In that regard, it must first be observed that the FEU Treaty, which contains no definition of monetary policy, refers, in its provisions relating to that policy, to the objectives, rather than to the instruments, of monetary policy.

54 Under Articles 127(1) TFEU and 282(2) TFEU, the primary objective of the Union's monetary policy is to maintain price stability. The same provisions further stipulate that the European System of Central Banks ('ESCB') is to support the general economic policies in the Union, with a view to contributing to the achievement

of its objectives, as laid down in Article 3 TEU. Further, under Article 139(2) TFEU, Article 127(1) TFEU is not to apply to Member States with a derogation within the meaning of Article 139(1).

55 It is necessary therefore to examine whether or not the objectives to be attained by the stability mechanism whose establishment is envisaged by Article 1 of Decision 2011/199 and the instruments provided to that end fall within monetary policy for the purposes of Articles 3(1)(c) TFEU and 127 TFEU.

56 As regards, first, the objective pursued by that mechanism, which is to safeguard the stability of the euro area as a whole, that is clearly distinct from the objective of maintaining price stability, which is the primary objective of the Union's monetary policy. Even though the stability of the euro area may have repercussions on the stability of the currency used within that area, an economic policy measure cannot be treated as equivalent to a monetary policy measure for the sole reason that it may have indirect effects on the stability of the euro.

57 As regards, secondly, the instruments envisaged in order to attain the objective concerned, Decision 2011/199 states only that the stability mechanism will grant any required financial assistance; it contains no other information on the operation of that mechanism. The grant of financial assistance to a Member State however clearly does not fall within monetary policy.

58 It must next be stated that, as is confirmed moreover by the conclusions of the European Council of 16 and 17 December 2010 to which reference is made in recital 4 of the preamble to Decision 2011/199, the stability mechanism whose establishment is envisaged by Article 1 of Decision 2011/199 serves to complement the new regulatory framework for strengthened economic governance of the Union. Constituted by various regulations of the European Parliament and the Council adopted on 16 November 2011, namely Regulation (EU) No 1173/2011 on the effective enforcement of budgetary surveillance in the euro area (OJ 2011 L 306, p. 1), Regulation (EU) No 1174/2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area (OJ 2011 L 306, p. 8), Regulation (EU) No 1175/2011 amending Council Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies (OJ 2011 L 306, p. 12), Regulation (EU) No 1176/2011 on the prevention and correction of macroeconomic imbalances (OJ 2011 L 306, p. 25); by Council Regulation (EU) No 1177/2011 of 8 November 2011 amending Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure (OJ 2011 L 306, p. 33), and by Council Directive 2011/85/EU of 8 November 2011 on requirements for budgetary frameworks of the Member States (OJ 2011 L 306, p. 41), that framework establishes closer coordination and surveillance of the economic and budgetary policies conducted by the Member States and is intended to consolidate macroeconomic stability and the sustainability of public finances.

59 While the provisions of the regulatory framework referred to in the preceding paragraph and the provisions in the chapter of the FEU Treaty relating to economic policy, in particular Articles 123 TFEU and 125 TFEU, are essentially preventive, in that their objective is to reduce so far as possible the risk of public debt crises, the objective of establishing the stability mechanism is the management of financial crises which, notwithstanding such preventive action as might have been taken, might nonetheless arise.

60 In the light of the objectives to be attained by the stability mechanism the establishment of which is envisaged by Article 1 of Decision 2011/199, the instruments provided in order to achieve those objectives and the close link between that mechanism, the provisions of the FEU Treaty relating to economic policy and the regulatory framework for strengthened economic governance of the Union, it must be concluded that the establishment of that mechanism falls within the area of economic policy.

61 That finding is not called into question by the fact that the ECB issued, on 17 March 2011, an opinion on the draft European Council Decision amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro (OJ 2011 C 140, p. 8). Although it must be accepted that the second subparagraph of Article 48(6) TEU provides that '[t]he European Council shall act by unanimity, after consulting ... the [ECB] in the case of institutional changes in the monetary area', the fact remains that it is clearly apparent from the wording of recital 5 of the preamble to Decision 2011/199 that the European Council consulted the ECB on its own initiative and not because it was under any obligation under that provision to do so.

62 In any event, the consultation of the ECB on the draft of Decision 2011/199 cannot affect the nature of the envisaged stability mechanism.

63 Consequently, Article 1 of Decision 2011/199 which, by the addition of a paragraph 3 to Article 136 TFEU, envisages the establishment of a stability mechanism, is not capable of affecting the exclusive competence held by the Union under Article 3(1)(c) TFEU in the area of monetary policy for the Member States whose currency is the euro.

64 Secondly, as regards whether Decision 2011/199 affects the Union's competence in the area of the coordination of the Member States' economic policies, it must be observed that, since Articles 2(3) and 5(1) TFEU restrict the role of the Union in the area of economic policy to the adoption of coordinating measures, the provisions of the EU and FEU Treaties do not confer any specific power on the Union to establish a stability mechanism of the kind envisaged by Decision 2011/199.

65 Admittedly, Article 122(2) TFEU confers on the Union the power to grant *ad hoc* financial assistance to a Member State which is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control. However, as emphasised by the European Council in recital 4 of the preamble to Decision 2011/199, Article 122(2) TFEU does not constitute an appropriate legal basis for the establishment of a stability mechanism of the kind envisaged by that decision. The fact that the mechanism envisaged is to be permanent and that its objectives are to safeguard the financial stability of the euro area as a whole means that such action cannot be taken by the Union on the basis of that provision of the FEU Treaty.

66 Further, even if Article 143(2) TFEU also enables the Union, subject to certain conditions, to grant mutual assistance to a Member State, that provision covers only Member States whose currency is not the euro.

67 As to whether the Union could establish a stability mechanism comparable to that envisaged by Decision 2011/199 on the basis of Article 352 TFEU, suffice it to say that the Union has not used its powers under that article and that, in any event, that provision does not impose on the Union any obligation to act (see Case 22/70 *Commission v Council* ('ERTA') [1971] ECR 263, paragraph 95).

68 Consequently, having regard to Articles 4(1) TEU and 5(2) TEU, the Member States whose currency is the euro are entitled to conclude an agreement between themselves for the establishment of a stability mechanism of the kind envisaged by Article 1 of Decision 2011/199 (see, to that effect, Joined Cases C-181/91 and C-248/91 *Parliament v Council and Commission* [1993] ECR I-3685, paragraph 16; Case C-316/91 *Parliament v Council* [1994] ECR I-625, paragraph 26, and Case C-91/05 *Commission v Council* [2008] ECR I-3651, paragraph 61).

69 However, those Member States may not disregard their duty to comply with European Union law when exercising their competences in that area (see Case C-55/00 *Gottardo* [2002] ECR I-413, paragraph 32). However, the reason why the grant of financial assistance by the stability mechanism is subject to strict conditionality under paragraph 3 of Article 136 TFEU, the article affected by the revision of the FEU Treaty, is in order to ensure that that mechanism will operate in a way that will comply with European Union law, including the measures adopted by the Union in the context of the coordination of the Member States' economic policies.

70 It follows from all the foregoing that Decision 2011/199 satisfies the condition laid down in the first and second subparagraphs of Article 48(6) TEU that a revision of the FEU Treaty by means of the simplified revision procedure may concern only provisions of Part Three of the FEU Treaty.

b) Whether the revision of the FEU Treaty increases the competences conferred on the Union in the Treaties

71 The referring court further seeks to ascertain whether Decision 2011/199 satisfies the condition laid down in Article 48(6) TEU that a revision of the FEU Treaty by means of the simplified procedure may not have the effect of increasing the competences of the Union.

72 In that regard, it should be recalled that Article 136(3) TFEU, the insertion of which is provided for by Article 1 of Decision 2011/199, confirms that Member States have the power to establish a stability mechanism and is further intended to ensure, by providing that the granting of any financial assistance under that mechanism will be made subject to strict conditionality, that the mechanism will operate in a way that will comply with European Union law.

73 That amendment does not confer any new competence on the Union. The amendment of Article 136 TFEU which is effected by Decision 2011/199 creates no legal basis for the Union to be able to undertake any action which was not possible before the entry into force of the amendment of the FEU Treaty.

74 Even though the ESM Treaty makes use of the Union's institutions, in particular the Commission and the ECB, that fact is not, in any event, capable of affecting the validity of Decision 2011/199, which in itself provides only for the establishment of a stability mechanism by the Member States and is silent on any possible role for the Union's institutions in that connection.

75 It follows that Decision 2011/199 does not increase the competences conferred on the Union in the Treaties.

76 It follows from all the foregoing that the answer to the first question is that examination of that question has disclosed nothing capable of affecting the validity of Decision 2011/199.

B – *The second question*

77 The second question concerns the interpretation of Articles 2 TEU, 3 TEU, 4(3) TEU and 13 TEU, of Articles 2(3) TFEU, 3(1)(c) and (2) TFEU, 119 TFEU to 123 TFEU, and 125 TFEU to 127 TFEU, and of the general principles of effective judicial protection and legal certainty. The referring court seeks to ascertain whether those articles and principles preclude a Member State whose currency is the euro from concluding and ratifying an agreement such as the ESM Treaty.

1. The jurisdiction of the Court

78 The Spanish Government maintains that, since the Union is not a contracting party to the ESM Treaty, the Court has no jurisdiction to interpret, in the context of a reference for a preliminary ruling, the provisions of that treaty (see Case C-132/09 *Commission v Belgium* [2010] ECR I-8695, paragraph 43 and case-law cited).

79 In that regard, suffice it to say that the second question, by its very wording, concerns the interpretation of various provisions of European Union law and not the interpretation of provisions of the ESM Treaty.

80 The Court has jurisdiction to provide the national court with all the criteria for the interpretation of European Union law which may enable it to assess whether the provisions of the ESM Treaty are compatible with European Union law (see, to that effect, Case C-489/09 *Vandoorne* [2011] ECR I-225, paragraph 25 and case-law cited).

81 The Court therefore has jurisdiction to examine the second question.

2. Admissibility

82 A number of the governments who submitted observations to the Court, along with the Commission, maintain that the second question is partly inadmissible because the referring court failed to provide any information as to how the interpretation of certain provisions and certain principles referred to in the second question is of any relevance to the outcome of the dispute before it.

83 It should first be recalled that, in accordance with settled case-law of the Court, the procedure provided for by Article 267 TFEU is an instrument for cooperation between the Court and national courts by means of which the Court provides national courts with the criteria for the interpretation of European Union law which they need in order to decide the disputes before them (see, inter alia, Case C-83/91 *Meilicke* [1992] ECR I-4871, paragraph 22; Case C-380/01 *Schneider* [2004] ECR I-1389, paragraph 20; and the order of 13 January 2010 in Joined Cases C-292/09 and C-293/09 *Calestani and Lunardi*, paragraph 18).

84 The Court has previously held that the need to provide an interpretation of European Union law which will be of use to the national court makes it necessary that the national court should give at least some explanation of the reasons for the choice of the European Union law provisions of which it requests an interpretation (order of 3 May 2012 in Case C-185/12 *Ciampaglia*, paragraph 5 and case-law cited).

85 Further, it must be emphasised in that regard that the information provided in orders for reference serves not only to enable the Court to give useful answers but also to ensure that governments of the Member States and other interested parties have the opportunity to submit observations in accordance with Article 23 of the Statute of the Court of Justice of the European Union. It is for the Court to ensure that that opportunity is safeguarded, given that, under that provision, only the orders for reference are notified to the interested parties, accompanied by a translation in the official language of each Member State, but excluding any case-file that may be sent to the Court by the national court (order of 23 March 2012 in Case C-348/11 *Thomson Sales Europe*, paragraph 49 and case-law cited).

86 In the present case, as stated by Ireland, the Slovak Government and the Commission, the order for reference gives no explanation of the relevance to the outcome of the dispute of the interpretation of Articles 2 TEU and 3 TEU. As maintained by the German, Spanish and French Governments and the Commission, the same is true of the interpretation of the general principle of legal certainty.

87 Consequently, the second question is inadmissible in so far as it concerns the interpretation of Articles 2 TEU and 3 TEU and the general principle of legal certainty.

88 Further, the Netherlands Government and the Commission express their uncertainty as to the direct effect of Articles 119 TFEU to 121 TFEU. Since those articles do not impose on Member States clear and unconditional obligations which may be relied on by individuals before the national courts, they contend that the question is inadmissible in so far as it concerns the interpretation of those articles. Ireland, which considers that none of the provisions referred to in the question has direct effect, maintains that the question is inadmissible in its entirety.

89 In that regard, in accordance with the Court's case-law, the Court has jurisdiction to give preliminary rulings concerning the interpretation of provisions of European Union law irrespective of whether or not they have direct effect (see Case C-254/08 *Futura Immobiliare and Others* [2009] ECR I-6995, paragraph 34 and case-law cited).

90 Further, it is clear that the purpose of the referring court's question is not to determine whether the applicant in the main proceedings can assert a right directly based on the articles concerned of the EU and FEU Treaties. The purpose of requesting criteria for interpretation from the Court is solely to enable the referring court to assess whether the provisions of the ESM Treaty are compatible with European Union law.

91 It follows from all the foregoing that the second question is admissible in so far as it concerns the interpretation of Articles 4(3) TEU and 13 TEU, of Articles 2(3) TFEU, 3(1)(c) and (2) TFEU, 119 TFEU to 123 TFEU and 125 TFEU to 127 TFEU, and of the general principle of effective judicial protection.

3. Substance

92 Interpretation is therefore required, first, of the provisions of the FEU Treaty relating to the Union's exclusive competence, namely Articles 3(1)(c) TFEU and 127 TFEU on the Union's monetary policy and Article 3(2) TFEU on the Union's competence for the conclusion of an international agreement, secondly, of provisions relating to the Union's economic policy, namely Articles 2(3) TFEU, 119 TFEU to 123 TFEU, 125 TFEU and 126 TFEU and, finally, of Articles 4(3) TEU and 13 TEU and the general principle of effective judicial protection.

a) Interpretation of provisions relating to the Union's exclusive competence

i) Interpretation of Articles 3(1)(c) TFEU and 127 TFEU

93 The referring court seeks to ascertain whether the stability mechanism established by the ESM Treaty falls under monetary policy and, accordingly, under the Union's exclusive competence. It follows from Article 3 of the ESM Treaty that its purpose is to support the stability of the euro. The referring court further refers to the argument of the applicant in the main proceedings that the grant of financial assistance to Member States whose currency is the euro or the recapitalisation of their financial institutions, and the necessary borrowing for that purpose, on the scale envisaged by the ESM Treaty, would increase the amount of euro currency in circulation. The Treaties on which the Union is founded confer on the ECB the exclusive power to regulate money supply in the euro area. The applicant argues that those Treaties do not allow a second entity to carry out such tasks and to act in parallel with the ECB, outside the framework of the European Union legal order. Further, an increase in money supply

has a direct influence on inflation. Consequently, the applicant claims that the activities of the ESM could have a direct impact on price stability in the euro area, which would go to the very core of the Union's monetary policy.

94 In that regard, as is apparent from paragraph 50 of this judgment, the Union has, under Article 3(1)(c) TFEU, an exclusive competence in the area of monetary policy for the Member States whose currency is the euro. Under Article 282(1) TFEU, the ECB and the central banks of the Member States whose currency is the euro, which constitute the Eurosystem, are to conduct the monetary policy of the Union. The objective pursued by the ESCB in general and the Eurosystem in particular is, in accordance with Articles 127(1) TFEU and 282(2) TFEU, to maintain price stability.

95 However, the activities of the ESM do not fall within the monetary policy which is the subject of those provisions of the FEU Treaty.

96 Under Articles 3 and 12(1) of the ESM Treaty, it is not the purpose of the ESM to maintain price stability, but rather to meet the financing requirements of ESM Members, namely Member States whose currency is the euro, who are experiencing or are threatened by severe financing problems, if indispensable to safeguard the financial stability of the euro area as a whole and of its Member States. To that end, the ESM is not entitled either to set the key interest rates for the euro area or to issue euro currency, while the financial assistance which the ESM grants must be entirely funded – the provisions of Article 123(1) TFEU being respected – from paid-in capital or by the issue of financial instruments, as provided for in Article 3 of the ESM Treaty.

97 As is apparent from paragraph 56 of this judgment, any effect of the activities of the ESM on price stability is not such as to call into question that finding. Even if the activities of the ESM might influence the rate of inflation, such an influence would constitute only the indirect consequence of the economic policy measures adopted.

98 It follows from the foregoing that Articles 3(1)(c) TFEU and 127 TFEU do not preclude either the conclusion by the Member States whose currency is the euro of an agreement such as the ESM Treaty or their ratification of it.

ii) Interpretation of Article 3(2) TFEU

99 The referring court asks whether the ESM Treaty is an international agreement the operation of which may affect the common rules on economic and monetary policy. To that end, the national court refers to recital 1 of the preamble to that treaty which states that the ESM will assume the tasks currently fulfilled by the EFSF and the EFSM.

100 In that regard, it must be recalled that, under Article 3(2) TFEU, the Union is to have 'exclusive competence for the conclusion of an international agreement when its conclusion ... may affect common rules or alter their scope'.

101 It follows also from that provision that Member States are prohibited from concluding an agreement between themselves which might affect common rules or alter their scope. However, the arguments put forward in this context have not demonstrated that an agreement such as the ESM Treaty would have such effects.

102 First, since the EFSF was established by the Member States whose currency is the euro outside the framework of the Union, the assumption by the ESM of the tasks conferred on the EFSF is not such as to affect common rules of the Union or alter their scope.

103 Secondly, even if it is apparent from recital 1 of the preamble to the ESM Treaty that the ESM will, among other tasks, assume the tasks hitherto allocated temporarily to the EFSM, established on the basis of Article 122(2) TFEU, that fact is not such as to affect common rules of the Union or alter their scope.

104 The establishment of the ESM does not affect the power of the Union to grant, on the basis of Article 122(2) TFEU, *ad hoc* financial assistance to a Member State when it is found that that Member State is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control.

105 Moreover, since neither Article 122(2) TFEU nor any other provision of the EU and FEU Treaties confers a specific power on the Union to establish a permanent stability mechanism such as the ESM (see paragraphs 64 to 66 of this judgment), the Member States are entitled, in the light of Articles 4(1) TEU and 5(2) TEU, to act in this area.

106 The conclusion and ratification of the ESM Treaty by the Member States whose currency is the euro therefore does not jeopardise in any way the objective pursued by Article 122(2) TEU or by Council Regulation (EU) No 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism (OJ 2010 L 118, p. 1), adopted on the basis of that provision, and does not prevent the Union from exercising its own competences in the defence of the common interest (see, to that effect, Case C-476/98 *Commission v Germany* [2002] ECR I-9855, paragraph 105).

107 Consequently, Article 3(2) TFEU does not preclude either the conclusion by the Member States whose currency is the euro of an agreement such as the ESM Treaty or their ratification of it.

b) Interpretation of various provisions of the ESM Treaty relating to economic policy

i) Interpretation of Articles 2(3) TFEU, 119 TFEU to 121 TFEU and 126 TFEU

108 The national court refers to the argument of the applicant in the main proceedings that the ESM Treaty constitutes an amendment which fundamentally subverts the legal order governing economic and monetary union and which is incompatible with European Union law. The applicant claims that it is clear from recital 2 in the preamble to Decision 2011/199 that the European Council itself considered that the establishment of a permanent stability mechanism required an amendment of the FEU Treaty. The applicant further claims that Articles 2(3) TFEU, 119 TFEU to 121 TFEU and 126 TFEU confer on the Union's institutions the competence for the coordination of economic policy. The referring court also seeks to ascertain whether the ESM Treaty encroaches on the power of the Council of the European Union to issue recommendations under Article 126 TFEU and, in particular, whether 'conditionality' provided for by the ESM Treaty is the equivalent of the recommendations provided for by that article.

109 In that regard, first, it is apparent from paragraph 68 of this judgment that the Member States have the power to conclude between themselves an agreement for the establishment of a stability mechanism such as the ESM Treaty provided that the commitments undertaken by the Member States who are parties to such an agreement are consistent with European Union law.

110 Next, the ESM is not concerned with the coordination of the economic policies of the Member States, but rather constitutes a financing mechanism. Under Articles 3 and 12(1) of the ESM Treaty, the purpose of the ESM is to mobilise funding and to provide financial stability support to ESM Members who are experiencing, or are threatened by, severe financing problems.

111 While it is true that, under Article 3, Article 12(1) and the first subparagraph of Article 13(3) of the ESM Treaty, the financial assistance provided to a Member State that is an ESM Member is subject to strict conditionality, appropriate to the financial assistance instrument chosen, which can take the form of a macro-economic adjustment programme, the conditionality prescribed nonetheless does not constitute an instrument for the coordination of the economic policies of the Member States, but is intended to ensure that the activities of the ESM are compatible with, inter alia, Article 125 TFEU and the coordinating measures adopted by the Union.

112 The second subparagraph of Article 13(3) of the ESM Treaty expressly provides that the conditions attached to any stability support are to be 'fully consistent with the measures of economic policy coordination provided for in [the FEU Treaty]'. Further, it is apparent from Article 13(4) that the Commission is to check, before signing the MoU defining the conditionality attached to stability support, that the conditions imposed are fully consistent with the measures of economic policy coordination.

113 Lastly, nor does the ESM Treaty affect the competence of the Council of the European Union to issue recommendations on the basis of Article 126(7) and (8) TFEU to a Member State in which an excessive deficit exists. First, the ESM is not called upon to issue such recommendations. Secondly, the second subparagraph of Article 13(3) and Article 13(4) of the ESM Treaty provide that the conditions imposed on ESM Members who

receive financial assistance must be consistent with any recommendation which the Council might issue under the abovementioned provisions of the FEU Treaty.

114 It follows that Articles 2(3) TFEU, 119 TFEU to 121 TFEU and 126 TFEU do not preclude either the conclusion by the Member States whose currency is the euro of an agreement such as the ESM Treaty or their ratification of it.

ii) Interpretation of Article 122 TFEU

115 It must first be recalled that, under Article 122(1) TFEU, the Council of the European Union may decide, in a spirit of solidarity between Member States, upon measures appropriate to the economic situation, in particular if severe difficulties arise in the supply of certain products, notably in the area of energy.

116 Since Article 122(1) TFEU does not constitute an appropriate legal basis for any financial assistance from the Union to Member States who are experiencing, or are threatened by, severe financing problems, the establishment of a stability mechanism such as the ESM does not encroach on the powers which that provision confers on the Council.

117 Next, in relation to Article 122(2) TFEU, the referring court, in order to assess whether the ESM encroaches on the competence attributed to the Union by that provision, asks whether that provision exhaustively defines the exceptional circumstances in which it is possible to grant financial assistance to Member States and whether that article empowers solely the Union's institutions to grant financial assistance.

118 In that regard, it must be stated that the subject-matter of Article 122 TFEU is solely financial assistance granted by the Union and not that granted by the Member States. Under Article 122(2) TFEU, the Council of the European Union may grant, under certain conditions, such assistance to a Member State which is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control.

119 The exercise by the Union of the competence conferred on it by that provision of the FEU Treaty is not affected by the establishment of a stability mechanism such as the ESM.

120 Further, nothing in Article 122 TFEU indicates that the Union has exclusive competence to grant financial assistance to a Member State.

121 It follows that the Member States remain free to establish a stability mechanism such as the ESM, provided however that, in its operation, that mechanism complies with European Union law and, in particular, with measures adopted by the Union in the area of coordination of the Member States' economic policies (see paragraphs 68 and 69 of this judgment). As is apparent from paragraphs 111 to 113 of this judgment, the second subparagraph of Article 13(3) and Article 13(4) of the ESM Treaty are intended to ensure that any financial assistance granted by the ESM will be consistent with such coordinating measures.

122 Consequently, Article 122 TFEU does not preclude either the conclusion by the Member States whose currency is the euro of an agreement such as the ESM Treaty or their ratification of it.

iii) Interpretation of Article 123 TFEU

123 Article 123 TFEU prohibits the ECB and the central banks of the Member States from granting overdraft facilities or any other type of credit facility to public authorities and bodies of the Union and of Member States and from purchasing directly from them their debt instruments.

124 The referring court asks whether the conclusion and ratification by the Member States whose currency is the euro of an agreement such as the ESM Treaty is not intended to circumvent the prohibition laid down in Article 123 TFEU since those Member States may not, either directly or through intermediary bodies created or recognised by them, derogate from European Union law or condone such a derogation.

125 In that regard, it must be held that Article 123 TFEU is addressed specifically to the ECB and the central banks of the Member States. The grant of financial assistance by one Member State or by a group of Member States to another Member State is therefore not covered by that prohibition.

126 It is apparent from Articles 3, 12(1) and 13 of the ESM Treaty that it is the ESM which grants financial assistance to an ESM Member when the conditions stated in those provisions are met. Accordingly, even if the Member States are acting via the ESM, the Member States are not derogating from the prohibition laid down in Article 123 TFEU, since that article is not addressed to them.

127 Moreover, there is no basis for the view that the funds provided by the ESM Members to the ESM might be derived from financial instruments prohibited by Article 123(1) TFEU.

128 Consequently, Article 123 TFEU does not preclude either the conclusion by the Member States whose currency is the euro of an agreement such as the ESM Treaty or their ratification of it.

iv) Interpretation of Article 125 TFEU

129 The referring court asks whether an agreement such as the ESM Treaty is in breach of the ‘no bail-out clause’ in Article 125 TFEU.

130 It must be stated at the outset that it is apparent from the wording used in Article 125 TFEU, to the effect that neither the Union nor a Member State are to ‘be liable for ... the commitments’ of another Member State or ‘assume [those commitments]’, that that article is not intended to prohibit either the Union or the Member States from granting any form of financial assistance whatever to another Member State.

131 That reading of Article 125 TFEU is supported by the other provisions in the chapter of the FEU Treaty relating to economic policy and, in particular, Articles 122 TFEU and 123 TFEU. First, Article 122(2) TFEU provides that the Union may grant *ad hoc* financial assistance to a Member State which is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control. If Article 125 TFEU prohibited any financial assistance whatever by the Union or the Member States to another Member State, Article 122 TFEU would have had to state that it derogated from Article 125 TFEU.

132 Secondly, Article 123 TFEU, which prohibits the ECB and the central banks of the Member States from granting ‘overdraft facilities or any other type of credit facility’, employs wording which is stricter than that used in the ‘no bail-out clause’ in Article 125 TFEU. The difference in the wording used in the latter article supports the view that the prohibition stated there is not intended to prohibit any financial assistance whatever to a Member State.

133 Accordingly, in order to determine which forms of financial assistance are compatible with Article 125 TFEU, it is necessary to have regard to the objective pursued by that article.

134 To that end, it must be recalled that the origin of the prohibition stated in Article 125 TFEU is to be found in Article 104b of the EC Treaty (which became Article 103 EC), which was inserted in the EC Treaty by the Treaty of Maastricht.

135 It is apparent from the preparatory work relating to the Treaty of Maastricht that the aim of Article 125 TFEU is to ensure that the Member States follow a sound budgetary policy (see Draft treaty amending the Treaty establishing the European Economic Community with a view to achieving economic and monetary union, *Bulletin of the European Communities*, Supplement 2/91, pp. 24 and 54). The prohibition laid down in Article 125 TFEU ensures that the Member States remain subject to the logic of the market when they enter into debt, since that ought to prompt them to maintain budgetary discipline. Compliance with such discipline contributes at Union level to the attainment of a higher objective, namely maintaining the financial stability of the monetary union.

136 Given that that is the objective pursued by Article 125 TFEU, it must be held that that provision prohibits the Union and the Member States from granting financial assistance as a result of which the incentive of the recipient Member State to conduct a sound budgetary policy is diminished. As is apparent from paragraph 5 of the ECB opinion on the draft European Council Decision amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro, the

activation of financial assistance by means of a stability mechanism such as the ESM is not compatible with Article 125 TFEU unless it is indispensable for the safeguarding of the financial stability of the euro area as a whole and subject to strict conditions.

137 However, Article 125 TFEU does not prohibit the granting of financial assistance by one or more Member States to a Member State which remains responsible for its commitments to its creditors provided that the conditions attached to such assistance are such as to prompt that Member State to implement a sound budgetary policy.

138 As regards the ESM Treaty, it is clear, first, that the instruments for stability support of which the ESM may make use under Articles 14 to 18 of the ESM Treaty demonstrate that the ESM will not act as guarantor of the debts of the recipient Member State. The latter will remain responsible to its creditors for its financial commitments.

139 The granting of financial assistance to an ESM Member in the form of a credit line, in accordance with Article 14 of the ESM Treaty, or in the form of loans, in accordance with Articles 15 and 16 of the ESM Treaty, in no way implies that the ESM will assume the debts of the recipient Member State. On the contrary, such assistance amounts to the creation of a new debt, owed to the ESM by that recipient Member State, which remains responsible for its commitments to its creditors in respect of its existing debts. It should be observed in that regard that, under Article 13(6) of the ESM Treaty, any financial assistance granted on the basis of Articles 14 to 16 thereof must be repaid to the ESM by the recipient Member State and that, under Article 20(1) thereof, the amount to be repaid is to include an appropriate margin.

140 As regards the stability support facilities provided for in Articles 17 and 18 of the ESM Treaty, first, the purchase by the ESM of bonds issued by an ESM Member on the primary market is comparable to the granting of a loan. For the reasons set out in the preceding paragraph, the ESM does not by purchasing such bonds assume the debts of the recipient Member State.

141 Next, as regards the purchase on the secondary market of bonds issued by an ESM Member, it is clear that, in such a situation, the issuing Member State remains solely answerable to repay the debts in question. The fact that the ESM as the purchaser on that market of bonds issued by an ESM Member pays a price to the holder of those bonds, who is the creditor of the issuing ESM Member, does not mean that the ESM becomes responsible for the debt of that ESM Member to that creditor. That price may be significantly different from the value of the claims contained in those bonds, since the price depends on the rules of supply and demand on the secondary market of bonds issued by the ESM Member concerned.

142 Secondly, the ESM Treaty does not provide that stability support will be granted as soon as a Member State whose currency is the euro is experiencing difficulties in obtaining financing on the market. In accordance with Articles 3 and 12(1) of the ESM Treaty, stability support may be granted to ESM Members which are experiencing or are threatened by severe financing problems only when such support is indispensable to safeguard the financial stability of the euro area as a whole and of its Member States and the grant of that support is subject to strict conditionality appropriate to the financial assistance instrument chosen.

143 It is apparent from paragraphs 111 and 121 of this judgment that the purpose of the strict conditionality to which all stability support provided by the ESM is subject is to ensure that the ESM and the recipient Member States comply with measures adopted by the Union in particular in the area of the coordination of Member States' economic policies, those measures being designed, *inter alia*, to ensure that the Member States pursue a sound budgetary policy.

144 Thirdly, the national court refers to an argument of the applicant in the main proceedings that the rules relating to capital calls stated in Article 25(2) of the ESM Treaty are incompatible with Article 125 TFEU in that they imply that the ESM Members guarantee the debt of the defaulting member.

145 In that regard, it must be noted that Article 25(2) of the ESM Treaty provides that where a Member State that is an ESM Member fails to pay the sum called for, a revised increased capital call is to be made to all the other ESM Members. However, under that same provision, the defaulting ESM Member State remains bound to pay its part of the capital. Accordingly, the other ESM Members do not act as guarantors of the debt of the defaulting ESM Member.

146 Consequently, a mechanism such as the ESM and the Member States who participate in it are not liable for the commitments of a Member State which receives stability support and nor do they assume those commitments, within the meaning of Article 125 TFEU.

147 It follows that Article 125 TFEU does not preclude either the conclusion by the Member States whose currency is the euro of an agreement such as the ESM Treaty or their ratification of it.

c) Interpretation of Article 4(3) TEU

148 Pursuant to the principle of sincere cooperation, established in Article 4(3) TEU, Member States are, *inter alia*, to refrain from any measure which could jeopardise the attainment of the Union's objectives.

149 The national court refers to the argument of the applicant in the main proceedings that the establishment of the ESM is incompatible with the provisions of the FEU Treaty relating to economic and monetary policy and, consequently, also with the principle of sincere cooperation contained in Article 4(3) TEU.

150 Such an argument cannot be accepted.

151 It is apparent from paragraphs 93 to 98 and 108 to 147 of this judgment that the establishment of a stability mechanism, such as the ESM, does not infringe the provisions of the FEU Treaty relating to economic and monetary policy. Further, as is apparent from paragraphs 111 to 113 of this judgment, the ESM Treaty contains provisions which ensure that, in carrying out its tasks, the ESM will comply with European Union law.

152 It follows that Article 4(3) TEU does not preclude either the conclusion by the Member States whose currency is the euro of an agreement such as the ESM Treaty or their ratification of it.

d) Interpretation of Article 13 TEU

153 Article 13(2) TEU provides that each institution of the Union is to act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them.

154 The referring court asks whether the allocation, by the ESM Treaty, of new tasks to the Commission, the ECB and the Court is compatible with their powers as defined in the Treaties. It is appropriate to examine separately the role which the Commission and the ECB, on the one hand, and the Court, on the other, will be called upon to play under the ESM Treaty.

i) The role allocated to the Commission and the ECB

155 The ESM Treaty allocates various tasks to the Commission and to the ECB.

156 As regards the Commission, those tasks consist of assessing requests for stability support (Article 13(1)), assessing their urgency (Article 4(4)), negotiating an MoU detailing the conditionality attached to the financial assistance granted (Article 13(3)), monitoring compliance with the conditionality attached to the financial assistance (Article 13(7)), and participating in the meetings of the Board of Governors and the Board of Directors as an observer (Articles 5(3) and 6(2)).

157 The tasks allocated to the ECB consist of assessing the urgency of requests for stability support (Article 4(4)), participating in the meetings of the Board of Governors and the Board of Directors as an observer (Articles 5(3) and 6(2)) and, in liaison with the Commission, assessing requests for stability support (Article 13(1)), negotiating an MoU (Article 13(3)) and monitoring compliance with the conditionality attached to the financial assistance (Article 13(7)).

158 In that regard, it is apparent from the case-law of the Court that the Member States are entitled, in areas which do not fall under the exclusive competence of the Union, to entrust tasks to the institutions, outside the framework of the Union, such as the task of coordinating a collective action undertaken by the Member States or managing financial assistance (see *Parliament v Council and Commission*, paragraphs 16, 20 and 22, and *Parliament v Council*, paragraphs 26, 34 and 41), provided that those tasks do not alter the essential character of

the powers conferred on those institutions by the EU and FEU Treaties (see, inter alia, Opinion 1/92 [1992] ECR I-2821, paragraphs 32 and 41; Opinion 1/00 [2002] ECR I-3493, paragraph 20; and Opinion 1/09 [2011] ECR I-1137, paragraph 75).

159 The duties allocated to the Commission and to the ECB in the ESM Treaty constitute tasks of the kind referred to in the preceding paragraph.

160 First, the activities of the ESM fall under economic policy. The Union does not have exclusive competence in that area.

161 Secondly, the duties conferred on the Commission and ECB within the ESM Treaty, important as they are, do not entail any power to make decisions of their own. Further, the activities pursued by those two institutions within the ESM Treaty solely commit the ESM.

162 Thirdly, the tasks conferred on the Commission and the ECB do not alter the essential character of the powers conferred on those institutions by the EU and FEU Treaties.

163 As regards the Commission, it is stated in Article 17(1) TEU that the Commission ‘shall promote the general interest of the Union’ and ‘shall oversee the application of Union law’.

164 It must be recalled that the objective of the ESM Treaty is to ensure the financial stability of the euro area as a whole. By its involvement in the ESM Treaty, the Commission promotes the general interest of the Union. Further, the tasks allocated to the Commission by the ESM Treaty enable it, as provided in Article 13(3) and (4) of that treaty, to ensure that the memoranda of understanding concluded by the ESM are consistent with European Union law.

165 As regards the tasks allocated to the ECB by the ESM Treaty, they are in line with the various tasks which the FEU Treaty and the Statute of the ESCB [and of the ECB] confer on that institution. By virtue of its duties within the ESM Treaty, the ECB supports the general economic policies in the Union, in accordance with Article 282(2) TFEU. Moreover, it is clear from Article 6.2 of the Statute of the ESCB that the ECB is entitled to participate in international monetary institutions. Article 23 of that Statute confirms that the ECB may ‘establish relations ... with organisations’.

166 The argument that, since the judgments in *Parliament v Council and Commission* and *Parliament v Council* predate the inclusion in the Treaties of provisions relating to enhanced cooperation, the Member States whose currency is the euro should have established enhanced cooperation between themselves in order to be entitled to make use of the Union’s institutions within the ESM, cannot be accepted.

167 It is clear from Article 20(1) TEU that enhanced cooperation may be established only where the Union itself is competent to act in the area concerned by that cooperation.

168 However, it is apparent from paragraphs 64 to 66 of this judgment that the provisions of the Treaties on which the Union is founded do not confer on the Union a specific competence to establish a permanent stability mechanism such as the ESM.

169 In those circumstances, Article 20 TEU does not preclude either the conclusion by the Member States whose currency is the euro of an agreement such as the ESM Treaty or their ratification of it.

ii) The role allocated to the Court

170 It must be recalled that, under Article 37(2) of the ESM Treaty, the Board of Governors is to decide on any dispute arising between an ESM Member and the ESM, or between ESM Members, in connection with the interpretation and application of the ESM Treaty, including any dispute about the compatibility of the decisions adopted by the ESM with that treaty. Under Article 37(3) thereof, if an ESM Member contests the decision referred to in paragraph 2, the dispute is to be submitted to the Court of Justice.

171 In that regard, first, it is apparent from recital (16) of the preamble to the ESM Treaty that the jurisdiction which the Court is called upon to exercise under Article 37(3) of the ESM Treaty is based directly on Article 273 TFEU. Under that article, the Court has jurisdiction in any dispute between Member States which relates to the subject-matter of the Treaties, if that dispute is submitted to it under a special agreement.

172 Secondly, while it is true that the jurisdiction of the Court under Article 273 TFEU is subject to the existence of a special agreement, there is no reason, given the objective pursued by that provision, why such agreement should not be given in advance, with reference to a whole class of pre-defined disputes, by means of a provision such as Article 37(3) of the ESM Treaty.

173 Thirdly, the disputes to be submitted to the jurisdiction of the Court are related to the subject-matter of the Treaties within the meaning of Article 273 TFEU.

174 In that regard, it must be observed that a dispute linked to the interpretation or application of the ESM Treaty is likely also to concern the interpretation or application of provisions of European Union law. Under Article 13(3) of the ESM Treaty, the MoU which is to be negotiated with the Member State requesting stability support must be fully consistent with European Union law and, in particular, with the measures taken by the Union in the area of coordination of the economic policies of the Member States. Accordingly, the conditions to be attached to the grant of such support to a Member State are, at least in part, determined by European Union law.

175 Fourthly, it is true that the jurisdiction of the Court under Article 273 TFEU is subject to the condition that only Member States are parties to the dispute submitted to it. That said, since the membership of the ESM consists solely of Member States, a dispute to which the ESM is party may be considered to be a dispute between Member States within the meaning of Article 273 TFEU.

176 It follows that the allocation by Article 37(3) of the ESM Treaty of jurisdiction to the Court to interpret and apply the provisions of that treaty satisfies the conditions laid down in Article 273 TFEU.

177 It follows from all the foregoing that Article 13 TEU does not preclude either the conclusion by the Member States whose currency is the euro of an agreement such as the ESM Treaty or their ratification of it.

e) Interpretation of the general principle of effective judicial protection

178 The national court observes, referring to an argument put forward by the applicant in the main proceedings, that the establishment of the ESM outside the European Union legal order may have the consequence that the ESM is removed from the scope of the Charter. The referring court seeks to ascertain whether the establishment of the ESM is thereby in breach of Article 47 of the Charter which guarantees that everyone has the right to effective judicial protection.

179 In that regard, it must be observed that, under Article 51(1) of the Charter, its provisions are addressed to the Member States only when they are implementing Union law. Under Article 51(2), the Charter does not extend the field of application of Union law beyond the powers of the Union, or establish any new power or task for the Union or modify powers and tasks as defined in the Treaties. Accordingly, the Court is called upon to interpret, in the light of the Charter, the law of the European Union within the limits of the powers conferred on it (see Case C-400/10 PPU *McB*. [2010] ECR I-8965, paragraph 51, and Case C-256/11 *Dereci and Others* [2011] ECR I-11315, paragraph 71).

180 It must be observed that the Member States are not implementing Union law, within the meaning of Article 51(1) of the Charter, when they establish a stability mechanism such as the ESM where, as is clear from paragraph 105 of this judgment, the EU and FEU Treaties do not confer any specific competence on the Union to establish such a mechanism.

181 It follows from the foregoing that the general principle of effective judicial protection does not preclude either the conclusion by the Member States whose currency is the euro of an agreement such as the ESM Treaty or their ratification of it.

182 In those circumstances, the answer to the second question is that Articles 4(3) TEU and 13 TEU, Articles 2(3) TFEU, 3(1)(c) and (2) TFEU, 119 TFEU to 123 TFEU and 125 TFEU to 127 TFEU, and the general principle of

effective judicial protection do not preclude either the conclusion by the Member States whose currency is the euro of an agreement such as the ESM Treaty or the ratification of that treaty by those Member States.

C – The third question

183 By this question, the referring court asks whether the Member States may conclude and ratify the ESM Treaty before the entry into force of Decision 2011/199.

184 In that regard, it must be recalled that the amendment of Article 136 TFEU by Article 1 of Decision 2011/199 confirms the existence of a power possessed by the Member States (see paragraphs 68, 72 and 109 of this judgment). Accordingly, that decision does not confer any new power on the Member States.

185 Consequently, the answer to the third question is that the right of a Member State to conclude and ratify the ESM Treaty is not subject to the entry into force of Decision 2011/199.

IV – Costs

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

On those grounds, the Court (Full Court) hereby rules:

1. **Examination of the first question referred has disclosed nothing capable of affecting the validity of European Council Decision 2011/199/EU of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro.**
2. **Articles 4(3) TEU and 13 TEU, Articles 2(3) TFEU, 3(1)(c) and (2) TFEU, 119 TFEU to 123 TFEU and 125 TFEU to 127 TFEU, and the general principle of effective judicial protection do not preclude the conclusion between the Member States whose currency is the euro of an agreement such as the Treaty establishing the European stability mechanism between the Kingdom of Belgium, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Grand Duchy of Luxembourg, Malta, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Slovenia, the Slovak Republic and the Republic of Finland, concluded at Brussels on 2 February 2012, or the ratification of that treaty by those Member States.**
3. **The right of a Member State to conclude and ratify that Treaty is not subject to the entry into force of Decision 2011/199.**

On steps towards Completing Economic and Monetary Union (COM/2015/0600 final)

1. INTRODUCTION

The architecture of the Economic and Monetary Union (EMU) has been significantly strengthened over the past years to enhance economic governance and to achieve financial stability. Nevertheless, the EMU's resilience needs to be further reinforced in order to re-launch a process of upward convergence, both between Member States and within societies, with increasing productivity, job creation and social fairness at its core.

In June 2015, the President of the European Commission, in close cooperation with the President of the Euro Summit, the President of the Eurogroup, the President of the European Central Bank and the President of the European Parliament presented a report on an ambitious yet pragmatic roadmap for completing the EMU. This Five Presidents' Report makes the point that progress is necessary on four fronts in parallel. Firstly, towards a genuine Economic Union that ensures each economy has the structural features to prosper within the Monetary Union. Secondly, towards a Financial Union that guarantees the integrity of the currency across the Monetary Union by limiting risk to financial stability and increasing risk-sharing with the private sector. Thirdly, towards a Fiscal Union that delivers both fiscal sustainability and fiscal stabilisation. And finally, towards a Political Union that provides the foundation for all of the above through genuine democratic accountability, legitimacy and institutional strengthening.

The Five Presidents also agreed on a roadmap for implementation that should consolidate the euro area by early 2017 (Stage 1 – "deepening by doing"). In this first stage, which started on 1 July 2015³, action would build on existing instruments, also by making the best possible use of the existing Treaties. Then, on the basis of benchmarks for a renewed upward convergence of the euro area economies, more fundamental reforms should be undertaken, moving to a medium- to long-term vision for new growth perspectives (Stage 2 – "completing EMU"). Overall, translating the Five Presidents' report into action requires a shared sense of purpose among all euro area Member States and EU institutions. The actions set out in this Communication apply to euro area Member States, but the process towards a deeper EMU is open to all EU countries. At the same time, the Commission will make sure that no distortions occur in the single market.

This Communication and its accompanying proposals take forward key elements of Stage 1 of the process to deepen EMU. The package of measures includes a revised approach to the European Semester; an improved toolbox of economic governance, including the introduction of national Competitiveness Boards and an advisory European Fiscal Board; a more unified representation of the euro area in international organisations, notably the International Monetary Fund; and steps towards a Financial Union, notably via a European Deposit Insurance Scheme. These measures will be complemented by steps taken with the European Parliament to improve democratic accountability of the European economic governance system.

2.A REVAMPED EUROPEAN SEMESTER

Economic policy coordination in the EMU has been significantly bolstered during the economic and financial crisis. In order to overcome pre-crisis imbalances, structural weaknesses and the legacy of the crisis, and to boost investment and rebuild medium-term growth potential, these common rules, procedures and institutions at EU level play a central role.

The European Semester, the annual cycle for the coordination of economic policies at EU level introduced in 2011, has become an important vehicle for delivering reforms at national and EU level. Yet, Member States should make more progress on implementing country-specific recommendations, given that implementation has so far been uneven and often only limited.

Over the years, the process has been continuously improved, to capitalise on its strengths and to address its weaknesses. Most recently, the new Commission has used its first European Semester in 2015 to substantially streamline the exercise. The publication of the Country Reports already in February created more space for genuine dialogue with the Member States, allowing for deeper debate at bilateral and multilateral level, as well as with other stakeholders. This earlier timing also requires adapting the role of National Reform Programmes which should become an instrument for Member States to respond to the Commission analysis by presenting forward-looking policy initiatives. More time for reflection and debate was also created by the earlier publication of the Commission proposals for country-specific recommendations in May. Here, the Commission introduced greater

focus by significantly decreasing the number of recommendations, only covering key priority issues of macro-economic and social relevance that require Member States' attention in the following twelve to eighteen months. While this focus must be maintained, the Country Reports will continue to take a more holistic approach, covering a broader range of topics with economic relevance for the Member States.

The stability and implementation of this improved structure is key to reaping the full benefits in the coming period. At the same time, and building on these developments, some further adjustments can bring additional benefits. This notably includes better integrating the euro area and national dimensions, a stronger focus on employment and social performance, promoting convergence by benchmarking and pursuing best practices, and the support to reforms from European Structural and Investment Funds and technical assistance. Table 1 provides a graphical overview of the proposed 2016 European Semester.

2.1. Better integrating the euro area and national dimensions

Given the deeper interdependence of euro area countries and the higher potential for spill-over effects among countries which share the single currency, enhanced coordination and stronger surveillance of the budgetary processes and economic policies of all euro area Member States is necessary. The lesson learned from the crisis is twofold: first, inadequate national fiscal and economic policies and financial supervision can cause huge economic and social hardship; second, the euro area as a whole is not immune to the risks of large and destabilising economic and financial shocks. Hence, while sound national policies would go a long way to reduce the chances of a crisis, there is also a case to monitor and analyse closely the aggregate fiscal, economic and social situation of the euro area as a whole, and consider this analysis in the formulation of national policies.

Already now, the European Semester includes an overall euro area dimension, in particular in the annual assessment of Draft Budgetary Plans of euro area Member States and the resulting overall fiscal stance in the euro area, as well as in the euro area recommendations. The process is about setting priorities together and acting on them with a euro area perspective. However, this process is still based on a strong country-by-country approach, and only takes into account the overall euro area dimension in an indirect way. The European Semester should be structured so that discussions and recommendations about the euro area take place first, ahead of country-specific discussions, so that common challenges are fully reflected in country-specific actions.

The Commission will therefore, as part of its Annual Growth Survey to be published in November, put specific focus on the key fiscal, economic, social and financial priorities for the euro area as a whole. In particular, the Commission calls for a specific Eurogroup discussion on the euro area fiscal stance in the context of its assessment of Draft Budgetary Plans. This may also require bringing the publication of the recommendation for the euro area forward.

Discussions on euro area priorities should take place within the Council and the Eurogroup, as well as with the European Parliament. The ensuing common understanding will then provide orientations for the content of National Reform and Stability Programmes of euro area Member States in April and the respective country-specific recommendations in May.

2.2. A stronger focus on employment and social performance

The Commission has already taken steps to enhance the focus on employment and social issues in the context of the European Semester and the process of deepening of EMU. The 2015 Country Reports discussed employment and social developments in detail. Country-specific recommendations in these fields were addressed to most Member States.

Employment and social aspects are being further emphasised also in the Macroeconomic Imbalances Procedure. The Commission proposed earlier in 2015 to add three indicators (activity rate, youth unemployment, long-term unemployment) to the existing 11 headline indicators of the Macroeconomic Imbalances Procedure scoreboard. This would serve the purpose of qualifying the social and employment context in which the adjustment is taking place, ultimately feeding through into better policy design. The Commission is planning to use the extended list of headline indicators as of the 2016 Alert Mechanism Report.

Greater attention is also given to the social fairness of new macroeconomic adjustment programmes to ensure that the adjustment is spread equitably and to protect the most vulnerable in society. The Commission prepared for the

first time a social impact assessment for the Memorandum of Understanding for Greece. 4 It intends to continue this practice in case of any future stability support programme.

A number of further steps should be taken to achieve stronger focus on Member States' employment and social performance. Member States should pay greater attention to the contribution of national social partners, in particular to strengthen ownership of reform efforts. To this end, the Commission encourages stronger involvement of social partners in the elaboration of National Reform Programmes. In addition, Commission representations in the Member States will consult national social partners at pre-defined key milestones of the Semester. These steps would be complemented by strengthened dialogue with social partners during European Semester missions. Moreover, the involvement of EU-level social partners will be continued and possibly enhanced, for instance through a renewed Tripartite Social Summit and Macroeconomic Dialogue, to strengthen their contributions to the Semester process.

Convergence towards best practices in the employment and social policy field should contribute to a better functioning and legitimacy of the EMU project. In the short term, such upward convergence could be achieved through the development of common benchmarks along the components of the 'flexicurity' concept, such as flexible and reliable labour contracts that avoid a two-tier labour market, comprehensive lifelong learning strategies, effective policies to help the unemployed re-enter the labour market, modern and inclusive social protection and education systems and enabling labour taxation. The Commission also confirmed its intention to put forward a European pillar of social rights, which would build on the existing "acquis" and serve as a compass for the overall convergence process.

2.3.Promoting convergence by benchmarking and pursuing best practices

The Five Presidents' report emphasises the use of benchmarking and cross-examining performance in order to achieve convergence and reach similarly resilient economic structures throughout the euro area. Cross-examination aims to identify underperformance and support convergence towards best performers in areas of labour markets, competitiveness, business environment and public administrations, as well as certain aspects of tax policy. Benchmarking can contribute to enhancing ownership of the Member States' structural reform agendas and foster their implementation.

As the ongoing benchmarking exercises in the Eurogroup (e.g. on the tax wedge on labour) have shown, benchmarking, if appropriately used, can be a truly powerful lever for action. In particular, benchmark indicators need to meet two requirements. First, they need to closely relate to the policy levers, such that they can lead to actual and meaningful policy implications. Second, there needs to be robust evidence and enough consensus that they contribute significantly to higher level objectives such as jobs, growth, competitiveness, social inclusion and fairness or financial stability. 5

The availability of such indicators, their statistical reliability, complexity and the extent to which they capture the full reality can vary significantly by policy area. As a consequence, the implementation of the benchmarking exercise should leave room for tailor-made adjustments by policy area. Furthermore, benchmarking needs to be complemented by economic analysis, which allows for reflection on potential trade-offs across policy areas and for in-depth evaluation of policy impacts.

Starting with the 2016 European Semester, the Commission will progressively suggest benchmarks and cross-examination exercises across policy or thematic areas. These will feed into debates in the appropriate Council formations and the Eurogroup, with a view to fostering a common understanding of challenges and policy responses.

The outcome of the discussions and evaluations will inform the European Semester and will pave the way to strengthening convergence of policies also in view of Stage 2.

2.4.More focused support to reforms through EU funds and technical assistance

To support structural reforms in line with the common economic priorities set at EU level, the Commission will seek to enhance the use of the European Structural and Investment Funds in support of key priorities highlighted in the country-specific recommendations, including through the use of the measures linking effectiveness of these Funds to sound economic governance. 6 The new legal framework requires that programmes co-financed by ESI

Funds address all relevant country-specific recommendations. The Commission will monitor and report progress towards the agreed objectives by 2017. The reform of Cohesion Policy in 2013 has introduced the principle of so-called macroeconomic conditionality to all five European Structural and Investment Funds. This is part of the broader effort to ensure that European Structural and Investment Funds are used to support reforms identified to be of key importance for social and economic performance in the Member States, and to ensure that the effectiveness of the European Structural and Investment Funds is not undermined by unsound macroeconomic policies. ⁷

At the same time, reform implementation will be supported through other EU funding programmes in their policy fields and the progressive roll-out of technical assistance offers by the Commission's Structural Reform Support Service. The Commission has established this Service in order to make technical support available upon request to all Member States for the preparation and effective implementation of reforms in the context of the economic governance processes (notably the implementation of country-specific recommendations, actions under the Macroeconomic Imbalances Procedure, or reforms under stability support programmes), including through support for the efficient and effective use of EU Funds.

3.IMPROVING THE TOOLBOX OF ECONOMIC GOVERNANCE

In the wake of the economic and financial crisis, the economic governance framework has been considerably strengthened with the introduction of the Six-Pack, Two-Pack and the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG) ⁸ . The reinforced fiscal rules as well as the recently created Macroeconomic Imbalances Procedure have significantly deepened and widened the scope and possible effectiveness of EU action.

A first review of the strengthened economic governance framework ⁹ identified some areas for improvement, notably concerning transparency, complexity and predictability of policy making, which are relevant to the effectiveness of the tools. The short experience with the operation of the new instruments, some of which entered into force only recently, limits the possibility to draw firm conclusions on their impact on growth, imbalances and convergence.

More evidence and experience with the reformed governance structures are necessary before embarking on further legislative reform. At the current juncture, the Commission will pursue the full and transparent application of the available instruments and tools. In parallel, the Commission intends to improve clarity and reduce the complexity of the existing framework, from the fiscal rules to the application of the Macroeconomic Imbalances Procedure. Moreover, as indicated in the Five Presidents' report, the Commission supports the introduction of a system of national Competitiveness Boards and the establishment of an advisory European Fiscal Board.

3.1.Improving transparency and reducing complexity of the current fiscal rules

With the aim of improving transparency of the way it applies the rules of the Stability and Growth Pact, the Commission has published a "Vade mecum on the Stability and Growth Pact" ¹⁰ . The Vade mecum will be updated annually to timely reflect changes in the evolution of the rules and surveillance practice. Furthermore, the Commission is sharing with Member States the data and calculations underlying its surveillance decisions. It also intends to share the same information with national fiscal councils and – after consultation with the Member States – with the public. The new independent advisory European Fiscal Board (see section 3.4) will contribute to increasing transparency. The Commission will also start presenting an update of the full set of external economic assumptions in September, to inform the formulation of national Draft Budgetary Plans.

The way the rules are implemented can be simplified and made more transparent, without changing their legal basis. The Commission will aim for the following clarifications, in close consultation with the Member States.

First, the Commission will ensure the consistency of methodology between the debt rule of the Excessive Deficit Procedure and Member States' structural budgetary target, known as the Medium Term Budgetary Objectives. The recent strengthening of economic governance has translated the debt criterion of the Excessive Deficit Procedure into a simple rule for the reduction of government debt in excess of 60% of GDP. What role the rule should play when deciding whether to place a Member State in EDP has however remained unclarified. When

updating the lower limits for the Medium Term Budgetary Objectives that Member States can set, the Commission will ensure the consistency of such values with the respect of the debt rule in the medium-term.

Second, the Commission will aim to streamline the methodology for assessing compliance with the Stability and Growth Pact. Currently, as a result of discussion with Member States over the years, different sets of budgetary indicators are used to assess the compliance of fiscal policies for Member States under the preventive arm of the Stability and Growth Pact and in the Excessive Deficit Procedure. A harmonised and consistent approach would bring greater simplicity and allow for a more consistent transition from the corrective to the preventive regime of the Stability and Growth Pact. The Commission will thus explore ways for increasing reliance on a single practical indicator of compliance with the Stability and Growth Pact.

Third, the Commission will explore the possibility of updating multi-year Council recommendations to reduce excessive deficits in order to take into account not only conditions of unforeseen deterioration of the economic environment – as it is explicitly envisaged in the Stability and Growth Pact –, but also in case of unforeseen improvements. Such an approach would support the objective of the Excessive Deficit Procedure to ensure a timely correction of excessive deficit situations.

Finally, the Commission is reviewing the transposition of the rules set out in the so-called Fiscal Compact (i.e. the fiscal part of the Treaty on Stability Coordination and Governance in the EMU), which are designed to strengthen the consistency between the national and European fiscal frameworks and enhance their ownership in Member States. The Commission has undertaken an analysis of the incorporation of the Fiscal Compact into national law in line with Article 3(2) TSCG. It has engaged in preliminary consultations with Contracting Parties, with a view to giving them, where necessary, the opportunity to submit their observations on the Commission's findings as foreseen in Article 8(1) TSCG and then publishing its report on the incorporation pursuant to that Article.

3.2.A stronger Macroeconomic Imbalances Procedure

The Macroeconomic Imbalances Procedure has been instrumental in bringing the key issues on imbalance to the forefront in the economic surveillance and has been effective in supporting effective policy adjustment in some countries (for example in Spain and Slovenia). Nevertheless, experience suggests that implementation can be improved in a number of ways.

First, the transparency of the Commission's decisions within the Macroeconomic Imbalances Procedure will be enhanced by a publication of a "Compendium", which will collect and present the relevant information on the implementation of the Macroeconomic Imbalances Procedure in one place. Also, the findings of the In-Depth Reviews will be presented in a clearer way both in the Country Reports and in the Communication presenting conclusions from the In-Depth Reviews. The Commission will also present explicit justification of decisions taken, including regarding country-specific recommendations linked to the Macroeconomic Imbalances Procedure.

Second, the Commission will ensure appropriate follow-up to the identification of excessive imbalances. This requires economic judgement and active engagement with Member States to tackle their specific challenges and ensure domestic ownership of reforms. So far, the Commission placed Member States with imbalances in different categories which evolved over time, and, depending on the nature and intensity of the imbalances, called for different degrees of monitoring and policy action. The Excessive Imbalances Procedure has not been invoked yet. The Commission will stabilise the categories, clarify the criteria guiding its decision, and better explain the link between the nature of imbalances and how they are addressed in the country-specific recommendations. The Commission will engage with Member States, including with the new Competitiveness Boards, 11 on how best to address the imbalances and put in place a strong and time-bound system of specific monitoring to support implementation. The Excessive Imbalances Procedure can be opened in case of insufficient commitment to reforms and lack of effective progress in implementation, and will be used in case of severe macroeconomic imbalances that jeopardise the proper functioning of the economic and monetary union, like those that led to the crises. The Commission will also invite greater Council involvement in the specific monitoring of countries with excessive imbalances for which the Excessive Imbalances Procedure is not activated.

Third, the euro area dimension of the Macroeconomic Imbalances Procedure will be enhanced. Euro area considerations will be better integrated in related documents (the Alert Mechanism Report and the Communication

on the In-Depth Reviews findings) and decisions. The Macroeconomic Imbalances Procedure will continue to deal with the correction of harmful external deficits as well as with fostering adequate reforms in countries accumulating large and sustained current account surpluses.

3.3.A system of national Competitiveness Boards

Competitiveness is essential for resilience and adjustment capacity inside the monetary union and to ensure sustainable growth and convergence looking forward. To foster progress with structural reforms in the competitiveness domain, the existing EU mechanisms for economic policy coordination need to be backed by strong national ownership of reform agendas. It makes sense to raise independent policy expertise at national level and to reinforce the policy dialogue between the EU and the Member States. Therefore, the Commission proposes that the Council recommends Member States to establish national Competitiveness Boards in charge of tracking performance and policies in the field of competitiveness.

Competitiveness Boards would help to improve national policymaking by providing independent expertise notably on assessing competitiveness performance and competitiveness-related reforms. They would thus contribute to effective reform design and implementation, including in response to country-specific recommendations. The scope of competitiveness aspects to be monitored should reflect a comprehensive notion of competitiveness, including price and non-price developments. Competitiveness Boards would compile and publish their findings on the areas monitored on an annual basis.

Competitiveness Boards should conform to a set of common principles, taking into account the diversity of experiences and practices in Member States. The Boards' advice should inform the wage setting processes, but their aim is neither to interfere with the wage setting process and the role of the social partners, nor to harmonise national wage setting systems. The Boards should be independent from public authorities dealing with related matters and have the capacity to ensure high-quality economic analysis. Provided that these requirements are met, Member States should be free to design their national Competitiveness Boards, either by setting up new institutions or adapting the mandate of existing bodies.

The Commission adopts together with this Communication a Recommendation for a Council Recommendation on the establishment of national Competitiveness Boards. It is addressed to the euro area Member States, but the other Member States are also encouraged to set up similar bodies. The Commission will monitor the follow-up to the Recommendation and, if necessary in Stage 2, will present common principles by means of a binding instrument.

3.4.An advisory European Fiscal Board

The past years have underscored the importance of conducting responsible fiscal policies as a key pillar of the European growth strategy. Fiscal policies should foster macroeconomic stability in line with the rule-based fiscal framework. The conduct of responsible national fiscal policies is especially important in the euro area.

Together with this Communication, the Commission establishes an independent advisory European Fiscal Board. This Board will contribute in an advisory capacity to multilateral surveillance in the euro area. It will be composed of five renowned experts with credible competence and experience in macroeconomics and practical budgetary policy-making. The Board's advice will rely on an economic judgment that is consistent with EU fiscal rules.

The Board should provide an evaluation of the implementation of the EU fiscal framework, in particular regarding the horizontal consistency of the decisions and implementation of budgetary surveillance, cases of particularly serious non-compliance with the rules, and the appropriateness of the actual fiscal stance at euro area and national level.

As the Stability and Growth Pact centres on national budget balances and debt developments and does not determine the aggregate fiscal stance, the Board should also contribute to a more informed discussion of the overall implications of budgetary policies at euro area and national level, with a view to achieving an appropriate fiscal stance for the euro area. Where it identifies risks jeopardising the proper functioning of the Economic and Monetary Union, the Board shall accompany its advice with a specific consideration of the policy options available under the Stability and Growth Pact.

The Board will also cooperate with the national fiscal councils, aiming at exchanging best practices and facilitating common understandings. This will be undertaken in direct connection to the Board's tasks and in mutual respect of the prerogatives and legal grounding of the national fiscal councils and the European Fiscal Board.

4. THE EXTERNAL REPRESENTATION OF THE EURO

In order to complete EMU, greater responsibility and integration at EU and euro area level must go hand in hand with institutional strengthening. One of the areas where concrete steps towards this objective are explicitly foreseen in the Treaty and can therefore be taken already today is the external representation of the euro area.

The economic and financial weight of the euro area and the existence of a single monetary and exchange rate policy have made euro area policy decisions and economic developments increasingly relevant for the world economy. While the strengthened governance framework for the euro area and the strong convergence of financial sector regulation and supervision in the context of the Banking Union have made the euro area internally more robust.

The progress that has been achieved on further internal integration of the euro area also needs to be projected externally, to allow the euro area to play a more active role in international financial institutions and to shape effectively its future role in the global financial architecture. A more coherent representation would also be to the benefit of third countries, in particular by means of a stronger and more consistent euro area contribution to global economic and financial stability.

Considerable progress has been made in strengthening the Union and the euro area external representation in many international economic and financial fora. In the International Monetary Fund, this included further strengthening of coordination arrangements in 2007, the election of a President of the group of EU representatives to the International Monetary Fund (so-called EURIMF), the improvement of the working relationship between the Sub-Committee on the International Monetary Fund of the Economic and Financial Committee (EFC/SCIMF) and the EURIMF, and the increased coordination among EURIMF members on Executive Board strategies. However, further steps are needed to achieve a truly unified external representation.

Accompanying this Communication, the Commission is presenting a Communication showing the way towards an increasingly unified external representation of the EMU. ¹² It also puts forward a proposal for a Council Decision under Article 138 TFEU laying down measures in view of establishing a unified representation of the euro area in the International Monetary Fund. ¹³ External representation of the euro area is still particularly fragmented in the International Monetary Fund, which through its lending instruments and surveillance is a key institutional actor in global economic governance. Such arrangements should be set out and agreed without delay, but implemented gradually, to allow all actors involved – at EU and international level – to make the necessary legal and institutional adjustments.

Taking into account the future development of the EMU or in the international financial architecture, the Commission may decide that further initiatives are useful to strengthen euro area external representation in also other international fora.

5. STEPS TOWARDS A FINANCIAL UNION

Besides progress in the areas of economic governance, completing the Banking Union is an indispensable step on the way towards a full and deep EMU. For the single currency, a unified and fully integrated financial system is the prerequisite not only for the proper transmission of monetary policy, but also for an adequate risk diversification across countries and general confidence in the banking system across the euro area. Important steps have been agreed in that direction in recent years, but further work is necessary.

First, the Commission will work with Member States to fully implement the agreed legal provisions. The Single Supervisory Mechanism aimed at independent and uniformly high quality prudential supervision is already fully operational, and the Single Resolution Mechanism will ensure effective resolution of troubled banks as of 1 January 2016. The Commission will make full use of its powers under the Treaty to ensure the full transposition of the Bank Recovery and Resolution Directive (the deadline was January 2015) ¹⁴ and the Deposit Guarantee Directive (the deadline was July 2015) ¹⁵ into national law by all Member States as soon as possible. Member

States are urged to ratify the Intergovernmental Agreement on the Single Resolution Mechanism by 30 November 2015. 16

Second, the Commission encourages Member States to find a swift agreement on an effective bridge financing mechanism, to ensure that, while the Single Resolution Fund is gradually being built up through levies raised from the banking sector, the Single Resolution Mechanism has sufficient resources at its disposal to finance possible residual resolution costs for troubled banks, in accordance with the Bank Recovery and Resolution Directive. In the same vein, Member States should agree swiftly on a common backstop for the Single Resolution Fund which should be fiscally neutral over the medium term.

Third, the Commission will make a legislative proposal before the end of the year on the first steps towards a common European Deposit Insurance Scheme with a view to creating a more European system, disconnected from the sovereign, so that financial stability is enhanced and citizens can be certain that the safety of their deposits does not depend on their geographical location.

The first step towards a more common system will build on a "re-insurance" approach. A joint reinsurance fund – supplemental to existing national Deposit Guarantee Schemes – would contribute under certain conditions when national Deposit Guarantee Schemes are called upon. These conditions should be designed to limit the liability for the fund and reduce moral hazard at the national level, and should reflect the fact that national funds are gradually being built up and different starting points successively being aligned. The European Deposit Insurance Scheme would be mandatory for euro area Member States and open to non-euro area Member States willing to join the Banking Union.

Fourth, in parallel with its proposal on the European Deposit Insurance Scheme, the Commission is committed to further reduce risks and ensure a level playing field in the banking sector and limit the bank-sovereign loop. To this end, it will set out how work can be brought forward in those outstanding areas where the regulatory and prudential framework may need to be reviewed and completed to achieve these objectives.

Finally, alongside the completion of the Banking Union, the Capital Markets Union is a key priority. On 30 September, the Commission published the Capital Markets Union Action Plan, inter alia aiming to ensuring more diversified sources of finance for companies and strengthened cross-border risk-sharing through deepening integration of bond and equity markets.

6.EFFECTIVE DEMOCRATIC LEGITIMACY, OWNERSHIP AND ACCOUNTABILITY

Effective democratic legitimacy and accountability are crucial for strengthening the ownership in Stage 1 of the deepening of EMU and is indispensable in Stage 2, when the envisaged initiatives involve more pooling of sovereignty. In recent years, the Commission has gradually established a deeper and more permanent dialogue with the Member States through bilateral meetings, more targeted discussion in the Council and more widespread technical and political missions to the capitals. The Commission will continue to intensify these dialogues, also by making use of its network of European Semester Officers in the Member States.

First practical steps have been initiated by the European Parliament to strengthen parliamentary oversight as part of the European Semester. ‘Economic dialogues’ between the European Parliament and the Council, the Commission and the Eurogroup have taken place in line with the provisions of the ‘Six-Pack’ and ‘Two-Pack’ legislation. This has already been part of the last European Semester rounds. These dialogues may be enhanced by agreeing on dedicated time-slots during the main steps of the Semester cycle. A new form of inter-parliamentary cooperation was established to bring together European and national actors. This takes place within the European Parliamentary Week organised by the European Parliament in cooperation with national Parliaments, which includes representatives from national Parliaments for in-depth discussions on policy priorities. The ‘Two-Pack’ also enshrined the right for a national Parliament to convene a Commissioner for a presentation of the Commission’s opinion on a draft budgetary plan or of its recommendation to a Member State in Excessive Deficit Procedure.

The timing and added value of these parliamentary moments could be further strengthened, in line with the renewed European Semester. In particular, the Commission could engage with the European Parliament at a plenary debate before the Annual Growth Survey is presented, and continue the debate following its adoption. Moreover, a second dedicated plenary debate could be held upon presentation by the Commission of the Country-

Specific Recommendations, in accordance with the relevant provisions of the 'Six-Pack' on economic dialogue. At the same time, Commission and Council representatives could participate in inter-parliamentary meetings in particular in the context of the European Parliamentary Week. This new practice could be progressively agreed upon in more detail between the EU institutions in full respect of their respective institutional role.

The Commission will also work out model arrangements to make the interaction with national Parliaments more efficient. Such interaction should apply to national parliamentary debates both on the Country-Specific Recommendations addressed to the Member State and within the annual national budgetary procedure. That would give more life to the right recognised in the 'Two-Pack' to convene a Commissioner. As a rule, national Parliaments should be closely involved in the adoption of National Reform and Stability Programmes.

7.COMPLETING EMU: PREPARING FOR STAGE 2

The steps presented in this Communication for Stage 1 of completing EMU, build on existing instruments and make the best possible use of the existing Treaties. However, all these initiatives of Stage 1 should not be seen in isolation, but rather as stepping stones towards the next stage, starting as of 2017. In Stage 2, more far-reaching measures should be agreed upon to complete the EMU's economic and institutional architecture. This will involve sharing more sovereignty and solidarity and will have to be accompanied by strengthened democratic oversight.

To prepare the transition from Stage 1 to Stage 2 of completing the EMU, the Commission will present a White Paper in spring 2017, building on the progress made in Stage 1 and outlining the next steps needed to complete the EMU in Stage 2. The White Paper will be prepared in consultation with the Presidents of the other EU institutions.

2016 will be crucial in preparing this White Paper, building on the three following strands:

-First, all EU institutions and Member States should agree and take action on the measures presented in this Communication. In particular, it would be important that the Competitiveness Boards and the European Fiscal Board become operational by mid-2016.

-Second, it is key to consult and engage with citizens, stakeholders, social partners, European and national Parliaments, Member States, regional and local authorities on completing EMU in Stage 2. With a view to stimulate this necessary broad-based debate across Europe, the Commission will facilitate a wide consultation, including public debates in 2016. The consultation should be broad-based, transparent and inclusive and allow citizens to give their views.

-Finally, the Commission will establish in mid-2016 an Expert Group to explore the legal, economic and political preconditions that will inform the more long-term proposals as outlined in the Five Presidents' Report.

The implementation of Stage 1, the outcome of the consultation and the work of the expert group should contribute to shaping a consensus for more fundamental steps ahead. This input will feed into the White Paper, which should eventually – following further discussion – be translated into a stronger legislative and institutional framework for the EMU.

8.CONCLUSION

This Communication substantiates the different steps under Stage 1 that the Five Presidents had outlined in their report on "Completing Europe's Economic and Monetary Union". These steps are ambitious and pragmatic. Following the principle of "deepening by doing", the proposed measures build on existing instruments and make the best possible use of the existing Treaties.

The presented initiatives will help to boost competitiveness and economic and social convergence, with the aim of further improving the Economic Union. The Fiscal Union is fostered via achieving and maintaining responsible fiscal policies at national and EU level. The initiatives will also help to further increase the efficiency and stability of financial markets and to complete the Financial Union. Finally, the Political Union is supported by enhancing democratic accountability and national ownership.

All of these elements are important in themselves, but they are also interdependent. They thus need to be tackled in parallel. As a whole, the Stage 1 initiatives will further bolster the resilience of the EMU. They are also an important step in stimulating the convergence necessary to move on to Stage 2 of the process of completing a deep and genuine EMU.

The Commission calls on all the actors involved to ensure that the process to deepen EMU is swiftly implemented. Only continued ambition and concerted action can ensure that the EMU not only survives but thrives, and regains its path towards strong, sustainable and inclusive growth and job creation.

5. THE FUTURE'S LOOKING GLASS: BREXIT

Although the European Union delivered unprecedented growth and peace across the European continent, its legitimacy and *raison-d'être* have been questioned consistently over the past decade. The most ferocious opponents to the EU integration project have been nationalist or extreme-left or –right wing political parties at the Member States' level. Calls for review of membership conditions and/or withdrawal from the European Union have become more explicit. In the United Kingdom, such calls have resulted in a popular consultation – a referendum – on the question whether to stay in the European Union or not. Following a rather tense campaign, the referendum organised on 23 June 2016 resulted in a majority of voters in favour of a so-called “Brexit”. As a result, the United Kingdom seems committed to leave the European Union as a Member State.

The envisaged Brexit has often been described as problematic, dramatic, or even as the death of the EU integration project. Whilst future developments will show where the Brexit will lead the European Union, it is undoubtedly the case that it triggers unprecedented problems associated with EU law. The final lecture in this course aims to introduce you to the withdrawal procedure in Article 50 TEU, which would enable the United Kingdom to exit from the EU, as well as to the potential legal forms through which the United Kingdom could continue to associate itself with – parts of – EU policy fields, such as the internal market.

LECTURE 11: THE EU LAW IMPLICATIONS OF AND SOLUTIONS FOR A BREXIT-SITUATION

The 23 June 2016 referendum's outcome in favour of an exit of the United Kingdom from the European Union fuelled debates on how to proceed with such unprecedented exit, both at the level of the United Kingdom as well as at EU level. In the United Kingdom, questions arose in particular regarding the need for Parliamentary approval of the triggering of a Brexit procedure. The United Kingdom Supreme Court confirmed this was the case indeed in a long-awaited 24 January 2017 judgment. At the EU level, Article 50 TEU allows for a procedure in this, but does not in itself offer an alternative for the United Kingdom to maintain some kind of legal affiliation with the EU's internal market. This lecture will outline the consequences of an exit from the EU and explore at the same time alternative options available. The focus of this lecture will be on the role of law in ensuring a smooth exit from and enabling a new settlement with the European Union.

Materials to read:

- Article 50 TEU.
- United Kingdom Supreme Court, R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant), [2017] UKSC 5
- G. Barrett, "The era of Article 50: how the UK will leave the EU if it opts for a Brexit in its 23 June 2016 vote", *University College Dublin Working Paper*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2784214 (via eCampus).

Lecture 11 outline:

- a. Brexit: political origins
 1. A continuous EU legitimacy crisis
 2. Organising a referendum
- b. After the referendum: article 50 TEU to the test
 1. Article 50 TEU
 2. Limits on Article 50 TEU
 3. Legal consequences of Article 50 TEU
 4. A role for the Court of Justice?
- c. Beyond Brexit: legal alternatives for the United Kingdom to maintain some EU affiliation
 1. Back to the future: membership of the European Free Trade Association
 2. A "Norwegian" solution: membership of the European Economic Area
 3. A "Swiss" solution?
 4. An entirely new deal grounded in public international law
 5. A hybrid cooperation arrangement?
- d. Reflections on the future of the European Union and EU law

e. Exam preparation information – Q&A session

Questions for discussion:

- Would it be possible – as a matter of EU law – that the United Kingdom stays in the European Union after the referendum's outcome? Would this legal possibility also be politically feasible?
- What are the advantages and disadvantages, from the point of view of legal coherence and legal certainty, of the different 'continuous affiliation' strategies available to the United Kingdom?

Article 50 TEU

1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.
 2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.
 3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.
 4. For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it.
- A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union.
5. If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49.

United Kingdom Supreme Court, 24 January 2017

R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant)

REFERENCE by the Attorney General for Northern Ireland - In the matter of an application by Agnew and others for Judicial Review

REFERENCE by the Court of Appeal (Northern Ireland) – In the matter of an application by Raymond McCord for Judicial Review

LORD NEUBERGER, LADY HALE, LORD MANCE, LORD KERR, LORD CLARKE, LORD WILSON, LORD SUMPTION, LORD HODGE:

Introductory

1. On 1 January 1973, the United Kingdom became a member of the European Economic Community (“the EEC”) and certain other associated European organisations. On that date, EEC law took effect as part of the domestic law of the United Kingdom, in accordance with the European Communities Act 1972 which had been passed ten weeks earlier. Over the next 40 years, the EEC expanded from nine to 28 member states, extended its powers or “competences”, merged with the associated organisations, and changed its name to the European Community in 1993 and to the European Union in 2009.

2. In December 2015, the UK Parliament passed the European Union Referendum Act, and the ensuing referendum on 23 June 2016 produced a majority in favour of leaving the European Union. UK government ministers (whom we will call “ministers” or “the UK government”) thereafter announced that they would bring UK membership of the European Union to an end. The question before this Court concerns the steps which are required as a matter of UK domestic law before the process of leaving the European Union can be initiated. The particular issue is whether a formal notice of withdrawal can lawfully be given by ministers without prior legislation passed in both Houses of Parliament and assented to by HM The Queen.

3. It is worth emphasising that nobody has suggested that this is an inappropriate issue for the courts to determine. It is also worth emphasising that this case has nothing to do with issues such as the wisdom of the decision to withdraw from the European Union, the terms of withdrawal, the timetable or arrangements for withdrawal, or the details of any future relationship with the European Union. Those are all political issues which are matters for ministers and Parliament to resolve. They are not issues which are appropriate for resolution by judges, whose duty is to decide issues of law which are brought before them by individuals and entities exercising their rights of access to the courts in a democratic society.

4. Some of the most important issues of law which judges have to decide concern questions relating to the constitutional arrangements of the United Kingdom. These proceedings raise such issues. As already indicated, this is not because they concern the United Kingdom’s membership of the European Union; it is because they concern (i) the extent of ministers’ power to effect changes in domestic law through exercise of their prerogative powers at the international level, and (ii) the relationship between the UK government and Parliament on the one hand and the devolved legislatures and administrations of Scotland, Wales and Northern Ireland on the other.

5. The main issue on this appeal concerns the ability of ministers to bring about changes in domestic law by exercising their powers at the international level, and it arises from two features of the United Kingdom’s constitutional arrangements. The first is that ministers generally enjoy a power freely to enter into and to terminate treaties without recourse to Parliament. This prerogative power is said by the Secretary of State for Exiting the European Union to include the right to withdraw from the treaties which govern UK membership of the European Union (“the EU Treaties”). The second feature is that ministers are not normally entitled to exercise any power they might otherwise have if it results in a change in UK domestic law, unless statute, ie an Act of Parliament, so provides. The argument against the Secretary of State is that this principle prevents ministers withdrawing from the EU Treaties, until effectively authorised to do so by a statute.

6. Most of the devolution issues arise from the contention that the terms on which powers have been statutorily devolved to the administrations of Scotland, Wales and Northern Ireland are such that, unless

Parliament provides for such withdrawal by a statute, it would not be possible for formal notice of the United Kingdom's withdrawal from the EU Treaties to be given without first consulting or obtaining the agreement of the devolved legislatures. And, in the case of Northern Ireland, there are certain other arguments of a constitutional nature.

7. The main issue was raised in proceedings brought by Gina Miller and Deir dos Santos ("the applicants") against the Secretary of State for Exiting the European Union in the Divisional Court of England and Wales. Those proceedings came before Lord Thomas of Cwmgiedd LCJ, Sir Terence Etherton MR and Sales LJ. They ruled against the Secretary of State in a judgment given on 3 November 2016 - *R (Miller) v The Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin). This decision now comes to this Court pursuant to an appeal by the Secretary of State.

8. The applicants are supported in their opposition to the appeal by a number of people, including (i) a group deriving rights of residence in the UK under EU law on the basis of their relationship with a British national or with a non-British EU national exercising EU Treaty rights to be in the United Kingdom, (ii) a group deriving rights of residence from persons permitted to reside in the UK because of EU rights, including children and carers, (iii) a group mostly of UK citizens residing elsewhere in the European Union, (iv) a group who are mostly non-UK EU nationals residing in the United Kingdom, and (v) the Independent Workers Union of Great Britain. The Secretary of State's case is supported by Lawyers for Britain Ltd, a group of lawyers.

9. Devolution arguments relating to Northern Ireland were raised in proceedings brought by Steven Agnew and others and by Raymond McCord against the Secretary of State for Exiting the European Union and the Secretary of State for Northern Ireland. Those arguments were rejected by Maguire J in a judgment given in the Northern Ireland High Court on 28 October 2016 - *Re McCord, Judicial Review* [2016] NIQB 85. On application by the Attorney General for Northern Ireland, Maguire J referred four of the issues in the *Agnew* case to this court for determination. Following an appeal against Maguire J's decision, the Northern Ireland Court of Appeal has also referred one issue to this Court.

10. The Attorney General for Northern Ireland supports the Secretaries of State's case that no statute is required before ministers can give notice of withdrawal. In addition, there are interventions on devolution issues by the Lord Advocate on behalf of the Scottish government and the Counsel General for Wales on behalf of the Welsh government; they also rely on the Sewel Convention (as explained in paras 137 to 139 below). They support the argument that a statute is required before ministers can give notice of withdrawal, as do the advocates for Mr McCord and for Mr Agnew.

11. We are grateful to all the advocates and solicitors involved for the clarity and skill with which the respective cases have been presented orally and in writing, and for the efficiency with which the very substantial documentation was organised. We have also been much assisted by a number of illuminating articles written by academics following the handing down of the judgment of the Divisional Court. It is a tribute to those articles that they have resulted in the arguments advanced before this Court being somewhat different from, and more refined than, those before that court.

12. As mentioned in paras 7 and 9 above, the appellant in the English and Welsh appeal is the Secretary of State for Exiting the European Union, and the Northern Irish proceedings were brought against the Secretary of State for Exiting the European Union and the Secretary of State for Northern Ireland. For the sake of simplicity, we will hereafter refer to either or both Secretaries of State simply as "the Secretary of State".

The United Kingdom's Relationship with the European Union 1971-2016

The relationship between the UK and the EU 1971-1975

13. From about 1960, the UK government was in negotiations with the then member states of the EEC with a view to the United Kingdom joining the EEC and associated European organisations. In October 1971, when it had become apparent that those negotiations were likely to be successful, and following debates in each House, the House of Lords and the House of Commons each resolved to "approve ... Her Majesty's Government's decision of principle to join the European Communities on the basis of the arrangements which have been negotiated". In the course of the debate in the House of Commons, the Prime Minister, Mr Heath, said that he did not think that "any Prime Minister has ... in time of peace ... asked the House to take a positive decision of such

importance as I am asking it to take”, and that he could not “over-emphasise tonight the importance of the vote which is being taken, the importance of the issue, the scale and quality of the decision and the impact that it will have equally inside and outside Britain”. In a debate in the House of Commons in January 1972, in which the earlier resolution was effectively re-affirmed, Mr Rippon, the Chancellor of the Duchy of Lancaster, said “I do not think Parliament in negotiations on a treaty has ever been brought so closely into the process of treaty-making as on the present occasion”, adding that “we all accept the unique character of the [Treaty of Accession](#)”.

14. On 22 January 1972, two days after that later debate, ministers signed a [Treaty of Accession](#) which provided that the United Kingdom would become a member of the EEC on 1 January 1973 and would accordingly be bound by the 1957 Treaty of Rome, which was then the main treaty in relation to the EEC, and by certain other connected treaties. As with most international treaties, the 1972 Accession Treaty was not binding unless and until it was formally ratified by the United Kingdom.

15. A Bill was then laid before Parliament, and after it had been passed by both Houses, it received Royal assent on 17 October 1972, when it became the European Communities Act 1972. The following day, 18 October 1972, ministers ratified the 1972 Accession Treaty on behalf of the United Kingdom, which accordingly became a member of the EEC on 1 January 1973.

16. The long title of the 1972 Act described its purpose as “to make provision in connection with the enlargement of the European Communities to include the United Kingdom ...”. Part I of the 1972 Act consisted of sections 1 to 3, which contained its “General Provisions”, and they are of central importance to these proceedings.

17. Section 1(2) of the 1972 Act contained some important definitions. “The Communities” meant the EEC and associated communities (now amended to “the EU” meaning the European Union). And “the Treaties” and “the Community Treaties” (now amended to “the EU Treaties”) were the treaties described in Schedule 1 (which were the existing treaties governing the rules and powers of the EEC at that time), the 1972 Accession Treaty itself, and “any other treaty entered into by any of the Communities, with or without any of the member States, or entered into, as a treaty ancillary to any of the Treaties, by the United Kingdom”. The use of a capital T in “the Treaties” and in “the EU Treaties” was significant. It meant that future treaties which were concerned with changing the membership or redefining the rules of the EEC could only become “Treaties” and “EU Treaties” and have effect in UK law as such if they were added to section 1(2) by an amending statute. By contrast, “ancillary” treaties covered other treaties entered into by the European Union or by the United Kingdom as a treaty ancillary to the EU Treaties. By virtue of section 1(3), even such an ancillary treaty did not take effect in UK law unless and until it was declared to do so by an Order in Council which had first to be “approved” in draft form “by resolution of each House of Parliament”.

18. Section 2 of the 1972 Act was headed “General Implementation of Treaties”. Section 2(1) of the 1972 Act was in these terms:

“All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly ...”

19. Section 2(2) of the 1972 Act provided that “Her Majesty may by Order in Council, and any designated Minister or department may by regulations, make provision” (a) “for the purpose of implementing any Community [now EU] obligation of the United Kingdom” (which is defined as any obligation “created or arising by or under the Treaties”) or “enabling any rights ... enjoyed ... by the United Kingdom under or by virtue of the Treaties to be exercised”, and (b) for ancillary purposes, including “the operation from time to time of subsection (1)”. Subsection (2) has since been amended, but nothing hangs on the amendments for present purposes. Schedule 2 to the 1972 Act contained “Provisions as to Subordinate Legislation” in relation to the powers conferred by section 2(2).

20. Section 2(4) provided as follows:

“The provision that may be made under subsection (2) above includes ... any such provision (of any such extent) as might be made by Act of Parliament, and any enactment passed or to be passed, other than one contained in this Part of this Act, shall be construed and have effect subject to the foregoing provisions of this section ...”

21. Section 3 of the 1972 Act provided, among other things, for any question as to the meaning and effect of the Treaties, or as to the validity, meaning or effect of any “Community instrument” (now “EU instrument”) to be treated as a question of EU law by the UK courts, and it further provided for such determination to be made in accordance with principles laid down by the European Court of Justice (“the Court of Justice”) or, if necessary, to be referred to the Court of Justice.

22. Part II of the 1972 Act, which contained sections 4 to 12, and incorporated Schedules 3 and 4, set out a number of statutory repeals and amendments which were needed to enable UK domestic law to comply with the requirements of EU law, that is the law from time to time laid down in the EU Treaties, Directives and Regulations, as interpreted by the Court of Justice.

23. Following a manifesto commitment made during a general election in 1974, the UK government decided to hold a referendum on whether the United Kingdom should remain in the EEC. To that end, it laid a Bill before Parliament which was duly enacted as the Referendum Act 1975. The referendum pursuant to that Act took place on 5 June 1975, and a majority of those who voted were in favour of remaining in the EEC.

The relationship between the UK and the EU after 1975

24. In the past 40 years, over 20 treaties relating to the EEC, the European Community and the European Union were signed on behalf of the member states, in the case of the United Kingdom by ministers. After being signed, each such treaty was then added to the list of “Treaties” in section 1(2) of the 1972 Act through the medium of an amendment made to that statute by a short appropriately worded statute passed by Parliament, and the treaty was then ratified by the United Kingdom. Some of these Treaties were concerned with redefining and expanding the competences of the EEC, the European Community and the European Union and changing the constitutional role of the European Parliament within the European Community or Union. They included the Single European Act signed in 1986, Titles II, III and IV of the Maastricht Treaty on European Union of 7 February 1992 (“the TEU”), the 1997 Amsterdam Treaty, the 2001 Treaty of Nice, and the Treaty of Lisbon amending the TEU and the Treaty on the Functioning of the European Union (“TFEU”), both signed in Lisbon on 13 December 2007 - see respectively section 1(2)(j), added by the European Communities (Amendment) Act 1986; section 1(2)(k), added by the European Communities (Amendment) Act 1993; section 1(2)(o), added by the European Communities (Amendment) Act 1998; section 1(2)(p), added by the European Communities (Amendment) Act 2002; and section 1(2)(s), added by the European Union (Amendment) Act 2008.

25. The Treaty of Lisbon introduced into the EU Treaties for the first time an express provision entitling a member state to withdraw from the European Union. It did this by inserting a new article 50 into the TEU. This article (“article 50”) provides as follows:

“1. Any member state may decide to withdraw from the Union in accordance with its own constitutional requirements.

2. A member state which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that state, setting out the arrangements for its withdrawal ...

3. The Treaties shall cease to apply to the state in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the member state concerned, unanimously decides to extend this period. ...”

26. In these proceedings, it is common ground that notice under article 50(2) (which we shall call “Notice”) cannot be given in qualified or conditional terms and that, once given, it cannot be withdrawn. Especially as it is the Secretary of State’s case that, even if this common ground is mistaken, it would make no difference to the

outcome of these proceedings, we are content to proceed on the basis that that is correct, without expressing any view of our own on either point. It follows from this that once the United Kingdom gives Notice, it will inevitably cease at a later date to be a member of the European Union and a party to the EU Treaties.

27. After 1975, in addition to the amending statutes referred to in para 24 above, statutes were enacted to give effect to changes in the way that members of the European Parliament were selected. The first was the European Assembly Elections Act 1978, which contained in section 6 a stipulation that no new treaty providing for an increase in the powers of the European Assembly (as it then was) should be ratified unless approved by an Act of Parliament. This provision was re-enacted as section 12 of the European Parliamentary Elections Act 2002. Section 1 of the 2002 Act provided for a specific number of Members of the European Parliament (“MEPs”) for specified regions of the United Kingdom. Section 8 of the 2002 Act stated that a person was entitled to vote in elections to the European Parliament if he or she satisfied certain residence requirements, and section 10 identified the (very limited) categories of people who were disqualified from standing as MEPs.

28. In addition to adding the Treaty of Lisbon and the TFEU to section 1(2) of the 1972 Act, the 2008 Act, referred to at the end of para 24 above, contained certain restrictions on the UK government’s agreement to changes in the rules of the European Union. Section 5 provided that any treaty which amended the TEU or the TFEU by altering the competences of the European Union, or which altered the decision-making processes of the European Union or its institutions in such a way as to dilute the influence of individual member states, should not be ratified by ministers “unless approved by Act of Parliament”. Section 6 of the 2008 Act stated that ministers should not support any decision under certain specified articles of the TEU and of the TFEU unless both Houses of Parliament had approved a motion sanctioning that course.

29. Subject to an immaterial exception, the [European Union Act 2011](#) repealed and replaced sections 5 and 6 of the 2008 Act. Part I of the 2011 Act included section 1 which was “Introductory”, sections 2 to 10, which imposed “Restrictions” both “relating to amendments of TEU and TFEU” and “relating to other decisions under TEU and TFEU”, and sections 11 to 13, which related to the conduct of referendums. Sections 2 to 5 imposed restrictions on the ratification by the United Kingdom of any treaty which amended or replaced TEU or TFEU, and also on ministers approving certain specified types of EU decisions under the so-called simplified revision procedure. Those restrictions were that (a) a statement relating to the treaty or decision had to be laid before Parliament, (b) the treaty or decision had to be approved by statute, and, (c) in broad terms, where the treaty or decision increased the competences of the European Union, it had to be approved in a UK-wide referendum. Section 6 provided that ministers should not, without prior approval both in a statute and in a UK-wide referendum, vote in favour of certain decisions, including those which resulted in a dilution in the influence of individual member states in relation to a number of different articles of the TEU and TFEU including in particular article 50(3). Sections 7 to 10 of the 2011 Act contained further restrictions on ministers voting in favour of certain measures under the TEU and TFEU without the prior approval of Parliament.

30. Section 18 of the 2011 Act provided as follows:

“Directly applicable or directly effective EU law (that is, the rights, powers, liabilities, obligations, restrictions, remedies and procedures referred to in section 2(1) of the European Communities Act 1972) falls to be recognised and available in law in the United Kingdom only by virtue of that Act or where it is required to be recognised and available in law by virtue of any other Act.”

31. Following a manifesto commitment in the 2015 general election to hold a referendum on the issue of EU membership, the UK government laid before Parliament a Bill which became the 2015 Act. Section 1 provided that “[a] referendum is to be held” on a date no later than 31 December 2017 “on whether the United Kingdom should remain a member of the European Union”, and it specified the question which should appear on the ballot papers. The remaining sections were concerned with questions such as entitlement to vote, the conduct of the referendum, rules about campaigning and financial controls.

32. The referendum duly took place throughout the United Kingdom on 23 June 2016, and it resulted in a majority in favour of leaving the European Union. Ministers have made it clear that the UK government intends to implement the result of the referendum and to give Notice by the end of March 2017.

33. On 7 December 2016, following a debate, the House of Commons resolved “[to recognise] ... that this House should respect the wishes of the United Kingdom as expressed in the referendum on 23 June; and further [to call] on the Government to invoke article 50 by 31 March 2017”.

The main issue: the 1972 Act and prerogative powers

Summary of the arguments on the main issue

34. The Secretary of State’s case is based on the existence of the well-established prerogative powers of the Crown to enter into and to withdraw from treaties. He contends that ministers are entitled to exercise this power in relation to the EU Treaties, and therefore to give Notice without the need for any prior legislation. Following the giving of Notice by the end of March 2017, ministers intend that a “Great Repeal Bill” will be laid before Parliament. This will repeal the 1972 Act and, wherever practical, it will convert existing EU law into domestic law at least for a transitional period. Under article 50, withdrawal will occur not more than two years after the Notice is given (unless that period is extended by unanimous agreement among the other member states), and it is intended that the Great Repeal Bill will come into force at that point.

35. As was made clear by Lord Browne-Wilkinson in *R v Secretary of State for the Home Department, Ex p Fire Brigades Union* [1995] 2 AC 513, 552, ministers’ intentions are not law, and the courts cannot proceed on the assumption that they will necessarily become law. That is a matter for Parliament to decide in due course. The issues before us must be resolved in accordance with the law as it stands, as the Secretary of State rightly accepted.

36. The applicants’ case in that connection is that when Notice is given, the United Kingdom will have embarked on an irreversible course that will lead to much of EU law ceasing to have effect in the United Kingdom, whether or not Parliament repeals the 1972 Act. As Lord Pannick QC put it for Mrs Miller, when ministers give Notice they will be “pulling ... the trigger which causes the bullet to be fired, with the consequence that the bullet will hit the target and the Treaties will cease to apply”. In particular, he said, some of the legal rights which the applicants enjoy under EU law will come to an end. This, he submitted, means that the giving of Notice would pre-empt the decision of Parliament on the Great Repeal Bill. It would be tantamount to altering the law by ministerial action, or executive decision, without prior legislation, and that would not be in accordance with our law.

37. Following opening remarks made by HM Attorney General, Mr Eadie QC in his submissions on behalf of the Secretary of State, did not challenge much if any of the factual basis of these assertions, but he did challenge the conclusions that were said to derive from them. He argued that the fact that significant legal changes will follow from withdrawing from the EU Treaties does not prevent the giving of Notice, because the prerogative power to withdraw from treaties was not excluded by the terms of the 1972 Act, and that, in any event, “acts of the government in the exercise of the prerogative can alter domestic law”. More particularly, he contended that the 1972 Act gave effect to EU law only insofar as the EU Treaties required it, and that that effect was therefore contingent upon the United Kingdom remaining a party to those treaties. Accordingly, he said, in the 1972 Act Parliament had effectively stipulated that, or had sanctioned the result whereby, EU law should cease to have domestic effect in the event that ministers decided to withdraw from the EU Treaties.

38. Mr Eadie also relied on the fact that, while statutes enacted since 1972 have imposed Parliamentary controls over the exercise of prerogative powers in relation to the EU Treaties, they have not touched the prerogative power to withdraw from them. Implicitly, therefore, he contended, Parliament has recognised that the power to withdraw from such treaties exists and is exercisable without prior legislation. Mr Eadie also suggested that the 2015 Act was enacted on the assumption that the result of the referendum would be decisive. Mr Eadie’s reliance on the legislation since 1972 was largely for the purpose of supporting his argument on the effect of the 1972 Act, but he did raise an argument that the legislation from 1972 to 2015 should be looked at as a whole. Also, in answer to a question from the Court, he adopted a suggestion that, even if Parliamentary authority would otherwise have been required, the 2015 Act and the subsequent referendum dispensed with that requirement, but he did not develop that argument, in our view realistically.

39. Before addressing these arguments, it is right to consider some relevant constitutional principles and in particular the Royal prerogative.

The constitutional background

40. Unlike most countries, the United Kingdom does not have a constitution in the sense of a single coherent code of fundamental law which prevails over all other sources of law. Our constitutional arrangements have developed over time in a pragmatic as much as in a principled way, through a combination of statutes, events, conventions, academic writings and judicial decisions. Reflecting its development and its contents, the UK constitution was described by the constitutional scholar, Professor AV Dicey, as “the most flexible polity in existence” - *Introduction to the Study of the Law of the Constitution* (8th ed, 1915), p 87.

41. Originally, sovereignty was concentrated in the Crown, subject to limitations which were ill-defined and which changed with practical exigencies. Accordingly, the Crown largely exercised all the powers of the state (although it appears that even in the 11th century the King rarely attended meetings of his Council, albeit that its membership was at his discretion). However, over the centuries, those prerogative powers, collectively known as the Royal prerogative, were progressively reduced as Parliamentary democracy and the rule of law developed. By the end of the 20th century, the great majority of what had previously been prerogative powers, at least in relation to domestic matters, had become vested in the three principal organs of the state, the legislature (the two Houses of Parliament), the executive (ministers and the government more generally) and the judiciary (the judges). It is possible to identify a number of seminal events in this history, but a series of statutes enacted in the twenty years between 1688 and 1707 were of particular legal importance. Those statutes were the Bill of Rights 1688/9 and the Act of Settlement 1701 in England and Wales, the Claim of Right Act 1689 in Scotland, and the Acts of Union 1706 and 1707 in England and Wales and in Scotland respectively. (Northern Ireland joined the United Kingdom pursuant to the Acts of Union 1800 in Britain and Ireland).

42. The independence of the judiciary was formally recognised in these statutes. In the broadest sense, the role of the judiciary is to uphold and further the rule of law; more particularly, judges impartially identify and apply the law in every case brought before the courts. That is why and how these proceedings are being decided. The law is made in or under statutes, but there are areas where the law has long been laid down and developed by judges themselves: that is the common law. However, it is not open to judges to apply or develop the common law in a way which is inconsistent with the law as laid down in or under statutes, ie by Acts of Parliament.

43. This is because Parliamentary sovereignty is a fundamental principle of the UK constitution, as was conclusively established in the statutes referred to in para 41 above. It was famously summarised by Professor Dicey as meaning that Parliament has “the right to make or unmake any law whatsoever; and further, no person or body is recognised by the law as having a right to override or set aside the legislation of Parliament” - *op cit*, p 38. The legislative power of the Crown is today exercisable only through Parliament. This power is initiated by the laying of a Bill containing a proposed law before Parliament, and the Bill can only become a statute if it is passed (often with amendments) by Parliament (which normally but not always means both Houses of Parliament) and is then formally assented to by HM The Queen. Thus, Parliament, or more precisely the Crown in Parliament, lays down the law through statutes - or primary legislation as it is also known - and not in any other way.

44. In the early 17th century *Case of Proclamations* (1611) 12 Co Rep 74, Sir Edward Coke CJ said that “the King by his proclamation or other ways cannot change any part of the common law, or statute law, or the customs of the realm”. Although this statement may have been controversial at the time, it had become firmly established by the end of that century. In England and Wales, the Bill of Rights 1688 confirmed that “the pretended power of suspending of laws or the execution of laws by regall authority without consent of Parlyament is illegall” and that “the pretended power of dispensing with laws or the execution of laws by regall authoritie as it hath beene assumed and exercised of late is illegall”. In Scotland, the Claim of Right 1689 was to the same effect, providing that “all Proclamations asserting ane absolute power to Cass [ie to quash] annull and Dissable lawes ... are Contrair to Law”. And article 18 of the Acts of Union of 1706 and 1707 provided that (with certain irrelevant exceptions) “all ... laws” in Scotland should “remain in the same force as before ... but alterable by the Parliament of Great Britain”.

45. The Crown’s administrative powers are now exercised by the executive, ie by ministers who are answerable to the UK Parliament. However, consistently with the principles established in the 17th century, the exercise of those powers must be compatible with legislation and the common law. Otherwise, ministers would be changing (or infringing) the law, which, as just explained, they cannot do. A classic statement of the position was given by Lord Parker of Waddington in *The Zamora* [1916] 2 AC 77, 90:

“The idea that the King in Council, or indeed any branch of the Executive, has power to prescribe or alter the law to be administered by Courts of law in this country is out of harmony with the principles of our Constitution. It is true that, under a number of modern statutes, various branches of the Executive have power to make rules having the force of statutes, but all such rules derive their validity from the statute which creates the power, and not from the executive body by which they are made. No one would contend that the prerogative involves any power to prescribe or alter the law administered in Courts of Common Law or Equity.”

46. It is true that ministers can make laws by issuing regulations and the like, often known as secondary or delegated legislation, but (save in limited areas where a prerogative power survives domestically, as exemplified by the cases mentioned in paras 52 and 53 below) they can do so only if authorised by statute. So, if the regulations are not so authorised, they will be invalid, even if they have been approved by resolutions of both Houses under the provisions of the relevant enabling Act - for a recent example see *R (The Public Law Project) v Lord Chancellor* [2016] AC 1531.

The Royal prerogative and Treaties

47. The Royal prerogative encompasses the residue of powers which remain vested in the Crown, and they are exercisable by ministers, provided that the exercise is consistent with Parliamentary legislation. In *Burmah Oil Co (Burma Trading) Ltd v Lord Advocate* [1965] AC 75, 101, Lord Reid explained that the Royal prerogative is a source of power which is “only available for a case not covered by statute”. Professor HWR Wade summarised the position in his introduction to the first edition of what is now Wade on *Administrative Law* (1961), p 13:

“[T]he residual prerogative is now confined to such matters as summoning and dissolving Parliament, declaring war and peace, regulating the armed forces in some respects, governing certain colonial territories, making treaties (though as such they cannot affect the rights of subjects), and conferring honours. The one drastic internal power of an administrative kind is the power to intern enemy aliens in time of war.”

48. Thus, consistently with Parliamentary sovereignty, a prerogative power however well-established may be curtailed or abrogated by statute. Indeed, as Professor Wade explained, most of the powers which made up the Royal prerogative have been curtailed or abrogated in this way. The statutory curtailment or abrogation may be by express words or, as has been more common, by necessary implication. It is inherent in its residual nature that a prerogative power will be displaced in a field which becomes occupied by a corresponding power conferred or regulated by statute. This is what happened in the two leading 20th century cases on the topic, *Attorney General v De Keyser's Royal Hotel Ltd* [1920] AC 508 and *Fire Brigades Union* cited above. As Lord Parmoor explained in *De Keyser* at p 575, when discussing the prerogative power to take a subject's property in time of war:

“The constitutional principle is that when the power of the Executive to interfere with the property or liberty of subjects has been placed under Parliamentary control, and directly regulated by statute, the Executive no longer derives its authority from the Royal Prerogative of the Crown but from Parliament, and that in exercising such authority the Executive is bound to observe the restrictions which Parliament has imposed in favour of the subject.”

49. In *Burmah Oil* cited above, at p 101, Lord Reid described prerogative powers as a “relic of a past age”, but that description should not be understood as implying that the Royal prerogative is either anomalous or anachronistic. There are important areas of governmental activity which, today as in the past, are essential to the effective operation of the state and which are not covered, or at least not completely covered, by statute. Some of them, such as the conduct of diplomacy and war, are by their very nature at least normally best reserved to ministers just as much in modern times as in the past, as indeed Lord Reid himself recognised in *Burmah Oil* at p 100.

50. Consistently with paras 44 to 46, and the passage quoted from Professor Wade in para 47 above, it is a fundamental principle of the UK constitution that, unless primary legislation permits it, the Royal prerogative does not enable ministers to change statute law or common law. As Lord Hoffmann observed in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2009] AC 453, para 44, “since the 17th century the prerogative has not empowered the Crown to change English common or statute law”. This is, of course, just

as true in relation to Scottish, Welsh or Northern Irish law. Exercise of ministers' prerogative powers must therefore be consistent both with the common law as laid down by the courts and with statutes as enacted by Parliament.

51. Further, ministers cannot frustrate the purpose of a statute or a statutory provision, for example by emptying it of content or preventing its effectual operation. Thus, ministers could not exercise prerogative powers at the international level to revoke the designation of Laker Airways under an aviation treaty as that would have rendered a licence granted under a statute useless: *Laker Airways Ltd v Department of Trade* [1977] QB 643 - see especially at pp 718-719 and 728 per Roskill LJ and Lawton LJ respectively. And in *Fire Brigades Union* cited above, at pp 551-552, Lord Browne-Wilkinson concluded that ministers could not exercise the prerogative power to set up a scheme of compensation for criminal injuries in such a way as to make a statutory scheme redundant, even though the statute in question was not yet in force. And, as already mentioned in para 35 above, he also stated that it was inappropriate for ministers to base their actions (or to invite the court to make any decision) on the basis of an anticipated repeal of a statutory provision as that would involve ministers (or the court) pre-empting Parliament's decision whether to enact that repeal.

52. The fact that the exercise of prerogative powers cannot change the domestic law does not mean that such an exercise is always devoid of domestic legal consequences. There are two categories of case where exercise of the prerogative can have such consequences. The first is where it is inherent in the prerogative power that its exercise will affect the legal rights or duties of others. Thus, the Crown has a prerogative power to decide on the terms of service of its servants, and it is inherent in that power that the Crown can alter those terms so as to remove rights, albeit that such a power is susceptible to judicial review: *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374. The Crown also has a prerogative power to destroy property in wartime in the interests of national defence (although at common law compensation was payable: *Burmah Oil* cited above). While the exercise of the prerogative power in such cases may affect individual rights, the important point is that it does not change the law, because the law has always authorised the exercise of the power.

53. The second category comprises cases where the effect of an exercise of prerogative powers is to change the facts to which the law applies. Thus, the exercise of the prerogative to declare war will have significant legal consequences: actions which were previously lawful may become treasonable (as in *Joyce v Director of Public Prosecutions* [1946] AC 347), and some people will become enemy aliens, whose property is liable to confiscation. Likewise, in *Post Office v Estuary Radio Ltd* [1968] 2 QB 740 the Crown's exercise of its prerogative to extend UK territorial waters resulted in the criminalisation of broadcasts from ships in the extended area, which had previously been lawful. These are examples where the exercise of the prerogative power alters the status of a person, thing or activity so that an existing rule of law comes to apply to it. However, in such cases the exercise has not created or changed the law, merely the extent of its application.

54. The most significant area in which ministers exercise the Royal prerogative is the conduct of the United Kingdom's foreign affairs. This includes diplomatic relations, the deployment of armed forces abroad, and, particularly in point for present purposes, the making of treaties. There is little case law on the power to terminate or withdraw from treaties, but, as a matter of both logic and practical necessity, it must be part of the treaty-making prerogative. As Lord Templeman put it in *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418, 476, "[t]he Government may negotiate, conclude, construe, observe, breach, repudiate or terminate a treaty".

55. Subject to any restrictions imposed by primary legislation, the general rule is that the power to make or unmake treaties is exercisable without legislative authority and that the exercise of that power is not reviewable by the courts - see *Civil Service Unions* case cited above, at pp 397-398. Lord Coleridge CJ said that the Queen acts "throughout the making of the treaty and in relation to each and every of its stipulations in her sovereign character, and by her own inherent authority" - *Rustomjee v The Queen* (1876) 2 QBD 69, 74. This principle rests on the so-called dualist theory, which is based on the proposition that international law and domestic law operate in independent spheres. The prerogative power to make treaties depends on two related propositions. The first is that treaties between sovereign states have effect in international law and are not governed by the domestic law of any state. As Lord Kingsdown expressed it in *Secretary of State in Council of India v Kamachee Boye Sahaba* (1859) 13 Moo PCC 22, 75, treaties are "governed by other laws than those which municipal courts administer". The second proposition is that, although they are binding on the United Kingdom in international law, treaties are not part of UK law and give rise to no legal rights or obligations in domestic law.

56. It is only on the basis of these two propositions that the exercise of the prerogative power to make and unmake treaties is consistent with the rule that ministers cannot alter UK domestic law. Thus, in *Higgs v Minister of National Security* [2000] 2 AC 228, 241, Lord Hoffmann pointed out that the fact that treaties are not part of domestic law was the “corollary” of the Crown’s treaty-making power. In *JH Rayner* cited above, at p 500, Lord Oliver of Aylmerton put it thus:

“As a matter of the constitutional law of the United Kingdom, the Royal Prerogative, whilst it embraces the making of treaties, does not extend to altering the law or conferring rights upon individuals or depriving individuals of rights which they enjoy in domestic law without the intervention of Parliament. Treaties, as it is sometimes expressed, are not self-executing. Quite simply, a treaty is not part of English law unless and until it has been incorporated into the law by legislation. So far as individuals are concerned, it is *res inter alios acta* [ie something done between others], from which they cannot derive rights and by which they cannot be deprived of rights or subjected to obligations; and it is outside the purview of the court not only because it is made in the conduct of foreign relations, which are a prerogative of the Crown, but also because, as a source of rights and obligations, it is irrelevant.”

57. It can thus fairly be said that the dualist system is a necessary corollary of Parliamentary sovereignty, or, to put the point another way, it exists to protect Parliament not ministers. Professor Campbell McLachlan in *Foreign Relations Law* (2014), para 5.20, neatly summarises the position in the following way:

“If treaties have no effect within domestic law, Parliament’s legislative supremacy within its own polity is secure. If the executive must always seek the sanction of Parliament in the event that a proposed action on the international plane will require domestic implementation, parliamentary sovereignty is reinforced at the very point at which the legislative power is engaged.”

58. While ministers have in principle an unfettered power to make treaties which do not change domestic law, it had become fairly standard practice by the late 19th century for treaties to be laid before both Houses of Parliament at least 21 days before they were ratified, to enable Parliamentary objections to be heard. In 1924, following an indication by the previous government that it did not regard itself as bound by the practice, Arthur Ponsonby, the Parliamentary Under-Secretary of State for Foreign Affairs, assured the House of Commons that ministers would in future adhere to this practice, which became known as the Ponsonby Convention. The convention was superseded and formalised by section 20 of the Constitutional Reform and Governance Act 2010. However, by virtue of section 23(1) of that Act, this section does not apply to new EU Treaties, because they are governed by the more specific statutory controls discussed in paras 28 and 29 above.

59. With that background, we turn to analyse the effect of the 1972 Act and the arguments as to whether, in the absence of prior authority from Parliament in the form of a statute, the giving of Notice by ministers would be ineffective under the United Kingdom’s constitutional requirements, as it would otherwise impermissibly result in a change in domestic law.

The status and character of the 1972 Act

60. Many statutes give effect to treaties by prescribing the content of domestic law in the areas covered by them. The 1972 Act does this, but it does considerably more as well. It authorises a dynamic process by which, without further primary legislation (and, in some cases, even without any domestic legislation), EU law not only becomes a source of UK law, but actually takes precedence over all domestic sources of UK law, including statutes. This may sound rather dry or technical to many people, but in constitutional terms the effect of the 1972 Act was unprecedented. Indeed, it is fair to say that the legal consequences of the United Kingdom’s accession to the EEC were not fully appreciated by many lawyers until the *Factortame* litigation in the 1990s - see the House of Lords decisions in *R v Secretary of State for Transport, Ex p Factortame Ltd (No 2)* [1991] 1 AC 603 and (*No 5*) [2000] 1 AC 524. Of course, consistently with the principle of Parliamentary sovereignty, this unprecedented state of affairs will only last so long as Parliament wishes: the 1972 Act can be repealed like any other statute. For that reason, we would not accept that the so-called fundamental rule of recognition (ie the fundamental rule by reference to which all other rules are validated) underlying UK laws has been varied by the 1972 Act or would be varied by its repeal.

61. In one sense, of course, it can be said that the 1972 Act is the source of EU law, in that, without that Act, EU law would have no domestic status. But in a more fundamental sense and, we consider, a more realistic sense, where EU law applies in the United Kingdom, it is the EU institutions which are the relevant source of that law. The legislative institutions of the EU can create or abrogate rules of law which will then apply domestically, without the specific sanction of any UK institution. It is true that the UK government and UK-elected members of the European Parliament participate in the EU legislative processes and can influence their outcome, but that does not diminish the point. Further, in the many areas of EU competence which are subject to majority decision, the approval of the United Kingdom is not required for its legislation to take effect domestically. It is also true that EU law enjoys its automatic and overriding effect only by virtue of the 1972 Act, and thus only while it remains in force. That point simply reflects the fact that Parliament was and remains sovereign: so, no new source of law could come into existence without Parliamentary sanction - and without being susceptible to being abrogated by Parliament. However, that in no way undermines our view that it is unrealistic to deny that, so long as that Act remains in force, the EU Treaties, EU legislation and the interpretations placed on these instruments by the Court of Justice are direct sources of UK law.

62. The 1972 Act did two things which are relevant to these appeals. First, it provided that rights, duties and rules derived from EU law should apply in the United Kingdom as part of its domestic law. Secondly, it provided for a new constitutional process for making law in the United Kingdom. These things are closely related, but they are legally and conceptually distinct. The content of the rights, duties and rules introduced into our domestic law as a result of the 1972 Act is exclusively a question of EU law. However, the constitutional processes by which the law of the United Kingdom is made is exclusively a question of domestic law.

63. Under the terms of the 1972 Act, EU law may take effect as part of the law of the United Kingdom in one of three ways. First, the EU Treaties themselves are directly applicable by virtue of section 2(1). Some of the provisions of those Treaties create rights (and duties) which are directly applicable in the sense that they are enforceable in UK courts. Secondly, where the effect of the EU Treaties is that EU legislation is directly applicable in domestic law, section 2(1) provides that it is to have direct effect in the United Kingdom without the need for further domestic legislation. This applies to EU Regulations (which are directly applicable by virtue of article 288 of the TFEU). Thirdly, section 2(2) authorises the implementation of EU law by delegated legislation. This applies mainly to EU Directives, which are not, in general, directly applicable but are required (again by article 288) to be transposed into national law. While this is an international law obligation, failure of the United Kingdom to comply with it is justiciable in domestic courts, and some Directives may be enforced by individuals directly against national governments in domestic courts. Further, any serious breach by the UK Parliament, government or judiciary of any rule of EU law intended to confer individual rights will entitle any individual sustaining damage as a direct result to compensation from the UK government: *Brasserie du Pêcheur SA v Germany*; *R v Secretary of State for Transport (Ex p Factortame Ltd) (No 4)* (Joined Cases C-46/93 and C-48/93) [1996] QB 404 (provided that, where the breach consists in a court decision, the breach is not only serious but also manifest: *Köbler v Austria* (Case C-224/01) [2004] QB 848).

64. Thus, EU law in EU Treaties and EU legislation will pass into UK law through the medium of section 2(1) or the implementation provisions of section 2(2) of the 1972 Act, so long as the United Kingdom is party to the EU Treaties. Similarly, so long as the United Kingdom is party to the EU Treaties, UK courts are obliged (i) to interpret EU Treaties, Regulations and Directives in accordance with decisions of the Court of Justice, (ii) to refer unclear points of EU law to the Court of Justice, and (iii) to interpret all domestic legislation, if at all possible, so as to comply with EU law (see *Marleasing v La Comercial Internacional de Alimentacion SA* (Case C-106/89) [1990] ECR I-4135). And, so long as the United Kingdom is party to the EU Treaties, UK citizens are able to recover damages from the UK government in cases where a decision of one of the organs of the state based on a serious error of EU law has caused them loss.

65. In our view, then, although the 1972 Act gives effect to EU law, it is not itself the originating source of that law. It is, as was said on behalf of the Secretary of State echoing the illuminating analysis of Professor Finnis, the “conduit pipe” by which EU law is introduced into UK domestic law. So long as the 1972 Act remains in force, its effect is to constitute EU law an independent and overriding source of domestic law.

66. Section 18 of the 2011 Act, set out in para 30 above, was enacted in order to make it clear that the primacy of EU law over domestic legislation did not prevent it being repealed by domestic legislation. But that simply confirmed the position as it had been since the beginning of 1973. The primacy of EU law means that, unlike other rules of domestic law, EU law cannot be implicitly displaced by the mere enactment of legislation which is inconsistent with it. That is clear from the second part of section 2(4) of the 1972 Act and *Factortame*

Ltd (No 2) [1991] 1 AC 603. The issue was informatively discussed by Laws LJ in *Thoburn v Sunderland City Council* [2003] QB 151, paras 37-47.

67. The 1972 Act accordingly has a constitutional character, as discussed by Laws LJ in *Thoburn* cited above, paras 58-59, and by Lord Reed and Lords Neuberger and Mance in *R (Buckinghamshire County Council) v Secretary of State for Transport* [2014] 1 WLR 324, paras 78 to 79 and 206 to 207 respectively. Following the coming into force of the 1972 Act, the normal rule is that any domestic legislation must be consistent with EU law. In such cases, EU law has primacy as a matter of domestic law, and legislation which is inconsistent with EU law from time to time is to that extent ineffective in law. However, legislation which alters the domestic constitutional status of EU institutions or of EU law is not constrained by the need to be consistent with EU law. In the case of such legislation, there is no question of EU law having primacy, so that such legislation will have domestic effect even if it infringes EU law (and that would be true whether or not the 1972 Act remained in force). That is because of the principle of Parliamentary sovereignty which is, as explained above, fundamental to the United Kingdom's constitutional arrangements, and EU law can only enjoy a status in domestic law which that principle allows. It will therefore have that status only for as long as the 1972 Act continues to apply, and that, of course, can only be a matter for Parliament.

68. We should add that, for these reasons, we do not accept the suggestion that, as a source of law, EU law can properly be compared with, delegated legislation. The 1972 Act effectively operates as a partial transfer of law-making powers, or an assignment of legislative competences, by Parliament to the EU law-making institutions (so long as Parliament wills it), rather than a statutory delegation of the power to make ancillary regulations - even under a so-called Henry the Eighth clause, as explained in the *Public Law Project* case, cited above, paras 25 and 26. The 1972 Act cannot be said to constitute EU legislative institutions the delegates of Parliament: they make laws independently of Parliament, and indeed they were doing so before the 1972 Act was passed. If EU law had the same status in domestic law as delegated legislation, the *Factortame* litigation referred to above would have had a different outcome. A statutory provision which provides that legislative documents and decisions made by EU institutions should be an independent and pre-eminent source of UK law is thus quite different from a statutory provision which delegates to ministers and other organs of the executive the right to make regulations and the like. The exceptional nature of the effect of the 1972 Act is well illustrated by the passages quoted by Lord Reed in para 182 below from the decisions of the Court of Justice in *Van Gend en Loos* (Case C-26/62) [1963] ECR 1, 12 and *Costa v ENEL* (Case C-6/64) [1964] ECR 585, 593. They demonstrate that rules which would, as Lord Reed says, normally be incompatible with UK constitutional principles, became part of our constitutional arrangements as a result of the 1972 Act and the 1972 Accession Treaty for as long as the 1972 Act remains in force.

The Divisional Court's analysis of the effect of the 1972 Act

69. Although article 50 operates on the plane of international law, it is common ground that, because the EU Treaties apply as part of UK law, our domestic law will change as a result of the United Kingdom ceasing to be party to them, and rights enjoyed by UK residents granted through EU law will be affected. The Divisional Court concluded that, because ministers cannot claim prerogative powers to take an action which would result in a change in domestic law, it was not open to ministers to withdraw from the EU Treaties, and therefore to serve Notice, without authorisation in a statute. In that connection, the Divisional Court identified three categories of right:

- (1) Rights capable of replication in UK law;
- (2) Rights derived by UK citizens from EU law in other member states;
- (3) Rights of participation in EU institutions that could not be replicated in UK law.

70. Many current EU rights fall within the first category. They include, for instance, the rights of UK citizens to the benefit of employment protection such as the Working Time Directive, to equal treatment and to the protection of EU competition law, and the right of non-residents to the benefit of the "four freedoms" (free movement of people, goods and capital, and freedom to provide services). Some of these rights have already been embodied in UK law by domestic legislation pursuant to section 2(2) of the 1972 Act, and they will not cease to have effect upon the United Kingdom's withdrawal from the European Union (unless the domestic legislation giving effect to them is repealed in accordance with the law), although the Court of Justice will no longer have

any binding role in relation to their scope or interpretation. Other rights, arising under EU Regulations or directly under the EU Treaties, will cease to have effect upon withdrawal (save in relation to rights and liabilities already accrued), but many could be replicated in a new statute - eg the proposed Great Repeal Bill. But, as the Divisional Court pointed out, the need for such replication would only arise because withdrawal from the EU Treaties would have abrogated domestic rights created by the 1972 Act of effect, and again the Court of Justice would no longer have any binding role in relation to them.

71. The second category may appear to be irrelevant for present purposes as the rights within it arise from the incorporation of EU law into the law of other member states, and not from UK legislation. However, some rights falling within one category may be closely linked with rights falling within another category. For example, the rights under Council Regulation (EC) No 2201/2003, *concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility* (known as “Brussels II Revised”), would be undermined if a domestic judgment governing the residence of a child could not be enforced outside the UK.

72. The rights in the third category will cease when the United Kingdom is no longer a member of the European Union, as they are by their very nature dependent on continued membership. They include the right to stand for selection or later election to the European Parliament, and the right to vote in European elections, as well as the right to invite the Commission to take regulatory action. However, they have the character of what Mr Eadie described as “club membership rights”, and are of a different nature from the other more “freestanding” rights in the first and second categories.

73. Given that it is clear that some rights in the first category will be lost on the United Kingdom withdrawing from the EU Treaties, it is unnecessary to consider whether, for the purpose of their present arguments, the applicants can rely on the loss of rights in the second and third categories. If they cannot succeed in their argument based on loss of rights in the first category, then invoking loss of rights in the other categories would not help them; and if they can succeed on the basis of loss of rights in the first category, they would not need to invoke loss of rights in the other categories.

Does the 1972 Act preclude the use of prerogative power to withdraw?

74. While accepting that some rights will be lost on withdrawal from the EU Treaties, the Secretary of State’s case is that the loss of these rights in such circumstances is provided for, and has therefore effectively been sanctioned, by Parliament in the 1972 Act itself. In this connection, Mr Eadie pointed out that the 1972 Act does not simply incorporate the EU Treaties into UK law in the same way as, say, the Carriage of Goods by Sea Act 1971 incorporates the Hague Rules. By contrast, he said, section 2 of the 1972 Act is “ambulatory”: in other words, it gives effect to whatever may from time to time be the international obligations of the United Kingdom under or pursuant to the EU Treaties.

75. He pointed out that changes in EU law are brought into domestic law through the medium of section 2 of the 1972 Act and that, once the United Kingdom ceases to be bound by the EU Treaties, there will be no rights and remedies etc to which section 2(1) can apply, and no EU obligations which require delegated legislation under section 2(2), and that the possibility of withdrawal from EU Treaties is therefore effectively provided for in the wording of section 2. It is his case that, by providing that EU law rights, remedies etc “from time to time provided for by or under the Treaties” were “to be given effect or used in the United Kingdom”, section 2(1) accommodated the possibility of ministers withdrawing from the Treaties without Parliamentary authority. He also contended that it was self-evident that Parliament cannot have intended that the variable content of EU law should continue to be part of domestic law after the UK withdraws from the EU Treaties.

76. We accept the proposition that the ambit of the rights and remedies etc which are incorporated into domestic law through section 2 of the 1972 Act varies with the United Kingdom’s obligations from time to time under the EU Treaties. This proposition is reflected in the language of subsections (1) and (2) of section 2, which are quoted in paras 18 and 19 above. However, this proposition is also limited in nature. Thus, the provisions of new EU Treaties are not automatically brought into domestic law through section 2: only once they have been statutorily added to “the Treaties” and “the EU Treaties” in section 1(2) can section 2 give effect to new EU Treaties. And section 2 can only apply to those rights and remedies which are capable of being “given legal effect or used” or “enjoyed” in the United Kingdom.

77. We also accept that Parliament cannot have intended that section 2 should continue to import the variable content of EU law into domestic law, or that the other consequences of the 1972 Act described in paras 62 to 64 above should continue to apply, after the United Kingdom had ceased to be bound by the EU Treaties. However, while acknowledging the force of Lord Reed’s powerful judgment, we do not accept that it follows from this that the 1972 Act either contemplates or accommodates the abrogation of EU law upon the United Kingdom’s withdrawal from the EU Treaties by prerogative act without prior Parliamentary authorisation. On the contrary: we consider that, by the 1972 Act, Parliament endorsed and gave effect to the United Kingdom’s membership of what is now the European Union under the EU Treaties in a way which is inconsistent with the future exercise by ministers of any prerogative power to withdraw from such Treaties.

78. In short, the fact that EU law will no longer be part of UK domestic law if the United Kingdom withdraws from the EU Treaties does not mean that Parliament contemplated or intended that ministers could cause the United Kingdom to withdraw from the EU Treaties without prior Parliamentary approval. There is a vital difference between changes in domestic law resulting from variations in the content of EU law arising from new EU legislation, and changes in domestic law resulting from withdrawal by the United Kingdom from the European Union. The former involves changes in EU law, which are then brought into domestic law through section 2 of the 1972 Act. The latter involves a unilateral action by the relevant constitutional bodies which effects a fundamental change in the constitutional arrangements of the United Kingdom.

79. So far as the interpretation of subsections (1) and (2) of section 2 of the 1972 Act are concerned, any right available under EU law to the United Kingdom to withdraw from the EU Treaties does not, as Mr Eadie rightly accepted, fall within the subsection, as it is not one which would be given “legal effect or used in”, or which would be “enjoyed by the United Kingdom”. Further, the fact that section 2(1) envisages EU law rights and procedures applying “as in accordance with the Treaties” “from time to time” and “without further enactment” takes matters no further. Subsection 2(1) and (2) are concerned to ensure that the variable content of EU law as it stands from time to time, is given effect in domestic law, and there was no practical alternative to such an arrangement in a dualist system. However, it does not follow from this that prerogative powers may be used to withdraw from the Treaties and so cut off the source of EU law entirely.

80. One of the most fundamental functions of the constitution of any state is to identify the sources of its law. And, as explained in paras 61 to 66 above, the 1972 Act effectively constitutes EU law as an entirely new, independent and overriding source of domestic law, and the Court of Justice as a source of binding judicial decisions about its meaning. This proposition is indeed inherent in the Secretary of State’s metaphor of the 1972 Act as a conduit pipe by which EU law is brought into the domestic UK law. Upon the United Kingdom’s withdrawal from the European Union, EU law will cease to be a source of domestic law for the future (even if the Great Repeal Bill provides that some legal rules derived from it should remain in force or continue to apply to accrued rights and liabilities), decisions of the Court of Justice will (again depending on the precise terms of the Great Repeal Bill) be of no more than persuasive authority, and there will be no further references to that court from UK courts. Even those legal rules derived from EU law and transposed into UK law by domestic legislation will have a different status. They will no longer be paramount, but will be open to domestic repeal or amendment in ways that may be inconsistent with EU law.

81. Accordingly, the main difficulty with the Secretary of State’s argument is that it does not answer the objection based on the constitutional implications of withdrawal from the EU. As we have said, withdrawal is fundamentally different from variations in the content of EU law arising from further EU Treaties or legislation. A complete withdrawal represents a change which is different not just in degree but in kind from the abrogation of particular rights, duties or rules derived from EU law. It will constitute as significant a constitutional change as that which occurred when EU law was first incorporated in domestic law by the 1972 Act. And, if Notice is given, this change will occur irrespective of whether Parliament repeals the 1972 Act. It would be inconsistent with long-standing and fundamental principle for such a far-reaching change to the UK constitutional arrangements to be brought about by ministerial decision or ministerial action alone. All the more so when the source in question was brought into existence by Parliament through primary legislation, which gave that source an overriding supremacy in the hierarchy of domestic law sources.

82. The point may be illustrated by reference to the formula which Lord Reed uses to make the argument about the variable content of EU law. That formula is “All such [members of a specified category] as [satisfy a specified condition] shall be [dealt with in accordance with a specified requirement]”. In the present case, the “specified condition” is a continuing obligation under the EU Treaties, and it must be satisfied by EU laws, which are the relevant “members of [the] specified category”, in order for the “specified requirement”, namely that those

EU laws are binding domestically, to apply. The membership of the specified category has a variable content which is contingent on the decisions of non-UK entities, and the contingency may change that content. That much may well be accommodated by the 1972 Act. But the very formula is not itself variable: it is a fixed rule of domestic law, enacted by Parliament. It is nothing to the point that there was, for UK purposes, no content in the specified category until the 1972 Accession Treaty was ratified (on the day after the 1972 Act received the royal assent). As mentioned in para 77 above, by the 1972 Act, Parliament endorsed and gave effect to the UK's future membership of the European Union, and this became a fixed domestic starting point. The question is whether that domestic starting point, introduced by Parliament, can be set aside, or could have been intended to be set aside, by a decision of the UK executive without express Parliamentary authorisation. We cannot accept that a major change to UK constitutional arrangements can be achieved by ministers alone; it must be effected in the only way that the UK constitution recognises, namely by Parliamentary legislation. This conclusion appears to us to follow from the ordinary application of basic concepts of constitutional law to the present issue.

83. While the consequential loss of a source of law is a fundamental legal change which justifies the conclusion that prerogative powers cannot be invoked to withdraw from the EU Treaties, the Divisional Court was also right to hold that changes in domestic rights acquired through that source as summarised in para 70 above, represent another, albeit related, ground for justifying that conclusion. Indeed, the consequences of withdrawal go further than affecting rights acquired pursuant to section 2 of the 1972 Act, as explained in paras 62 to 64 above. More centrally, as explained in paras 76 to 79 above, section 2 of that Act envisages domestic law, and therefore rights of UK citizens, changing as EU law varies, but it does not envisage those rights changing as a result of ministers unilaterally deciding that the United Kingdom should withdraw from the EU Treaties.

84. Mr Eadie also argued that exercise of prerogative powers can change domestic law. While there are circumstances (as described in paras 52 and 53 above) where the exercise of prerogative powers can affect domestic legal rights, they plainly do not apply in the present case. The rights which flow through the conduit pipe of the 1972 Act are contingent on the possibility of their being removed or changed in accordance with decisions taken by EU institutions, as is recognised by the expression from "time to time" in section 2(1). However, as implied in para 79 above, far from helping the Secretary of State's case, the presence of those words in section 2 highlights their absence from the definition of "Treaties" and "EU Treaties" in section 1(2). When one reads the two subsections together, the clear implication is that the continued existence of the conduit pipe, as opposed to the contents which flow through it, can be changed only if Parliament changes the law.

85. In the course of his attractively presented submissions, Mr Eadie sought to meet these points with the argument that the 1972 Act (as amended from time to time) effectively incorporates the EU Treaties, and that the applicants cannot point to any provision in the Act which states that the prerogative powers in relation to those treaties are to be abrogated. Given that there is nothing in the 1972 Act which expressly or by necessary implication abrogated ministers' prerogative powers to withdraw from the Treaties to which it applied, he contended that it followed that the prerogative to withdraw from the EU Treaties was not precluded by the 1972 Act. In this connection, he relied on dicta in *De Keyser* cited above (including Lord Parmoor's reference to "directly regulated by statute" in the passage quoted in para 48 above) which suggested that prerogative powers should not be treated as abrogated unless a statute expressly, or by necessary implication, provided for their abrogation. Mr Eadie also relied on *R v Secretary of State for Foreign and Commonwealth Affairs, Ex p Rees-Mogg* [1994] QB 552, in which the Court of Appeal held that ministers could ratify a protocol to the TEU without Parliamentary approval. In the course of his reasons for rejecting an argument based on the proposition that prerogative powers could not be used to alter the law, Lloyd LJ at p 567H appears to have concluded that ministers' prerogative powers exist generally in relation to the EU Treaties, apparently on the basis that a prerogative power can be fettered by statute only in express terms.

86. However, as explained above, the EU Treaties not only concern the international relations of the United Kingdom, they are a source of domestic law, and they are a source of domestic legal rights many of which are inextricably linked with domestic law from other sources. Accordingly, the Royal prerogative to make and unmake treaties, which operates wholly on the international plane, cannot be exercised in relation to the EU Treaties, at least in the absence of domestic sanction in appropriate statutory form. It follows that, rather than the Secretary of State being able to rely on the absence in the 1972 Act of any exclusion of the prerogative power to withdraw from the EU Treaties, the proper analysis is that, unless that Act positively created such a power in relation to those Treaties, it does not exist. And, once one rejects the contention that section 2 accommodates a ministerial power to withdraw from the EU Treaties (as to which see paras 79 and 84 above), it is plain that the 1972 Act did not create such a power of withdrawal, as the Secretary of State properly accepts.

87. We accept, of course, that it would have been open to Parliament to provide expressly that the constitutional arrangements and the EU rights introduced by the 1972 Act should themselves only prevail from time to time and for so long as the UK government did not decide otherwise, and in particular did not decide to withdraw from the EU Treaties. But we cannot accept that the 1972 Act did so provide. As Lord Hoffmann explained in *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115, 131, “the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost”, and so “[f]undamental rights cannot be overridden by general ... words” in a statute, “because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process”. Had the Bill which became the 1972 Act spelled out that ministers would be free to withdraw the United Kingdom from the EU Treaties, the implications of what Parliament was being asked to endorse would have been clear, and the courts would have so decided. But we must take the legislation as it is, and we cannot accept that, in Part I of the 1972 Act, Parliament “squarely confront[ed]” the notion that it was clothing ministers with the far-reaching and anomalous right to use a treaty-making power to remove an important source of domestic law and important domestic rights.

88. In our judgment, far from indicating that ministers had the power to withdraw from the EU Treaties, the provisions of the 1972 Act, particularly when considered in the light of the unusual nature of those Treaties and the Act’s unusual legislative history, support the contrary view. As the Divisional Court said, the long title of the 1972 Act stated that its purpose was to make provision in connection with the “enlargement” of what is now the European Union, which is not easy to reconcile with a prerogative power to achieve the opposite. Similarly, the side-note to section 2, “General implementation of Treaties”, points away from a prerogative to terminate any implementation. In addition, there is the fact that the 1972 Act required ministers not to commit the United Kingdom to any new arrangement, whether it increased or decreased the potential volume and extent of EU law, without first being approved by Parliament - by statute in the case of a new EU Treaty and by an approved Order in Council in the case of a treaty ancillary to any existing EU Treaty. It would scarcely be compatible with those provisions if, in reliance on prerogative powers, ministers could unilaterally withdraw from the EU Treaties, thereby reducing the volume and extent of EU law which takes effect domestically to nil without the need for Parliamentary approval.

89. For these reasons, we disagree with Lloyd LJ’s conclusion in *Rees-Mogg* in so far as he held that ministers could exercise prerogative powers to withdraw from the EU Treaties. It is only right to add that his ultimate decision was nonetheless correct for the reason he gave on p 568, namely that ratification of the particular protocol in that case would not in any significant way alter domestic law.

90. The EU Treaties as implemented pursuant to the 1972 Act were and are unique in their legislative and constitutional implications. In 1972, for the first time in the history of the United Kingdom, a dynamic, international source of law was grafted onto, and above, the well-established existing sources of domestic law: Parliament and the courts. And, as explained in paras 13-15 above, before (i) signing and (ii) ratifying the 1972 Accession Treaty, ministers, acting internationally, waited for Parliament, acting domestically, (i) to give clear, if not legally binding, approval in the form of resolutions, and (ii) to enable the Treaty to be effective by passing the 1972 Act. Bearing in mind this unique history and the constitutional principle of Parliamentary sovereignty, it seems most improbable that those two parties had the intention or expectation that ministers, constitutionally the junior partner in that exercise, could subsequently remove the graft without formal appropriate sanction from the constitutionally senior partner in that exercise, Parliament.

91. The improbability of the Secretary of State’s case is reinforced by the point that, if, as he contends, prerogative powers could be invoked in relation to the EU Treaties despite the provisions of the 1972 Act, it would have been open to ministers to take such a course on or at any time after 2 January 1973 without authorisation by Parliament. It would also follow that ministers could have taken that course even if there had been no referendum or indeed, at least in theory, even if any referendum had resulted in a vote to remain. Those are implausible propositions.

92. To meet this criticism, it was suggested that, if ministers had invoked their prerogative powers to withdraw from the EU Treaties in such circumstances, their decision may have been judicially reviewable. That is rather a bold suggestion, given that it has always been considered that, because they only operate on the international plane, prerogative treaty-making powers are not subject to judicial review - see para 55 above. It was also suggested that it should not cause surprise if ministers could exercise prerogative powers to withdraw from the EU Treaties, as they would be accountable to Parliament for their actions. This seems to us to be a potentially controversial argument constitutionally. It would justify all sorts of powers being accorded to the executive, on

the basis that ministers could always be called to account for their exercise of any power. There is a substantial difference between (i) ministers having a freely exercisable power to do something whose exercise may have to be subsequently explained to Parliament and (ii) ministers having no power to do that thing unless it is first accorded to them by Parliament. The major practical difference between the two categories, in a case such as this where the exercise of the power is irrevocable, is that the exercise of power in the first category pre-empts any Parliamentary action. When the power relates to an action of such importance to the UK constitution as withdrawing from the Treaties, it would clearly be appropriate for the power to be in the second category. The fact that ministers are free to issue a declaration of war without first obtaining the sanction of Parliament does not assist the Secretary of State's case. Such a declaration, while plainly of fundamental significance in practice, does not change domestic laws or domestic sources of law, although it will lead to new laws - provided Parliament decides that it should.

93. Thus, the continued existence of the new source of law created by the 1972 Act, and the continued existence of the rights and other legal incidents which flow therefrom, cannot as a matter of UK law have depended on the fact that to date ministers have refrained from having recourse to the Royal prerogative to eliminate that source and those rights and other incidents.

Subsidiary arguments as to the effect of the 1972 Act

94. The Secretary of State relied on the fact that it was inevitable that Parliament would be formally involved in the process of withdrawal from the European Union, in that primary legislation, not least the Great Repeal Bill referred to in para 34 above, would be required to enable the United Kingdom to complete its withdrawal in an orderly and coherent manner. That seems very likely indeed, but it misses the point. If ministers give Notice without Parliament having first authorised them to do so, the die will be cast before Parliament has become formally involved. To adapt Lord Pannick's metaphor, the bullet will have left the gun before Parliament has accorded the necessary leave for the trigger to be pulled. The very fact that Parliament will have to pass legislation once the Notice is served and hits the target highlights the point that the giving of the Notice will change domestic law: otherwise there would be no need for new legislation.

95. It was also argued on behalf of the Secretary of State that, when ministers are participating in EU law-making processes and are therefore involved in making EU law, and hence domestic law, they are thereby exercising prerogative powers, and that the giving of Notice would be an equally legitimate exercise of those powers. We readily accept, without formally deciding, that ministerial activity in the EU law-making process is effected under the Royal prerogative. However, it does not follow from this that ministers should be entitled to exercise a prerogative power to leave the European Union. When taking part in EU decision-making, UK ministers are carrying out the very functions which were envisaged by Parliament when enacting the 1972 Act. Withdrawing from the EU Treaties involves ministers doing the opposite, namely, unilaterally dismantling the very system which they set up in a co-ordinated way with Parliament, as explained in paras 13 to 15 above. Consistently with this, article 16 of TEU stipulates that "a representative of each member state at ministerial level" can commit member states by voting on the European Council, whereas article 50 provides that withdrawal must be effected by a member state "in accordance with [its] constitutional requirements".

96. It was further pointed out that unilateral actions by other member states could remove EU law-based rights enjoyed by EU nationals (including UK citizens) living in the United Kingdom - eg if another member state withdrew from the European Union. We agree, but cannot accept that it has any relevance to the present dispute, which concerns the domestic constitutional arrangements which apply if the UK government wishes to withdraw from the EU Treaties. The fact that it is inevitable that to the extent that they depend on a particular foreign government, EU rights can be abrogated by the withdrawal from EU Treaties by that foreign government gives no guidance as to what is required by the United Kingdom's constitutional arrangements before ministers can cause the United Kingdom to withdraw from those Treaties.

97. Mr Eadie identified two instances which, he contended, showed that there were circumstances in which the UK government could withdraw from treaties without prior Parliamentary sanction, even if such withdrawal changed domestic law. The first was the United Kingdom's withdrawal in 1972 from the European Free Trade Agreement, EFTA. That is of no assistance to the Secretary of State. For, in stark contrast with UK membership of the European Union as a result of the 1972 Act, no directly effective rights had been created as a result of UK membership of EFTA. Moreover, the decision to withdraw from EFTA was an inevitable corollary of joining the EEC, and the formal notice withdrawing from EFTA was only served after both Houses of Parliament had "approve[d]" the "decision of principle to join the European Communities" as explained in para

13 above; it was thus an aspect of the exercise which the Prime Minister and the Chancellor of the Duchy of Lancaster respectively described in the House of Commons in October 1971 and January 1972.

98. The second instance given by Mr Eadie was that of bilateral double taxation treaties (“DTTs”), which were entered into with other states by the UK government under section 788 of the Income and Corporation Taxes Act 1988 (“section 788”), now replaced by section 2 of the Taxation (International and Other Provisions) Act 2010 (“TIOPA”). This point was hardly mentioned in the oral argument before us, perhaps because discussions in some of the articles referred to in para 11 above have shown that the DTTs are an unsatisfactory analogy. By section 788 and now by TIOPA, Parliament provided in primary legislation that arrangements agreed by ministers in a DTT at international level will have effect in national law, but only if those arrangements are specified in an Order in Council which is approved by the House of Commons. Thus, unlike EU law which becomes part of UK law automatically as a result of the 1972 Act, the arrangements under a DTT do not take effect automatically as a result of section 788 or, now, TIOPA, but only through a specific Order in Council which has to be approved by Parliament. The conduit pipe metaphor which applies to the 1972 Act in relation to EU law is inapposite for section 788 and TIOPA in relation to DTTs.

99. Before concluding on the effect of the 1972 Act, it is worth mentioning two points. First, eminent judges have taken it for granted that it is a matter for Parliament whether the United Kingdom withdraws from the EU Treaties. In *Blackburn v Attorney General* [1971] 1 WLR 1037, 1040, Lord Denning MR said that “[i]f her Majesty’s Ministers sign this treaty and Parliament enacts provisions to implement it” he did “not envisage that Parliament would afterwards go back on it and try to withdraw from it”, but “if Parliament should do so” then the courts would consider it. In *Macarthys Ltd v Smith* [1981] ICR 785, 789, Lord Denning (albeit in a dissenting judgment) made “a constitutional point”, and referred to the possibility of “our Parliament deliberately pass[ing] an Act with the intention of repudiating the Treaty”. In *Pham v Secretary of State for the Home Department* [2015] 1 WLR 1591, para 80, having stated that “EU law [is] part of domestic law because Parliament has so willed”, Lord Mance said that “[t]he question how far Parliament has so willed is thus determined by construing the 1972 Act”. In *R (Shindler) v Chancellor of the Duchy of Lancaster* [2016] 3 WLR 1196, para 58, Lord Dyson MR said that “Parliament agreed to join the EU by exercising sovereign powers untrammelled by EU law and I think it would expect to be able to leave the EU in the exercise of the same untrammelled sovereign power”.

100. Secondly, if, as the Secretary of State has argued, it is legitimate to take account of the fact that Parliament will, of necessity, be involved in its legislative capacity as a result of UK withdrawal from the EU Treaties, it would militate in favour of, rather than against, the view that Parliament should have to sanction giving Notice. An inevitable consequence of withdrawing from the EU Treaties will be the need for a large amount of domestic legislation. There is thus a good pragmatic argument that such a burden should not be imposed on Parliament by exercise of prerogative powers and without prior Parliamentary authorisation. We do not rest our decision on that point, but it serves to emphasise the major constitutional change which withdrawal from the European Union will involve, and therefore the constitutional propriety of prior Parliamentary sanction for the process.

Conclusion on the effect of the 1972 Act

101. Accordingly, we consider that, in light of the terms and effect of the 1972 Act, and subject to considering the effect of subsequent legislation and events, the prerogative could not be invoked by ministers to justify giving Notice: ministers require the authority of primary legislation before they can take that course.

102. We turn, then, to deal with the impact of legislation and events after 1972.

Legislation and events after 1972: from 1973 to 2014

103. With one exception, the legislation and events between 1973 and 2014 were relied on in argument by the Secretary of State rather than by the applicants. We will first discuss the Secretary of State’s points in this connection and we will then turn to the applicants’ point.

104. We start by addressing the fact that the EU Treaties contained no provision entitling a member state to withdraw at the time of the 1972 Act, and that such a provision, article 50, was introduced by the TFEU in 2008. Although its invocation will have the inevitable consequence which Lord Pannick described (as mentioned in para 36 above), article 50 operates only on the international plane, and is not therefore brought into UK law through

section 2 of the 1972 Act, as explained in para 79 above. Accordingly, the Secretary of State can derive no domestic authority from the fact that the EU Treaties now include provision for unilateral withdrawal. In any event, article 50 only entitles a member state to withdraw from the EU Treaties “in accordance with its own constitutional requirements”, which returns one to the issue in the current proceedings.

105. It was suggested that, by incorporating the TFEU, including its introduction of article 50, into section 1(2) of the 1972 Act in 2008, it cannot have been the intention of Parliament to “strip” ministers of their ability to exercise their powers under article 50. That is not the issue. Nobody doubts but that, under the TFEU and the TEU, ministers can give Notice under article 50(2); the question we have to decide is whether they can do so under prerogative powers or only with Parliamentary authority.

106. So far as the 2008 Act and the 2011 Act are concerned, Mr Eadie rightly did not go so far as to suggest that they conferred power on ministers to withdraw if that power did not exist under the 1972 Act. More subtly, he submitted that these later statutes implicitly, but clearly, recognised the existence of the prerogative power to withdraw from the EU Treaties, unconstrained by Parliamentary control.

107. He pointed out that the two statutes specified in detail the prerogative powers which Parliament intended to control in relation to the EU Treaties, and that they did not include the power to withdraw from those treaties under article 50(2). That omission was said to be particularly striking because, as explained in para 29 above, the 2011 Act covered another aspect of article 50, as it required legislation and a referendum before ministers could vote in favour of a decision under article 50(3) to depart from the need for unanimity in any decision to extend the two-year period in the event of another member state seeking to withdraw from the EU Treaties. But it did not seek to control the giving of notice by ministers under article 50(2), for all its fundamental and irreversible consequences.

108. We do not accept this argument. The fact that a statute says nothing about a particular topic can rarely, if ever, justify inferring a fundamental change in the law. As explained in *Ex p Simms* [2000] 2 AC 115, 131 cited in para 87 above, “[f]undamental rights cannot be overridden by general ... words” in a statute, “because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process.” If this is true of general expressions in a statute it must *a fortiori* be a principle which applies to omissions in a statute.

109. Even if this principle admits of exceptions, they must be rare, and there is no justification for the view that the absence of any reference to article 50(2) in the 2008 and 2011 Acts is such an exception. Those statutes were not attempting to codify the legislative restrictions on the use of the prerogative in relation to the EU Treaties. The restrictions imposed by the two statutes were largely prompted by the fact that the TFEU had both increased the competences of the EU and included provisions which enabled EU institutions to short-circuit some of the EU’s decision-making processes by replacing some of the previous requirements for unanimity or consensus with majority voting or involvement of the European Parliament. (It is fair to add that the restrictions also applied to certain policy issues such as the inclusion of the UK in the Schengen area and the UK’s adoption of the Euro, but that does not undermine the point).

110. As explained in paras 5 and 6 of the Explanatory Notes to the 2011 Act, Part 1 of that Act was intended to impose specific restrictions, which in summary terms were as follows. It required “a referendum [to] be held before the UK could agree to an amendment” of TEU or TFEU, and “before the UK could agree to certain decisions already provided for by TEU and TFEU ... if these would transfer power or competence from the UK to the EU”. Further, a referendum and “[i]n addition, ... an Act of Parliament would be required before the UK could agree to a number of other specified decisions provided for in TEU and TFEU”. Also, “certain other decisions would require a motion to be agreed ... in both Houses of Parliament before the UK could vote in favour of specified decisions in [EU institutions]”.

111. In other words, expressed in broad terms, Part 1 of the 2011 Act was aimed at preventing ministers, without prior Parliamentary approval (plus, in many cases prior approval in a referendum), from supporting any decisions made by the European Union or its institutions which would extend EU competences and the like, or which would dilute the effect of UK voting rights in the EU or any EU institutions. It cannot be inferred from the fact that it was thought necessary to deal with such issues that Parliament intended or assumed that there were no legal limits to the prerogative powers that ministers might exercise in other types of case. Part 1 of the 2011 Act was concerned with decisions of EU institutions in which ministers played a part, not with unilateral decisions of ministers. More broadly, the absence of any Parliamentary controls on article 50(2) in the 2011 Act is entirely

consistent with the notion that Parliament assumed that ministers could not withdraw from the EU Treaties without a statute authorising that course - and that if and when Parliament had to consider the issue, it would decide whether and if so on what terms, if any, to give such authorisation.

112. If prerogative powers are curtailed by legislation, they may sometimes be reinstated by the repeal of that legislation, depending on the construction of the statutes in question. But if, as we have concluded, there never had been a prerogative power to withdraw from the EU Treaties without statutory authority, there is nothing to be curtailed or reinstated by later legislation. The prerogative power claimed by the Secretary of State can only be created by a subsequent statute if the express language of that statute unequivocally shows that the power was intended to be created - see per Lord Hobhouse of Woodborough in *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2003] 1 AC 563, para 45. Mr Eadie was right to concede that, however one approaches them, the 2008 and 2011 Acts did not show that.

113. Mr Eadie further submitted that, rather than looking at the question whether ministers could give Notice without statutory authorisation in historical terms starting in 1972, it should be addressed by viewing the effect of the present state of the legislation as a whole, without regard to what the position might have been at some earlier stage. We do not agree. A statute cannot normally be interpreted by reference to a later statute, save in so far as the later statute intends to amend the earlier statute or the two statutes are *in pari materia*, ie they are given a collective title, are required to be construed as one, have identical short titles, or “deal with the same subject matter on similar lines” - see *Bennion on Statutory Interpretation* (6th ed, 2013) section 28(13). None of these tests can possibly be said to be satisfied by the 2008 Act or the 2011 Act in relation to the 1972 Act, not least because the later statutes are concerned with a different issue from the 1972 Act. In any event, even if the two later statutes were *in pari materia* with the 1972 Act, for the reasons given in paras 110 to 112 above we do not consider that they would together yield the interpretation for which the Secretary of State contends.

114. The one feature of the post-1972 history on which the applicants relied was the effect of the 2002 Act. As explained in para 27 above, that Act gave most people of the United Kingdom the right to vote in elections for MEPs, and (albeit by inference) the right to stand for election as an MEP. On the face of it, these are free-standing rights outside the ambit of the 1972 Act, in that they are domestically granted in primary legislation passed by Parliament. The Secretary of State cannot argue that these rights are in any sense ambulatory. And they are rights which will inevitably be lost if the United Kingdom withdraws from the EU Treaties and ceases being a member of the European Union.

115. There is therefore some force in the argument that, even if formal Parliamentary sanction to the giving of Notice was not needed on the grounds discussed in paras 74 to 101 above, it would nonetheless be needed because withdrawal from the EU Treaties would deprive UK citizens of the rights given them by Parliament through the 2002 Act. However, there is also force in the Secretary of State’s response that the rights given by the 2002 Act are simply rights of institutional participation which are contingent on continued UK membership of the European Union. The same sort of arguments might perhaps arise in relation to statutory provisions such as section 4(2) of the Communications Act 2003, which requires OFCOM, the UK telecommunications regulator, to carry out its statutory functions “in accordance with the six Community requirements”, which are set out in the ensuing subsections and give effect to, and are mandated by, an EU Directive. Given our conclusion that, in the light of the terms and effect of the 1972 Act, ministers cannot give Notice without prior sanction from the UK Parliament, we can limit ourselves to saying that we consider that the arguments based on the 2002 Act do nothing to undermine and may be regarded as reinforcing that conclusion.

Legislation and events after 1972: the 2015 Act and the referendum

116. We turn to the 2015 Act and the ensuing referendum. The Attorney General submitted that the traditional view as to the limits of prerogative power should not apply to a ministerial decision authorised by a majority of the members of the electorate who vote in a referendum provided for by Parliament. In effect, he said that, even though it was Parliament which required the referendum, the response to the referendum result should be a matter for ministers, and that it should not be constrained by the legal limitations which would have applied in the absence of the referendum.

117. The referendum is a relatively new feature of UK constitutional practice. There have been three national referendums: on EEC membership in 1975, on the Parliamentary election voting system in 2011 and on EU membership in 2016. There have also been referendums about devolution in Scotland, Wales and Northern Ireland and about independence in Scotland. In 2000, it was considered worth having a legislative framework for the

conduct of referendums “held in pursuance of any provision made by or under an Act of Parliament” - see Part VII of the Political Parties, Elections and Referendums Act.

118. The effect of any particular referendum must depend on the terms of the statute which authorises it. Further, legislation authorising a referendum more often than not has provided for the consequences on the result. Thus, the authorising statute may enact a change in the law subject to the proviso that it is not to come into effect unless approved by a majority in the referendum. The Scotland Act 1978 provided for devolution, but stipulated that the minister should bring the Act into force if there was a specified majority in a referendum, and if there was not he was required to lay an order repealing the Act. The Parliamentary Voting System and Constituencies Act 2011 had a provision requiring the alternative vote system to be adopted in Parliamentary elections, but by section 8 stated that the minister should bring this provision into force if it was approved in a referendum, but, if it was not, he should repeal it. Section 1 of the Northern Ireland Act 1998 (“the NI Act”) provided that if a referendum were to result in a majority for the province to become part of a united Ireland, the Secretary of State should lay appropriate proposals before Parliament.

119. All these statutes stipulated what should happen in response to the referendum result, and what changes in the law were to follow, and how they were to be effected. The same is true of the provisions in Part 1 of the 2011 Act. By contrast, neither the 1975 Act nor the 2015 Act, which authorised referendums about membership of the European Community or European Union, made provision for any consequences of either possible outcome. They provided only that the referendum should be held, and they did so in substantially identical terms. The way in which the proposed referendum was described in public statements by ministers, however, differed in the two cases. The 1975 referendum was described by ministers as advisory, whereas the 2016 referendum was described as advisory by some ministers and as decisive by others, but nothing hangs on that for present purposes. Whether or not they are clear and consistent, such public observations, wherever they are made, are not law: they are statements of political intention. Further, such statements are, at least normally, made by ministers on behalf of the UK government, not on behalf of Parliament.

120. It was suggested on behalf of the Secretary of State that, having referred the question whether to leave or remain to the electorate, Parliament cannot have intended that, upon the electorate voting to leave, the same question would be referred straight back to it. There are two problems with this argument. The first is that it assumes what it seeks to prove, namely that the referendum was intended by Parliament to have a legal effect as well as a political effect. The second problem is that the notion that Parliament would not envisage both a referendum and legislation being required to approve the same step is falsified by sections 2, 3 and 6 of the 2011 Act, which, as the Explanatory Notes (quoted in para 111 above) acknowledge, required just that - albeit in the more elegant way of stipulating for legislation whose effectiveness was conditional upon a concurring vote in a referendum.

121. Where, as in this case, implementation of a referendum result requires a change in the law of the land, and statute has not provided for that change, the change in the law must be made in the only way in which the UK constitution permits, namely through Parliamentary legislation.

122. What form such legislation should take is entirely a matter for Parliament. But, in the light of a point made in oral argument, it is right to add that the fact that Parliament may decide to content itself with a very brief statute is nothing to the point. There is no equivalence between the constitutional importance of a statute, or any other document, and its length or complexity. A notice under article 50(2) could no doubt be very short indeed, but that would not undermine its momentous significance. The essential point is that, if, as we consider, what would otherwise be a prerogative act would result in a change in domestic law, the act can only lawfully be carried out with the sanction of primary legislation enacted by the Queen in Parliament.

123. This is why the Secretary of State rightly accepted that the resolution of the House of Commons on 7 December 2016, calling on ministers to give Notice by 31 March 2017, cannot affect the legal issues before this court. A resolution of the House of Commons is an important political act. No doubt, it makes it politically more likely that any necessary legislation enabling ministers to give Notice will be enacted. But if, as we have concluded, ministers cannot give Notice by the exercise of prerogative powers, only legislation which is embodied in a statute will do. A resolution of the House of Commons is not legislation.

124. Thus, the referendum of 2016 did not change the law in a way which would allow ministers to withdraw the United Kingdom from the European Union without legislation. But that in no way means that it is devoid of

effect. It means that, unless and until acted on by Parliament, its force is political rather than legal. It has already shown itself to be of great political significance.

125. It is instructive to see how the issue was addressed in ministers' response to the 12th Report of Session 2009-10 of the House of Lords Select Committee on the Constitution (*Referendums in the United Kingdom*). The Committee included the following recommendation in para 197:

“[B]ecause of the sovereignty of Parliament, referendums cannot be legally binding in the UK, and are therefore advisory. However, it would be difficult for Parliament to ignore a decisive expression of public opinion.”

The UK government's response as recorded in the Committee's Fourth Report of Session 2010-11 was

“The Government agrees with this recommendation. Under the UK's constitutional arrangements Parliament must be responsible for deciding whether or not to take action in response to a referendum result.”

The References from Northern Ireland and the devolution questions

Introductory

126. As mentioned above, four devolution questions have been referred to this Court by the High Court of Justice in Northern Ireland on the direction of the Attorney General for Northern Ireland, and one has been referred by the Court of Appeal in Northern Ireland on the appeal from Maguire J. The five devolution questions are:

(i) Does any provision of the NI Act, read together with the Belfast Agreement and the British-Irish Agreement, have the effect that primary legislation is required before Notice can be given?

(ii) If the answer is “yes”, is the consent of the Northern Ireland Assembly required before the relevant legislation is enacted?

(iii) If the answer to question (i) is “no”, does any provision of the NI Act read together with the Belfast Agreement and the British-Irish Agreement operate as a restriction on the exercise of the prerogative power to give Notice?

(iv) Does section 75 of the NI Act prevent exercise of the power to give Notice in the absence of compliance by the Northern Ireland Office with its obligations under that section?

(v) Does the giving of Notice without the consent of the people of Northern Ireland impede the operation of section 1 of the NI Act?

127. Following the hearing, our attention was drawn to the decision of the Northern Irish Court of Appeal in *Lee v McArthur and Ashers Baking Co Ltd (No 2)* handed down on 22 December 2016. That decision suggests that the High Court may not have had jurisdiction to have made the reference in these proceedings as sought by the Attorney General for Northern Ireland. Given that the issues raised in that reference were fully debated, and that no party to these proceedings has sought belatedly to rely on the decision of the Court of Appeal, we think it appropriate to deal with the reference.

128. The NI Act is the product of the Belfast Agreement and the British-Irish Agreement, and is a very important step in the programme designed to achieve reconciliation of the communities of Northern Ireland. It has established institutions and arrangements which are intended to address the unique political history of the province and the island of Ireland. Yet there is also a relevant commonality in the devolution settlements in Northern Ireland, Scotland and Wales (i) in the statutory constraint on the executive and legislative competence of the devolved governments and legislatures that they must not act in breach of EU law (“the EU constraints”); and (ii) in the operation of the Sewel Convention. (The EU constraints are to be found in sections 29(2)(d), 54 and 57(2) of the Scotland Act 1998; sections 108(6)(c) and 80(8) of the Government of Wales Act 2006; and sections 6(2)(d) and 24(1) of the NI Act).

Questions (i), (iii), (iv) and (v)

129. Because we have concluded that primary legislation is required to authorise the giving of Notice, the third question is superseded. The first question is for a similar reason less significant than it otherwise might have been but we address it briefly. When enacting the EU constraints in the NI Act and the other devolution Acts, Parliament proceeded on the assumption that the United Kingdom would be a member of the European Union. That assumption is consistent with the view that Parliament would determine whether the United Kingdom would remain a member of the European Union. But, in imposing the EU constraints and empowering the devolved institutions to observe and implement EU law, the devolution legislation did not go further and require the United Kingdom to remain a member of the European Union. Within the United Kingdom, relations with the European Union, like other matters of foreign affairs, are reserved or excepted in the cases of Scotland and Northern Ireland, and are not devolved in the case of Wales - see section 30(1) of, and paragraph 7(1) of Schedule 5 to, the Scotland Act 1998; section 108(4) of, and Part 1 of Schedule 7 to, the Government of Wales Act 2006; and section 4(1) of, and paragraph 3 of Schedule 2 to, the NI Act.

130. Accordingly, the devolved legislatures do not have a parallel legislative competence in relation to withdrawal from the European Union. The EU constraints are a means by which the UK Parliament and government make sure that the devolved democratic institutions do not place the United Kingdom in breach of its EU law obligations. The removal of the EU constraints on withdrawal from the EU Treaties will alter the competence of the devolved institutions unless new legislative constraints are introduced. In the absence of such new restraints, withdrawal from the EU will enhance the devolved competence. We consider the effect of the alteration of competence in our discussion of the Sewel Convention in paras 136 to 151 below.

131. Mr Scoffield QC, who appeared for Mr Agnew, is unquestionably right, however, to claim that the NI Act conferred rights on the citizens of Northern Ireland. Sections 6(2)(d) and 24(1), in imposing the EU constraints, have endowed the people of Northern Ireland with the right to challenge actions of the Executive or the Assembly on the basis that they are in breach of EU law. A recent example of the exercise of such a right is found in the case of *Re JR65's Application* [2016] NICA 20, where the lifetime ban on men who have had sex with other men from giving blood in Northern Ireland was challenged as being contrary to EU law.

132. As already explained, it is normally impermissible for statutory rights to be removed by the exercise of prerogative powers in the international sphere. It would accordingly be incongruous if constraints imposed on the legislative competence of the devolved administrations by specific statutory provisions were to be removed, thereby enlarging that competence, other than by statute. A related incongruity arises by virtue of the fact that observance and implementation of EU obligations are a transferred matter and therefore the responsibility of the devolved administration in Northern Ireland. The removal of a responsibility imposed by Parliament by ministerial use of prerogative powers might also be considered a constitutional anomaly. In light of our conclusion that a statute is required to authorise the decision to withdraw from the European Union, and therefore the giving of Notice, it is not necessary to reach a definitive view on the first referred question. The EU constraints and the provisions empowering the implementation of EU law are certainly consistent with our interpretation of the 1972 Act but we refrain from deciding whether they impose a discrete requirement for Parliamentary legislation.

133. Section 75(1) of the NI Act obliges a public authority in carrying out its functions in relation to Northern Ireland to “have due regard to the need to promote equality of opportunity”. By section 75(2), this duty includes an obligation to have regard to the desirability of promoting good relations between persons of different religious belief, political persuasion or radical group. Section 75(3) defines “public authority” for the purpose of the section and, unlike section 76(7), does not include within the definition a Minister of the Crown. Thus, the Secretary of State does not fall within its ambit. Further, in our view, and in agreement with the Attorney General for Northern Ireland, the decision to withdraw from the European Union and to give Notice is not a function carried out by the Secretary of State for Northern Ireland in relation to Northern Ireland within the meaning of section 75. Because we have held that there is no prerogative power to give Notice, the fourth question is superseded. But in so far as the Secretary of State may have a role in the measures taken by the UK Parliament to give Notice, we are satisfied that section 75 imposes no obligation on him in that context.

134. We also answer the fifth question in the negative. Section 1 of the NI Act is headed “Status of Northern Ireland” and it provides:

“(1) It is hereby declared that Northern Ireland in its entirety remains part of the United Kingdom and shall not cease to be so without the consent of a majority of the people of Northern Ireland voting in a poll held for the purposes of this section in accordance with Schedule 1.

(2) But if the wish expressed by a majority in such a poll is that Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland, the Secretary of State shall lay before Parliament such proposals to give effect to that wish as may be agreed between Her Majesty’s Government in the United Kingdom and the Government of Ireland.”

135. In our view, this important provision, which arose out of the Belfast Agreement, gave the people of Northern Ireland the right to determine whether to remain part of the United Kingdom or to become part of a united Ireland. It neither regulated any other change in the constitutional status of Northern Ireland nor required the consent of a majority of the people of Northern Ireland to the withdrawal of the United Kingdom from the European Union. Contrary to the submission of Mr Lavery QC for Mr McCord, this section cannot support any legitimate expectation to that effect.

The Sewel Convention and question (ii)

136. That leaves the second question, which raises in substance the application of the Sewel Convention. The convention was adopted as a means of establishing cooperative relationships between the UK Parliament and the devolved institutions, where there were overlapping legislative competences. In each of the devolution settlements the UK Parliament has preserved its right to legislate on matters which are within the competence of the devolved legislature. Section 5 of the NI Act empowers the Northern Ireland Assembly to make laws, but subsection (6) states that “[t]his section does not affect the power of the Parliament of the United Kingdom to make laws for Northern Ireland”. Section 28(7) of the Scotland Act 1998 provides that the section empowering the Scottish Parliament to make laws: “does not affect the power of the Parliament of the United Kingdom to make laws for Scotland”. Substantially identical provision is made for Wales in section 107(5) of the Government of Wales Act 2006.

137. The practical benefits of achieving harmony between legislatures in areas of competing competence, of avoiding duplication of effort, of enabling the UK Parliament to make UK-wide legislation where appropriate, such as establishing a single UK implementing body, and of avoiding any risk of legal challenge to the vires of the devolved legislatures were recognised from an early date in the devolution process. The convention takes its name from Lord Sewel, the Minister of State in the Scotland Office in the House of Lords who was responsible for the progress of the Scotland Bill in 1998. In a debate in the House of Lords on the clause which is now section 28 of the Scotland Act 1998, he stated in July 1998 that, while the devolution of legislative competence did not affect the ability of the UK Parliament to legislate for Scotland, “we would expect a convention to be established that Westminster would not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament”. That expectation has been fulfilled.

138. The convention was embodied in a Memorandum of Understanding between the UK government and the devolved governments originally in December 2001 (Cm 5240). Para 14 of the current Memorandum of Understanding, which was published in October 2013, states:

“The UK Government will proceed in accordance with the convention that the UK Parliament would not normally legislate with regard to devolved matters except with the agreement of the devolved legislature. The devolved administrations will be responsible for seeking such agreement as may be required for this purpose on an approach from the UK Government.”

139. Thus, the UK government undertook not to seek or support relevant legislation in the UK Parliament without the prior consent of the devolved legislature. That consent is given by a legislative consent motion which the devolved government introduces into the legislature. Para 2 of the Memorandum of Understanding stated that it was a statement of political intent and that it did not create legal obligations.

140. Over time, devolved legislatures have passed legislative consent motions not only when the UK Parliament has legislated on matters which fall within the legislative competence of a devolved legislature, but also when the UK Parliament has enacted provisions that directly alter the legislative competence of a devolved legislature or amend the executive competence of devolved administrations. Thus, as the Lord Advocate showed

in a helpful schedule, legislative consent motions were passed by the Scottish Parliament before the enactment of both the Scotland Act 2012 and the Scotland Act 2016. Similarly, the Welsh Assembly passed a legislative consent motion in relation to the Wales Act 2014, and in November 2016 the Welsh government laid a legislative consent motion before the Assembly in relation to the current Wales Bill 2016. But legislation which implements changes to the competences of EU institutions and thereby affects devolved competences, such as the 2008 Act which incorporated the Treaty of Lisbon amending the TEU and the TFEU into section 1(2) of the 1972 Act, has not been the subject of legislative consent motions in any devolved legislature.

141. Before addressing the more recent legislative recognition of the convention, it is necessary to consider the role of the courts in relation to constitutional conventions. It is well established that the courts of law cannot enforce a political convention. In *Re Resolution to Amend the Constitution* [1981] 1 SCR 753, the Supreme Court of Canada addressed the nature of political conventions. In the majority judgment the Chief Justice (Laskin) and Dickson, Beetz, Estey, McIntyre, Chouinard and Lamer JJ stated at pp 774 to 775:

“The very nature of a convention, as political in inception and as depending on a consistent course of political recognition by those for whose benefit and to whose detriment (if any) the convention developed over a considerable period of time is inconsistent with its legal enforcement.”

142. In a dissenting judgment on one of the questions before the court, the Chief Justice and Estey and MacIntyre JJ developed their consideration of conventions at p 853:

“[A] fundamental difference between the legal, that is the statutory and common law rules of the constitution, and the conventional rules is that, while a breach of the legal rules, whether of statutory or common law nature, has a legal consequence in that it will be restrained by the courts, no such sanction exists for breach or non-observance of the conventional rules. The observance of constitutional conventions depends upon the acceptance of the obligation of conformance by the actors deemed to be bound thereby. When this consideration is insufficient to compel observance no court may enforce the convention by legal action. The sanction for non-observance of a convention is political in that disregard of a convention may lead to political defeat, to loss of office, or to other political consequences, but will not engage the attention of the courts which are limited to matters of law alone. Courts, however, may recognise the existence of conventions ...”

143. Martland, Ritchie, Dickson, Beetz, Chouinard and Lamer JJ made the same point at pp 882 to 883:

“It is because the sanctions of convention rest with institutions of government other than courts ... or with public opinion and ultimately, with the electorate, that it is generally said that they are political.”

144. Attempts to enforce political conventions in the courts have failed. Thus in *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645, the Judicial Committee of the Privy Council had to consider a submission that legal effect should be given to the convention which applied at that time that the UK Parliament would not legislate without the consent of the government of Southern Rhodesia on matters within the competence of the Legislative Assembly. In its judgment delivered by Lord Reid the Board stated at p 723 that:

“That is a very important convention but it had no legal effect in limiting the legal power of Parliament. It is often said that it would be unconstitutional for the UK Parliament to do certain things, meaning that the moral, political and other reasons against doing them are so strong that most people would regard it as highly improper if Parliament did these things. But that does not mean that it is beyond the power of Parliament to do such things. If Parliament chose to do any of them the courts could not hold the Act of Parliament invalid.”

More recently, the political nature of the Sewel Convention was recognised by Lord Reed in a decision of the Inner House of the Court of Session, *Imperial Tobacco v Lord Advocate* 2012 SC 297, para 71.

145. While the UK government and the devolved executives have agreed the mechanisms for implementing the convention in the Memorandum of Understanding, the convention operates as a political restriction on the

activity of the UK Parliament. Article 9 of the Bill of Rights, which provides that “Proceedings in Parliament ought not to be impeached or questioned in any Court or Place out of Parliament”, provides a further reason why the courts cannot adjudicate on the operation of this convention.

146. Judges therefore are neither the parents nor the guardians of political conventions; they are merely observers. As such, they can recognise the operation of a political convention in the context of deciding a legal question (as in the Crossman diaries case - *Attorney General v Jonathan Cape Ltd* [1976] 1 QB 752), but they cannot give legal rulings on its operation or scope, because those matters are determined within the political world. As Professor Colin Munro has stated, “the validity of conventions cannot be the subject of proceedings in a court of law” - (1975) 91 LQR 218, 228.

147. The evolving nature of devolution has resulted in the Sewel Convention also receiving statutory recognition through section 2 of the Scotland Act 2016, which inserted sub-section (8) into section 28 of the Scotland Act 1998 (which empowers the Scottish Parliament to make laws). Thus subsections (7) and (8) now state:

“(7) This section does not affect the power of the Parliament of the United Kingdom to make laws for Scotland.

(8) But it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament.”

A substantially identical provision (clause 2) is proposed in the Wales Bill 2016-2017, which is currently before the UK Parliament.

148. As the Advocate General submitted, by such provisions, the UK Parliament is not seeking to convert the Sewel Convention into a rule which can be interpreted, let alone enforced, by the courts; rather, it is recognising the convention for what it is, namely a political convention, and is effectively declaring that it is a permanent feature of the relevant devolution settlement. That follows from the nature of the content, and is acknowledged by the words (“it is recognised” and “will not normally”), of the relevant subsection. We would have expected UK Parliament to have used other words if it were seeking to convert a convention into a legal rule justiciable by the courts.

149. In the Scotland Act 2016, the recognition of the Sewel Convention occurs alongside the provision in section 1 of that Act. That section, by inserting section 63A into the Scotland Act 1998, makes the Scottish Parliament and the Scottish government a permanent part of the United Kingdom’s constitutional arrangements, signifies the commitment of the UK Parliament and government to those devolved institutions, and declares that those institutions are not to be abolished except on the basis of a decision of the people of Scotland voting in a referendum. This context supports our view that the purpose of the legislative recognition of the convention was to entrench it as a convention.

150. The Lord Advocate and the Counsel General for Wales were correct to acknowledge that the Scottish Parliament and the Welsh Assembly did not have a legal veto on the United Kingdom’s withdrawal from the European Union. Nor in our view has the Northern Ireland Assembly. Therefore, our answer to the second question in para 126 above is that the consent of the Northern Ireland Assembly is not a legal requirement before the relevant Act of the UK Parliament is passed.

151. In reaching this conclusion we do not underestimate the importance of constitutional conventions, some of which play a fundamental role in the operation of our constitution. The Sewel Convention has an important role in facilitating harmonious relationships between the UK Parliament and the devolved legislatures. But the policing of its scope and the manner of its operation does not lie within the constitutional remit of the judiciary, which is to protect the rule of law.

Conclusion

152. Accordingly, (i) we dismiss the Secretary of State’s appeal against the decision of the English and Welsh Divisional Court, (ii) we invite the parties to the reference from the Northern Irish Court of Appeal to agree or, failing agreement, to make written submissions as to the order to be made on the appeal from that Court, and

(iii) we answer the second and fifth questions referred by the courts of Northern Ireland as indicated respectively in paras 150 and 134 above, and we do not answer the first, third and fourth questions as they have been superseded.

LORD REED: (dissenting)

Introduction

153. Article 50 of the Treaty of European Union (“TEU”) provides:

“1. Any member state may decide to withdraw from the Union in accordance with its own constitutional requirements.

2. A member state which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that state, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union ...

3. The Treaties shall cease to apply to the state in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the member state concerned, unanimously decides to extend this period ...”

154. The cases before the court arise from disputes as to the “constitutional requirements” which govern a decision by the United Kingdom to withdraw from the European Union under article 50(1): a decision which must be taken before notification can be given under article 50(2). In the case brought by Mrs Miller and Mr Dos Santos (whom I shall refer to as the Miller claimants), the Miller claimants maintain that the Crown cannot lawfully give notification under article 50(2) unless an Act of Parliament authorises it to do so. The Secretary of State for Exiting the European Union, on the other hand, maintains that the decision is one which can lawfully be taken by the Crown in the exercise of prerogative powers. The Divisional Court decided the case in favour of the Miller claimants, and the case now comes before this court as an appeal against that decision.

155. A number of interested parties and interveners have taken part in the Miller appeal. They include the Lord Advocate and the Counsel General for Wales, who as well as presenting arguments in support of those advanced by the Miller claimants, have also argued that, in the event that an Act of Parliament is required, the consent of the Scottish Parliament and the National Assembly for Wales is also required, in accordance with a convention known as the Sewel Convention.

156. Two other cases are also before the court. In the first, an application for leave to apply for judicial review brought by Mr Agnew and others, a number of devolution issues have been referred to this court by the High Court of Northern Ireland. Put shortly, the court is asked to decide whether provisions of the Northern Ireland Act 1998 (“the Northern Ireland Act”) have the effect that an Act of Parliament is required before notification is given under article 50(2); if so, whether the consent of the Northern Ireland Assembly is required before such an Act of Parliament is enacted, in accordance with the Sewel Convention; and, in any event, whether the Northern Ireland Act prevents or constrains the exercise of the power to give notice.

157. In the second case, an application for leave to apply for judicial review brought by Mr McCord, another devolution issue has been referred to this court by the Court of Appeal of Northern Ireland. The court is asked to decide whether the giving of notification under article 50(2) in the exercise of prerogative powers, without the consent of the people of Northern Ireland, would impede the operation of section 1 of the Northern Ireland Act, which provides that Northern Ireland shall not cease to be part of the United Kingdom without the consent of a majority of the people of Northern Ireland.

158. I shall begin by considering the Miller appeal.

The argument of the Secretary of State in the Miller appeal

159. Each side of the argument in the Miller appeal is based on a principle of the British constitution. Counsel on each side cited a library's worth of authority, but I need mention only a few of the most important cases, as the essence of the relevant principles is clear and well-known. The Secretary of State relies on the principle that, as a matter of law, the conduct of the UK's foreign relations falls within the prerogative power of the Crown, advised by its Ministers. This prerogative power includes the power to negotiate international treaties, to amend them, and to withdraw from them. The exercise of that treaty-making power is not justiciable by the courts, unless statute has made it so. As Lord Oliver of Aylmerton said in the *Tin Council* case (*JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418, 499:

“On the domestic plane, the power of the Crown to conclude treaties with other sovereign states is an exercise of the Royal Prerogative, the validity of which cannot be challenged in municipal law: see *Blackburn v Attorney General* [1971] 1 WLR 1037. The Sovereign acts ‘throughout the making of the treaty and in relation to each and every of its stipulations in her sovereign character, and by her own inherent authority; and, as in making the treaty, so in performing the treaty, she is beyond the control of municipal law, and her acts are not to be examined in her own courts.’ *Rustomjee v The Queen* (1876) 2 QBD 69, 74, per Lord Coleridge CJ.”

The case of *Blackburn v Attorney General*, to which Lord Oliver referred, concerned the UK's entry into the European Communities, as the EU was then known. The action was an attempt to prevent the Crown from acceding to the Treaty of Rome. Lord Denning MR stated:

“The treaty-making power of this country rests not in the courts, but in the Crown; that is, Her Majesty acting upon the advice of her Ministers. When her Ministers negotiate and sign a treaty, even a treaty of such paramount importance as this proposed one, they act on behalf of the country as a whole. They exercise the prerogative of the Crown. Their action in so doing cannot be challenged or questioned in these courts.” (p 1040)

160. The compelling practical reasons for recognising this prerogative power to manage international relations were identified by Blackstone:

“This is wisely placed in a single hand by the British constitution, for the sake of unanimity, strength, and despatch. Were it placed in many hands, it would be subject to many wills: many wills, if disunited and drawing different ways, create weakness in a government; and to unite those several wills, and reduce them to one, is a work of more time and delay than the exigencies of state will afford.” (*Commentaries on the Laws of England* (1765-1769), Book I, Chapter 7, “Of the King's Prerogative”)

The value of unanimity, strength and dispatch in the conduct of foreign affairs are as evident in the 21st century as they were in the 18th.

161. Confiding foreign affairs to the Crown, in the exercise of the prerogative, does not, however, secure their effective conduct at the expense of democratic accountability. Ministers of the Crown are politically accountable to Parliament for the manner in which this prerogative power is exercised, and it is therefore open to Parliament to require its exercise to be debated and even to be authorised by a resolution or legislation: as it has done, for example, in relation to the ratification of certain treaties under the [European Union Amendment Act 2008](#), the Constitutional Reform and Governance Act 2010 and the [European Union Act 2011](#). The Crown can, in addition, seek Parliamentary approval before exercising the prerogative power if it so chooses. There is however no legal requirement for the Crown to seek Parliamentary authorisation for the exercise of the power, except to the extent that Parliament has so provided by statute: that follows from the general principle set out in *Blackburn v Attorney General* and the *Tin Council* case. Since there is no statute which requires the decision under article 50(1) to be taken by Parliament, it follows that it can lawfully be taken by the Crown, in the exercise of the prerogative. There is therefore no legal requirement for an Act of Parliament to authorise the giving of notification under article 50(2). So runs the Secretary of State's argument.

162. In support of this argument, the Secretary of State points out that there has been considerable Parliamentary scrutiny of Ministers' conduct and their plans in relation to article 50. That scrutiny has included

inquiries by the House of Commons Select Committee on Exiting the EU and by the House of Lords European Union Committee, as well as Parliamentary questions and debates. The latter have included a debate in the House of Commons on 7 December 2016, following which the following motion was agreed:

“That this House recognises that leaving the EU is the defining issue facing the UK; notes the resolution on parliamentary scrutiny of the UK leaving the EU agreed by the House on 12 October 2016; recognises that it is Parliament’s responsibility to properly scrutinise the Government while respecting the decision of the British people to leave the European Union; confirms that there should be no disclosure of material that could be reasonably judged to damage the UK in any negotiations to depart from the European Union after article 50 has been triggered; and calls on the Prime Minister to commit to publishing the Government’s plan for leaving the EU before article 50 is invoked, consistently with the principles agreed without division by this House on 12 October; recognises that this House should respect the wishes of the United Kingdom as expressed in the referendum on 23 June; and further calls on the Government to invoke article 50 by 31 March 2017.”

The Secretary of State submits that it is for Parliament, not the courts, to determine the nature and extent of its involvement.

163. The Secretary of State also emphasises, in response to the argument of the Miller claimants, that the giving of notification under article 50(2) does not in itself alter any laws in force in the UK: it merely initiates a process of negotiation. If, at the end of those negotiations, a withdrawal agreement is reached, the procedures for Parliamentary approval laid down in the Constitutional Reform and Governance Act 2010 are likely to apply. Parliament will in any event be invited to legislate before the EU treaties cease to apply to the UK, so as to address the issues then arising in relation to rights and obligations under EU law which are currently given effect in the UK through the European Communities Act 1972 as amended (“the 1972 Act”).

The argument of the Miller claimants

164. The Miller claimants, on the other hand, rely on decided cases concerned with the use of prerogative powers in other situations. They argue that those cases establish the existence of legal constraints on the exercise of those powers, and that those constraints are applicable in the admittedly different situation with which we are now concerned. They argue that the effect of those constraints is that Ministers cannot lawfully give notification under article 50(2) unless an Act of Parliament authorises them to do so.

165. The starting point of this argument is the *Case of Proclamations* (1611) 12 Co Rep 74, which concerned the question whether James I could, by proclamation, prohibit the construction of new buildings in and around London, and prohibit the manufacture of starch from wheat. Coke CJ stated that “the King by his proclamation or other ways cannot change any part of the common law, or statute law, or the customs of the realm” (p 75). Those three categories were exhaustive of English law: “the law of England is divided into three parts, common law, statute law, and custom; but the King’s proclamation is none of them” (ibid). It followed that “the King cannot create any offence by his prohibition or proclamation, which was not an offence before, for that was to change the law” (ibid).

166. The same approach can be seen in more recent cases. For example, in *The Zamora* [1916] 2 AC 77 an issue arose as to whether the courts were bound, by an Order in Council made under prerogative powers, to decide that a neutral ship found during wartime to have a contraband cargo on board, while ostensibly bound for a neutral port, was lawful prize: an issue which, under established legal principles, depended on whether the ship or its cargo was in reality destined for the enemy. Lord Parker of Waddington stated:

“The idea that the King in Council, or indeed any branch of the Executive, has power to prescribe or alter the law to be administered by Courts of law in this country is out of harmony with the principles of our Constitution ... No one would contend that the prerogative involves any power to prescribe or alter the law administered in Courts of Common Law or Equity.” (p 90)

167. These cases were not concerned with the prerogative power to conduct foreign relations. It is however consistent with those cases that, although the Crown can undoubtedly enter into treaties in the exercise of

prerogative powers, it cannot, by doing so, alter domestic law. That is known as the dualist approach to international law, in distinction to the monist approach adopted by many other countries, under which treaties automatically take effect in the domestic legal system. In support of the principle that treaties cannot alter domestic law, the Miller claimants rely on the explanations of the relationship between international and domestic law given by Lord Templeman and Lord Oliver in the *Tin Council* case. The case concerned the question whether a Minister of the Crown was liable under English law for the debts of an international organisation which had been established by a treaty to which the UK was party. Rejecting the contention that the Minister was liable, Lord Templeman said:

“A treaty is a contract between the governments of two or more sovereign states. International law regulates the relations between sovereign states and determines the validity, the interpretation and the enforcement of treaties. A treaty to which Her Majesty’s Government is a party does not alter the laws of the United Kingdom. A treaty may be incorporated into and alter the laws of the United Kingdom by means of legislation. Except to the extent that a treaty becomes incorporated into the laws of the United Kingdom by statute, the courts of the United Kingdom have no power to enforce treaty rights and obligations at the behest of a sovereign government or at the behest of a private individual.” (pp 476-477)

Lord Oliver said much the same:

“... as a matter of the constitutional law of the United Kingdom, the Royal Prerogative, whilst it embraces the making of treaties, does not extend to altering the law or conferring rights upon individuals or depriving individuals of rights which they enjoy in domestic law without the intervention of Parliament. Treaties, as it is sometimes expressed, are not self-executing. Quite simply, a treaty is not part of English law unless and until it has been incorporated into the law by legislation. So far as individuals are concerned, it is *res inter alios acta* from which they cannot derive rights and by which they cannot be deprived of rights or subjected to obligations; and it is outside the purview of the court not only because it is made in the conduct of foreign relations, which are a prerogative of the Crown, but also because, as a source of rights and obligations, it is irrelevant.” (p 500)

Similar observations were made by Lord Hoffmann in the Privy Council case of *Higgs v Minister of National Security* [2001] 2 AC 228, 241, concerned with the impact of the American Convention on Human Rights on the domestic law of the Bahamas, where he stated that “treaties cannot alter the law of the land”.

168. The principle that the Crown cannot alter the common law or statute by an exercise of the prerogative was developed in the case of *Attorney General v De Keyser’s Royal Hotel Ltd* [1920] AC 508, which concerned the requisitioning of a hotel during the First World War for use as the headquarters of the Royal Flying Corps. After the war, a dispute arose over the basis on which the compensation to be paid to the owners should be assessed. There was a statutory scheme for requisitioning, which included a statutory right to compensation, but Ministers argued that the Crown was in any event entitled to requisition the hotel under prerogative powers, in which event compensation was payable *ex gratia* rather than being assessed in accordance with the statutory scheme. That argument was rejected by the House of Lords on the basis that “if the whole ground of something which could be done by the prerogative is covered by the statute, it is the statute that rules” (per Lord Dunedin at p 526). As Lord Dunedin reasoned:

“Inasmuch as the Crown is a party to every Act of Parliament it is logical enough to consider that when the Act deals with something which before the Act could be effected by the prerogative, and specially empowers the Crown to do the same thing, but subject to conditions, the Crown assents to that, and by that Act, to the prerogative being curtailed.” (p 526)

The case thus established that, to the extent that a matter has been regulated by Parliament, the Crown cannot regulate it differently under the prerogative. The cases of *Laker Airways Ltd v Department of Trade* [1977] QB 643 and *R v Secretary of State for the Home Department, Ex p Fire Brigades Union* [1995] 2 AC 513 are cited by the Miller claimants as more recent examples of the application of the same principle, although in the former case only Roskill LJ relied on it (contrast Lord Denning MR at pp 705G-706A and Lawton LJ at p 728A), while the decision in the latter case was based on a different principle (see per Lord Browne-Wilkinson at p 553G and Lord Lloyd of Berwick at p 573 C-D).

169. In the light of these decided cases, and others to the same effect, the Miller claimants argue that giving notification under article 50(2) will alter domestic law and destroy statutory rights. That is because it will result in the EU treaties ceasing to apply to the UK, in accordance with article 50(3), from the date of the entry into force of the withdrawal agreement or, failing that, from the expiry of a period of two years after notification, or any longer period which may be agreed with the European Council. Since the EU treaties have been given effect in domestic law by the 1972 Act, so as to create rights enforceable before our national courts, it would offend against the principle established in the *Case of Proclamations*, and explained more recently in the *Tin Council* case, for that alteration in domestic law to be effected under the prerogative. This argument assumes that, once notification is given under article 50(2), the process of withdrawal from the EU cannot be stopped. It is common ground in all the cases before the court that it should proceed on that assumption. In any event, even if the process might be stopped, it is common ground that Ministers' power to give notice under article 50(2) has to be tested on the basis that it may not be stopped. In those circumstances, that is the basis on which this court is proceeding.

170. Furthermore, since the 1972 Act makes provision for the effect of the EU treaties in domestic law, and notification under article 50(2) will sooner or later result in the treaties ceasing to have effect in domestic law, it is argued that there is a conflict between the exercise of the prerogative to give notification and the statutory scheme. Following *De Keyser*, that conflict should be resolved in favour of the statute, by holding that the prerogative must be constrained.

The referendum

171. Both sides of the argument proceed on the basis that the referendum on membership of the EU, held under the [European Union Referendum Act 2015](#) ("the 2015 Act"), which resulted in a vote to leave the EU, does not provide the answer. The Secretary of State's argument proceeds on the basis that the Crown has taken the decision under article 50(1), accepting the result of the referendum. The Miller claimants argue that only Parliament can take that decision. Both the Secretary of State and the Miller claimants proceed on the basis that the referendum result was not itself a decision by the UK to withdraw from the EU, in accordance with the UK's constitutional requirements, and that the 2015 Act did not itself authorise notification under article 50(2). In these circumstances, there is no issue before the court as to the legal effect of the referendum result. Nor is this an appropriate occasion on which to consider the implications for our constitutional law of the developing practice of holding referendums before embarking on major constitutional changes: a matter on which the court has heard no argument.

Other arguments

172. In addition to the arguments advanced by the parties to the Miller appeal, the court also has before it the submissions presented on behalf of the interested parties and interveners. They largely provide further elaboration of the arguments presented on behalf of the principal parties. Without intending any discourtesy, I do not think it is necessary to set out their arguments in full, and would generally wish only to acknowledge the assistance which they have provided. It is however appropriate to note the submissions made by the Lord Advocate (which share common ground with those of the first interested party and the fourth interveners), and by the Counsel General for Wales.

173. One argument advanced by the Lord Advocate and by Ms Mountfield QC on behalf of the first interested party is that the UK's withdrawal from the EU will alter the UK's rule of recognition: that is to say, the rule which identifies the sources of law in our legal system and imposes a duty to give effect to laws emanating from those sources. The status of the EU institutions as a recognised source of law will inevitably be revoked, sooner or later, following notification under article 50(2). Since that will be a fundamental alteration in the UK's constitution, it can only be effected by Parliamentary legislation. An Act of Parliament is therefore argued to be necessary before notification can be given.

174. The Lord Advocate also cites material from Scottish sources which is consistent with the principle derived by the Miller claimants from English case law, such as the *Case of Proclamations* and the *Tin Council* case. This includes the provision of the Claim of Right Act 1689:

“... That all Proclamations asserting ane absolute power to Cass annull and Dissable lawes... are Contrair to Law.”

This provision is analogous to the corresponding provisions in sections 1 and 2 of the Bill of Rights 1688, to which the Miller claimants refer:

“That the pretended power of suspending of laws or the execution of laws by regall authority without consent of Parlyament is illegall.

That the pretended power of dispensing with laws or the execution of laws by regall authoritie as it hath beene assumed and exercised of late is illegall.”

As Lord Denning MR noted, however, in *McWhirter v Attorney General* [1972] CMLR 882, 886, the Bill of Rights did not restrict the Crown’s prerogative powers in relation to foreign affairs: “the Crown retained, as fully as ever, the prerogative of the treaty-making power.” The same appears to be true of the Claim of Right. The Lord Advocate also cites article 18 of the Union with England Act 1707. This provision, like the corresponding provision in the Union with Scotland Act 1706, states that laws in use in Scotland are to be “alterable by the Parliament of Great Britain”.

175. The Lord Advocate and the Counsel General for Wales have also advanced submissions concerning the Sewel Convention. That convention was originally stated by Lord Sewel, when Parliamentary Under-Secretary of State at the Scottish Office, in the House of Lords during the passage of the Scotland Bill. He said that “we would expect a convention to be established that Westminster would not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament”: Hansard (HL Debates), 21 July 1998, col 791. The convention was later embodied in a Memorandum of Understanding between the UK Government and the devolved governments (Cm 5240, 2001). Para 14 of the current Memorandum of Understanding, which was published in October 2013, states:

“The United Kingdom Parliament retains authority to legislate on any issue, whether devolved or not. It is ultimately for Parliament to decide what use to make of that power. However, the UK Government will proceed in accordance with the convention that the UK Parliament would not normally legislate with regard to devolved matters except with the agreement of the devolved legislature.”

Para 2 states:

“This Memorandum is a statement of political intent, and should not be interpreted as a binding agreement. It does not create legal obligations between the parties.”

In relation to Scotland, the convention was given statutory recognition in section 28(8) of the Scotland Act 1998 (as amended by section 2 of the Scotland Act 2016), which has to be read together with section 28(7):

“(7) This section does not affect the power of the Parliament of the United Kingdom to make laws for Scotland.

(8) But it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament.”

Summary of conclusions

176. It may be helpful to summarise at this stage the conclusions which I have reached in relation to the Miller appeal, before explaining the reasons why I have arrived at them.

177. I entirely accept the importance in our constitutional law of the principle of Parliamentary supremacy over our domestic law, established in the *Case of Proclamations*, the *Tin Council* case, and other similar cases such as *The Zamora*. That principle does not, however, require that Parliament must enact an Act of Parliament before the UK can leave the EU. That is because the effect which Parliament has given to EU law in our domestic law, under the 1972 Act, is inherently conditional on the application of the EU treaties to the UK, and therefore on the UK’s membership of the EU. The Act imposes no requirement, and manifests no intention, in respect of the UK’s membership of the EU. It does not, therefore, affect the Crown’s exercise of prerogative powers in

respect of UK membership. For essentially the same reason, the supposed analogy with *De Keyser* appears to me to be misplaced. Further, since the effect of EU law in the UK is entirely dependent on the 1972 Act, no alteration in the fundamental rule governing the recognition of sources of law has resulted from membership of the EU, or will result from notification under article 50. It follows that Ministers are entitled to give notification under article 50, in the exercise of prerogative powers, without requiring authorisation by a further Act of Parliament.

178. Given that conclusion, the argument in relation to the Sewel Convention does not arise: the convention concerns Parliamentary legislation, not the exercise of prerogative powers.

The European Communities Act 1972

179. The issue which lies at the heart of these cases is the effect of the 1972 Act, as amended. Section 2(1) provides:

“All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly ...”

180. The expression “the Treaties” is defined by section 1(2). Put shortly, it includes the pre-accession treaties (described in Part 1 of Schedule 1), taken with other treaties listed in section 1(2), and “any other treaty entered into by the EU ... with or without any of the member States, or entered into, as a treaty ancillary to any of the Treaties, by the United Kingdom”. In relation to the treaties in the latter categories, section 1(3) lays down a procedure to be followed:

“If Her Majesty by Order in Council declares that a treaty specified in the Order is to be regarded as one of the EU Treaties as herein defined, the Order shall be conclusive that it is to be so regarded; but a treaty entered into by the United Kingdom after the 22nd January 1972, other than a pre-accession treaty to which the United Kingdom accedes on terms settled on or before that date, shall not be so regarded unless it is so specified, nor be so specified unless a draft of the Order in Council has been approved by resolution of each House of Parliament.”

The term “treaty” is defined by section 1(4) as including “any international agreement, and any protocol or annex to a treaty or international agreement”.

181. Section 1(2) is prospective in scope: it is not confined to treaties existing when the 1972 Act was originally enacted, but envisages treaties being entered into in the future. At the time of accession, the Treaties were relatively few in number, and included the Treaty of Rome. Since then, many other treaties, including the Maastricht Treaty and the Treaty of Lisbon, have been added, either by the amendment of section 1(2) so as to add to the list of specified treaties, or by the making of Orders of Council approved by resolutions of both Houses, under section 1(3).

182. Returning to section 2(1), it is important to understand why it was necessary. It follows from the UK’s dualist approach to international law that the Treaties could only be given effect in our domestic law by means of an Act of Parliament. This was so notwithstanding the doctrine of EU law, established by the European Court of Justice in *Van Gend en Loos* (Case C-26/62) [1963] ECR 1, 12, that the Treaty of Rome was “more than an agreement which merely creates mutual obligations between the contracting states”, and that “independently of the legislation of member states, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage.” This doctrine was reiterated in *Costa v ENEL* (Case C-6/64) [1964] ECR 585, 593:

“By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the member states and which their courts are bound to apply.”

183. This doctrine is incompatible with the dualist approach of the UK constitution, and ultimately with the fundamental principle of Parliamentary sovereignty. This was explained by Lord Denning MR in two cases

decided around the time when the UK joined the European Communities. The first, *Blackburn v Attorney General* [1971] 1 WLR 1037, was as explained earlier an attempt to prevent the Crown from acceding to the Treaty of Rome by signing the Treaty of Accession. Having been referred to *Costa v ENEL*, the Master of the Rolls observed:

“Even if a treaty is signed, it is elementary that these courts take no notice of treaties as such. We take no notice of treaties until they are embodied in laws enacted by Parliament. and then only to the extent that Parliament tells us.” (p 1039)

The second case, *McWhirter v Attorney General*, was decided after the UK had signed the [Treaty of Accession](#) but before the 1972 Act had been enacted. The Master of the Rolls stated:

“Even though the Treaty of Rome has been signed, it has no effect, so far as these courts are concerned, until it is made an Act of Parliament. Once it is implemented by an Act of Parliament, these courts must go by the Act of Parliament. Until that day comes, we take no notice of it.” (p 886)

As will appear, section 2(1) enables EU law to be given direct effect in our domestic law, but within a framework established by Parliament, in which Parliamentary sovereignty remains the fundamental principle.

184. Considering section 2(1) in greater detail, it is a long and densely-packed provision, whose syntax is complex, and whose meaning is not immediately clear. It requires to be read with care. Its essential structure can be expressed in this way:

All such [members of a specified category] as [satisfy a specified condition] shall be [dealt with in accordance with a specified requirement].

Rules in that form can be used in many contexts: for example, all such prisoners as are charged with conduct contrary to good order and discipline shall be brought before the Governor; all such incoming passengers as are displaying symptoms of ebola shall be placed in quarantine.

185. Two features of such rules should be noted. First, the rule is conditional in nature: the application of the requirement which it imposes depends on there being members of the specified category that satisfy the relevant condition. In the examples just given, for example, the relevant conditions are being charged with conduct contrary to good order and discipline; and displaying symptoms of ebola. Secondly, although a rule in that form contemplates the possibility that the condition may be satisfied, the form of the rule does not convey any intention that the condition *will* be satisfied. In the examples just given, for example, the rule does not convey an intention that there will be prisoners who are charged, or passengers who display symptoms of ebola. The intention of the rule-maker, so far as it can be derived from the rule, would not therefore be thwarted or frustrated if, either immediately, or at some point in the future, there were no members of the relevant category which satisfied the relevant condition.

186. In section 2(1), the relevant category is:

“rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and ... remedies and procedures from time to time provided for by or under the Treaties.”

The words “from time to time”, which appear twice, mean that section 2(1) is concerned not only with the Treaties, and the regulations and other legal instruments made under them, as they stood at the time of accession, but also with the Treaties and instruments made under them as they may change over time in the future. This recognises the fact that the “rights, powers, liabilities, obligations and restrictions ... created or arising by or under the Treaties”, and the “remedies and procedures ... provided for by or under the Treaties”, alter from time to time, as a result of changes to the Treaties or to the laws made under the procedures laid down in the Treaties.

187. This is relevant in the present context, since it demonstrates that Parliament has recognised that rights given effect under the 1972 Act may be added to, altered or revoked without the necessity of a further Act of Parliament (something which is also apparent from section 1(3)). In response to this point, the majority of the

court draw a distinction, described as “a vital difference”, between changes in domestic law resulting from variations in the content of EU law arising from new EU legislation, and changes resulting from withdrawal by the UK from the European Union. There is no basis in the language of the 1972 Act for drawing any such distinction. Under the arrangements established by the Act, alterations in the UK’s obligations under the Treaties are automatically reflected in alterations in domestic law. That is equally the position whether the alterations in the UK’s obligations under the Treaties result from the Treaties’ ceasing to apply to the UK, in accordance with article 50, or from changes to the Treaties or to legislation made under the Treaties. The Act simply creates a scheme under which the effect given to EU law in domestic law reflects the UK’s international obligations under the Treaties, whatever they may be. There is nothing in the Act to suggest that Parliament’s intention to ensure an exact match depends on the reason why they might not match.

188. The requirement imposed by section 2(1) is:

“shall be *recognised and available in law, and be enforced, allowed and followed accordingly.*”

This phrase gives effect in domestic law to all such rights, powers and so forth as satisfy the relevant condition.

189. The condition which must be satisfied, in order for that requirement to apply, is set out in the following phrase:

“All such ... as *in accordance with the Treaties are without further legal enactment to be given legal effect or used in the United Kingdom.*”

This phrase is of particular importance to the resolution of the Miller appeal. It follows from this phrase that rights, powers and so forth created or arising by or under the Treaties are not automatically given effect in domestic law. Legal effect is given only to such rights, powers and so forth arising by or under the Treaties as “in accordance with the Treaties” are without further enactment to be given legal effect “in the United Kingdom”. In this respect, once more, the 1972 Act creates a scheme under which the effect given to EU law in domestic law exactly matches the UK’s international obligations, whatever they may be.

190. The words “without further enactment” reflect the EU law concept of direct effect, established by *Van Gend en Loos* and *Costa v ENEL* as explained above (and, in so far as it may be regarded as distinct, the concept of direct applicability, established by article 189 of the Treaty of Rome and now stated in article 288 of the Treaty on the Functioning of the European Union (TFEU): see section 18 of the [European Union Act 2011](#)). Accordingly, where “in accordance with the Treaties”, rights, powers and so forth are to be directly applicable or directly effective in the law of the UK, section 2(1) achieves that effect. But there is no obligation “in accordance with the Treaties” to give effect in the UK to EU rights, powers and so forth merely because they are directly effective under EU law: such an obligation arises only if and for so long as the Treaties apply to the UK. The extent to which the effect given by section 2(1) to rights, powers and so forth arising under EU law is dependent on the Treaties cannot therefore be confined to the question whether the rights, powers and so forth are, under the Treaties, directly effective: it also depends, more fundamentally, on whether the Treaties impose any obligations on the UK to give effect to EU law.

191. Whether rights, powers and so forth are to be given legal effect in the UK, in accordance with the Treaties, therefore depends on whether the Treaties apply to the UK. As the majority of the court state at para 77, “Parliament cannot have intended that section 2 should continue to import the variable content of EU law into domestic law, or that the other consequences of the 1972 Act described in paras 62 to 64 above should continue to apply, after the United Kingdom had ceased to be bound by the EU Treaties.” If the Treaties do not apply to the UK, then there are no rights, powers and so forth which, in accordance with the Treaties, are to be given legal effect in the UK.

192. This point is illustrated by the fact that, when the 1972 Act came into force on 17 October 1972, the [Treaty of Accession](#) had not yet been ratified or entered into force, with the consequence that the Treaties did not apply to the UK. In consequence, section 2(1) initially had no practical application, there being at that time no rights, powers and so forth which, in accordance with the Treaties, were to be given legal effect in the UK. It was not until 1 January 1973, when the [Treaty of Accession](#) came into force, following its ratification by the Crown in the exercise of its prerogative powers, that the condition to which section 2(1) subjected the domestic effect of EU law was satisfied.

193. The Miller claimants respond to this point by arguing that the effect of the 1972 Act was to require the Crown to ratify the [Treaty of Accession](#). This is not, in the first place, an answer to the point that the effect of section 2(1) was contingent on the Treaty's entering into force. Furthermore, although it is fair to say that the 1972 Act was enacted in anticipation that ratification was likely to occur that is far from saying that ratification was required by statute.

194. In the first place, as explained in para 159 above, it is a basic principle of our constitution that the conduct of foreign relations, including the ratification of treaties, falls within the prerogative powers of the Crown. That principle is so fundamental that it can only be overridden by express provision or necessary implication, as is accepted in the majority judgment at para 48. No such express provision exists in the 1972 Act. Nor do its provisions override that principle as a matter of necessary implication. As Lord Hobhouse of Woodborough explained in *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2002] UKHL 21; [2003] 1 AC 563, para 45:

“A necessary implication is not the same as a reasonable implication ... A *necessary* implication is one which necessarily follows from the express provisions of the statute construed in their context. It distinguishes between what it would have been sensible or reasonable for Parliament to have included or what Parliament would, if it had thought about it, probably have included and what it is clear that the express language of the statute shows that the statute must have included. A necessary implication is a matter of express language and logic not interpretation.”

195. Secondly, it is not difficult to contemplate circumstances in which ratification might not have occurred. The passage of the 1972 Act was hard fought (as the former minister Ken Clarke's memoir, *Kind of Blue* (2016), pp 66ff, makes clear), and the possibility of a future Labour Government taking the UK out of the European Communities was apparent. When the Labour Government subsequently came to power, in 1974, it proceeded to hold a referendum in accordance with its manifesto commitment. If the Conservative Government had fallen and the Opposition had come to power while the [Treaty of Accession](#) remained unratified, the incoming Labour Government would have been unlikely to ratify it without holding a referendum. Indeed, the Opposition continued to oppose ratification following the Parliamentary passage of the 1972 Act, using an adjournment debate on the date of Royal Assent to criticise ratification as being against the wish of the British people (Hansard (HC Debates), 17 October 1972, cols 58-59). The Government won the division by 31 votes; but if it had lost it, would it have been acting unlawfully if it had decided to respect the will of the House of Commons by not ratifying the treaty? Would it have been legally bound by the 1972 Act to ratify the treaty regardless? These questions can only be answered in the negative. The point can also be illustrated by considering what would have happened if some crisis had occurred in the UK's diplomatic relations with one of its intended partners in the European Communities. If, for example, some dispute comparable in gravity to the then current dispute with Iceland, or the subsequent dispute with Argentina, had occurred with one of the other parties to the Treaty of Rome or the Treaty of Accession, is it likely that the UK would then have ratified the Treaty of Accession?

196. The seemingly less ambitious suggestion in the majority judgment at para 78, that it was not “contemplated”, when the 1972 Act was being passed, that Ministers would not ratify the Treaties or that, having ratified them, would at some point repudiate them, meets the same objection. That ratification was contemplated is clear, but that tells you nothing about whether the operation of the 1972 Act is conditional on continued membership. What individual members of Parliament contemplated, or expected to happen, is on ordinary principles not relevant to the construction of the Act. In any event it is likely to have varied a good deal. The possibility of the UK being taken out of the European Communities if there were a change of government was apparent.

197. Referring to the structure of section 2(1) of the 1972 Act as set out at para 184 above, it is said at para 82 of the majority judgment that “the membership of the specified category [viz, the rights, powers and so forth arising under EU law to which domestic effect must be given] has a variable content which is contingent on the decisions of non-UK entities”. Section 2(1) says nothing, however, which either expressly or impliedly limits the contingency, to which the duty to give domestic effect to EU law is subject, to decisions by non-UK entities. The contingency is that the rights, powers and so forth are “such ... as in accordance with the Treaties are without further legal enactment to be given legal effect or used in the United Kingdom”. It follows from that contingency that the effect given to EU law in our domestic law is conditional on the Treaties' application to the UK. That condition was not satisfied when the Act came into force, because the Treaties did not then apply to the UK. The content of the specified category was therefore zero. The satisfaction of the condition, some months later, depended on the decision of a UK entity: it depended on the Crown's exercise of prerogative powers. The content

would return to zero if the condition ceased to be satisfied as the result of the UK's invoking article 50. That would be so whether the decision to invoke article 50 had, or had not, been authorised by an Act of Parliament. It is, indeed, accepted by the majority that the condition would cease to be satisfied if the Crown invoked article 50 after being authorised to do so by statute. So the contingency cannot be limited to decisions by non-UK entities. The only issue in dispute is whether the action by the Crown, as a result of which the contingency will cease to be satisfied, must be authorised by an Act of Parliament. On that issue, section 2(1) is silent. Neither expressly nor by implication does it require such action to be authorised by Parliament. The fact that section 2(1) is itself a fixed rule of domestic law enacted by Parliament does not affect that conclusion, since a fixed rule which is conditional will necessarily operate only for as long as the condition is satisfied. Nor does it support a conclusion that Parliament has, by necessary implication, deprived the Crown of its prerogative powers: from what words, one might ask, is that implication derived?

The amendment of the 1972 Act by section 2 of the European Union (Amendment) Act 2008

198. I have discussed the position as it stood in 1972. But the real question in the Miller appeal concerns the position following the signing of the Treaty of Lisbon in 2007, and its entry into force in 2009. That is because it was the Treaty of Lisbon which inserted article 50 into the TEU.

199. Parliament addressed the Treaty of Lisbon in the European Union Amendment Act 2008 ("the 2008 Act"). Section 2 of that Act provides:

"At the end of the list of treaties in section 1(2) of the European Communities Act 1972 (c 68) add; and

(s) the Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community signed at Lisbon on 13 December 2007 (together with its Annex and protocols), excluding any provision that relates to, or in so far as it relates to or could be applied in relation to, the Common Foreign and Security Policy;"

Section 2 of the 2008 Act thus added the Lisbon Treaty (other than the parts dealing with the Common Foreign and Security Policy) to the Treaties listed in section 1 of the 1972 Act, to which section 2(1) of that Act refers.

200. It follows that the words "such ... as in accordance with the Treaties are without further legal enactment to be given legal effect or used in the United Kingdom", in section 2(1) of the 1972 Act, must be read as meaning "such ... as in accordance with the Treaties, including article 50 TEU, are without further legal enactment to be given legal effect or used in the United Kingdom". The contingency to which the effect of EU law in our domestic law has been subject since the amendment of the 1972 Act by the 2008 Act therefore includes the potential operation of article 50. It is entirely "in accordance with the Treaties" for article 50 to operate, with the result that, when a withdrawal agreement comes into force, or the time allowed under article 50(3) expires, there may be no rights which, "in accordance with the Treaties", are to be given legal effect in the UK.

201. This conclusion is not inconsistent with the statement by the majority of the court, at para 104, that article 50 is not given effect in domestic law by section 2 of the 1972 Act. The majority may be right about that, although the point has not been argued, and the opposite view may be arguable (see, for example, Robert Craig, "Casting Aside Clanking Medieval Chains: Prerogative, Statute and Article 50 after the EU Referendum", (2016) MLR 1041, where it is argued that section 2(1) of the 1972 Act has given article 50 domestic effect as a power exercisable by Ministers, superseding the prerogative but also supplying the Parliamentary authorisation desiderated by the Miller claimants). Whether article 50 has direct effect in domestic law does not however affect the question whether its operation forms part of the contingency on which the direct effect given to EU law by the 1972 Act is dependent.

202. The result of section 2 of the 2008 Act is thus that the effect given by section 2(1) of the 1972 Act to EU law, which was always conditional on the Treaties' applying to the UK, is now subject to the exercise of the power conferred by article 50 to initiate a particular procedure under which the Treaties will cease to apply to the UK.

203. The Miller claimants respond to these points by arguing that section 2(1) of the 1972 Act impliedly requires the power of withdrawal under article 50 to be exercised by Parliament. In so far as that argument is

based on the common law principles established by such authorities as the *Case of Proclamations*, *The Zamora*, the *Tin Council* case and the *De Keyser* case, I shall discuss those principles later. One can however note at present that, as previously mentioned, there is nothing in section 2(1) which demonstrates that Parliament intended to depart from the fundamental principle that powers relating to the UK's participation in treaty arrangements are exercisable by the Crown. As the majority of the court rightly state at para 108, the fact that a statute says nothing about a particular topic can rarely, if ever, justify inferring a fundamental change in the law. Nor would withdrawal under article 50 be inconsistent with the 1972 Act, any more than a failure to ratify the [Treaty of Accession](#). The result would simply be that there were no rights answering to the description in section 2(1): there would be no rights "such ... as in accordance with the Treaties are without further legal enactment to be given legal effect or used in the United Kingdom".

204. This is a point of general importance. If Parliament chooses to give domestic effect to a treaty containing a power of termination, it does not follow that Parliament must have stripped the Crown of its authority to exercise that power. In the present context, the impact of the exercise of the power on EU rights given effect in domestic law is accommodated by the 1972 Act: the rights simply cease to be rights to which section 2(1) applies. Withdrawal under article 50 alters the application of the 1972 Act, but is not inconsistent with it. The application of the 1972 Act after a withdrawal agreement has entered into force (or the applicable time limit has expired) is the same as it was before the [Treaty of Accession](#) entered into force. As in the 1972 Act as originally enacted, Parliament has created a scheme under which domestic law tracks the obligations of the UK at the international level, whatever they may be.

Other post-1972 legislation

205. Other post-1972 legislation is of only secondary importance. It is however relevant in so far as it demonstrates, first, that Parliament has legislated on the basis that the 1972 Act did not restrict the exercise of the foreign affairs prerogative in relation to other aspects of the EU treaties, and secondly, that Parliament is perfectly capable of making clear its intention to restrict the exercise of the prerogative when it wishes to do so.

206. Several examples can be given. The earliest is section 6(1) of the European Parliamentary Elections Act 1978 (as amended by section 3 of the European Communities (Amendment) Act 1986), which provided:

"No treaty which provides for any increase in the powers of the European Parliament shall be ratified by the United Kingdom unless it has been approved by an Act of Parliament."

That provision was later re-enacted in section 12 of the European Parliamentary Elections Act 2002 ("the 2002 Act").

207. A further example is the 2008 Act, which imposed numerous restrictions on the exercise of prerogative powers in relation to provisions of the Lisbon Treaty. Section 5 is particularly significant. It provided:

"(1) A treaty which satisfies the following conditions may not be ratified unless approved by Act of Parliament.

(2) Condition 1 is that the treaty amends -

(a) the Treaty on European Union (signed at Maastricht on 7 February 1992),

(b) the Treaty on the Functioning of the European Union (the Treaty establishing (what was then called) the European Economic Community, signed at Rome on 25 March 1957 (renamed by the Treaty of Lisbon)), or

(c) the Treaty establishing the European Atomic Energy Community (signed at Rome on 25 March 1957).

(3) Condition 2 is that the treaty results from the application of article 48(2) to (5) of the Treaty on European Union (as amended by the Treaty of Lisbon) (Ordinary Revision Procedure for amendment of founding Treaties, including amendments affecting EU competence)."

Section 5 therefore prohibited the ratification of treaties unless approved by an Act of Parliament, where the treaties amended the TEU or the TFEU, and resulted from the application of article 48(2) to (5) TEU.

208. Article 48 TEU was a provision introduced by the Lisbon Treaty to provide a simplified procedure for the conclusion of treaties amending the TEU or the TFEU. Paragraphs (2) to (5) provided, so far as material:

“2. The Government of any member state, the European Parliament or the Commission may submit to the Council proposals for the amendment of the Treaties. These proposals may, *inter alia*, serve either to increase or to reduce the competences conferred on the Union in the Treaties ...

3. If the European Council, after consulting the European Parliament and the Commission, adopts by a simple majority a decision in favour of examining the proposed amendments, the President of the European Council shall convene a Convention composed of representatives of the national Parliaments, of the Heads of State or Government of the member states, of the European Parliament and of the Commission ... The Convention shall examine the proposals for amendments and shall adopt by consensus a recommendation to a conference of representatives of the governments of the member states as provided for in paragraph 4.

4. A conference of representatives of the governments of the member states shall be convened by the President of the Council for the purpose of determining by common accord the amendments to be made to the Treaties.

The amendments shall enter into force after being ratified by all the member states in accordance with their respective constitutional requirements.

5. If, two years after the signature of a treaty amending the Treaties, four fifths of the member states have ratified it and one or more member states have encountered difficulties in proceeding with ratification, the matter shall be referred to the European Council.”

209. The TFEU establishes numerous rights which are given effect in the UK by section 2(1) of the 1972 Act. Those rights could be altered by a treaty concluded by the UK Government and the governments of the other member states, under article 48(2) TFEU. Section 5 of the 2008 Act required an Act of Parliament before such a treaty could be ratified. If the Miller claimants’ arguments are correct, an Act of Parliament was already necessary before the UK Government could exercise the treaty-making prerogative so as to alter those rights. Section 5 of the 2008 Act was, however, understood as introducing a requirement for legislation where none previously existed: that was the mischief intended to be addressed. For example, the House of Lords Select Committee on the Constitution stated:

“Clause 5 of the Bill seeks to create a new requirement for prior parliamentary authorisation of ratification. It would apply to amendments of the founding treaties - the Treaty on European Union, the Treaty on the Functioning of the European Union and the Treaty Establishing the European Atomic Energy Community - when those amendments are made by the ‘ordinary revision procedure’.

Before examining clause 5 in more detail, it must be noted that the need for express parliamentary approval before the Government ratifies a treaty amending the founding Treaties of the EU has been recognised in one important respect for some time.” (6th Report of Session 2007-08, European Union Amendment Bill and the Lisbon Treaty: Implications for the UK Constitution, HL 84, 2008, paras 23-24).

The latter sentence referred not to the 1972 Act, but to section 12 of the 2002 Act, discussed at para 206 above.

210. It is also relevant to note section 6(1) of the 2008 Act, which imposed restrictions on the UK’s participation in several procedures laid down in the Lisbon Treaty:

“A Minister of the Crown may not vote in favour of or otherwise support a decision under any of the following unless Parliamentary approval has been given in accordance with this section ...”

The section went on to require Parliamentary approval in the form of a resolution of both Houses. The provisions of the Lisbon Treaty to which section 6 applied did not include article 50 TEU.

211. The Constitutional Reform and Governance Act 2010 (“the 2010 Act”) is also relevant. It codifies the previous Ponsonby Rule (a convention that treaties, with limited exceptions, would be laid before Parliament before they were ratified), and sets out detailed procedures for Parliamentary scrutiny of new treaties. It does not apply to treaties which are covered by section 5 of the 2008 Act or by the [European Union Act 2011](#) (“the 2011 Act”), to which I turn next. A withdrawal agreement under article 50(3) would be likely to fall within its scope, but it would have no application to a decision to withdraw from a treaty or to commence the process of withdrawal.

212. The 2011 Act repealed section 12 of the 2002 Act and sections 5 and 6 of the 2008 Act (subject to an immaterial exception), replacing them with a more elaborate system of Parliamentary control. The evident aim was to introduce stronger Parliamentary controls, in relation to matters falling within the scope of the legislation, than were present under the existing law. The power to amend article 50(3), concerning the extension of the two year period for negotiation, or to adopt the ordinary legislative procedure in relation to that provision, was brought within the scope of these controls by sections 4 and 6, read with Schedule 1. Article 50(1) and (2), concerning the decision to withdraw and its notification, were not.

213. As explained earlier, section 5 of the 2008 Act was enacted on the basis that the Crown could exercise its treaty-making power so as to alter EU rights given effect in domestic law by the 1972 Act, without necessarily requiring further authorisation by an Act of Parliament. One can also infer from this body of legislation, as the Divisional Court did in the case of *R v Secretary of State for Foreign Affairs, Ex p Rees-Mogg* [1994] QB 552, discussed in paras 235-237 below, that since Parliament has repeatedly placed express restrictions on the exercise of the prerogative in relation to the EU treaties, the absence of a particular restriction in the 1972 Act tends to support the conclusion that no such restriction was intended to arise by implication.

214. It is also necessary to consider the 2015 Act. For the reasons explained in para 171 above, I do not propose to consider the legal implications of the referendum result. It is, however, proper to take note of the judgment of Lord Dyson MR, with whom the other members of the court agreed, in *R (Shindler) v Chancellor of the Duchy of Lancaster* [2016] EWCA Civ 419; [2016] 3 WLR 1196. That was a case in which a challenge was brought to the franchise rules applicable to the referendum. Having referred to the provision in article 50(1) that any member state may decide to withdraw from the EU “in accordance with its own constitutional requirements”, the Master of the Rolls stated:

“The 2015 Act contains part of the constitutional requirements of the UK as to how it may decide to withdraw from the EU ... In short, by passing the 2015 Act, Parliament decided that one of the constitutional requirements that had to be satisfied as a condition of a withdrawal from the EU was a referendum.” (paras 13 and 19)

It follows that, in enacting the 2015 Act, Parliament considered withdrawal from the EU, and made the holding of a referendum part of the process of taking the decision under article 50(1). It laid down no further role for itself in that process. In the absence of any provision requiring Parliamentary authorisation of the decision, it is difficult, against the background of such provisions being laid down in the Acts of 1978, 2002, 2008, 2010 and 2011, to regard such a requirement as being implicit.

Using the prerogative to alter the law, or take away statutory rights?

215. In the light of the foregoing discussion, one can return to the arguments advanced by the Miller claimants on the basis of authorities concerned with the common law limits of prerogative powers. The first argument, summarised at paras 165-167 and 169 above, is that the giving of notification under article 50(2) will result in the alteration of the law and the destruction of statutory rights, and therefore cannot be effected in the exercise of prerogative powers, applying the principles established in such cases as the *Case of Proclamations*, *The Zamora*, the *Tin Council* case, and *Higgs v Minister of National Security*, and reflected also in the Bill of Rights and the Claim of Right.

216. The argument that the 1972 Act created statutory rights which cannot be taken away without a further Act of Parliament starts from a premise which requires examination. The 1972 Act did not create statutory rights in the same sense as other statutes, but gave legal effect in the UK to a body of law now known as EU law. As explained at paras 186-187 above, section 2(1) recognises that the rights arising under that body of law can be altered from time to time, as a result of changes to the Treaties or to the laws made under the procedures laid down in the Treaties, without the necessity of a further Act of Parliament. Such alterations result not only in the creation of EU rights which are consequently given effect in domestic law by the 1972 Act, but also in the repeal and restriction of EU rights previously created, and given effect under domestic law. The successive regulations imposing fishing quotas are an example. To give another example, if Greece were to decide to leave the EU while the UK remained a member, the Treaties would cease to apply to Greece either when a withdrawal agreement entered into force, or in any event after two years had expired. Greek citizens living in the UK would then cease to enjoy the EU rights which continued to be enjoyed here, for example, by French citizens. As these examples illustrate, rights given direct effect by section 2(1) of the 1972 Act are inherently contingent, and can be altered without any further Act of Parliament. This is a very different situation from any contemplated by the judges in the cases relied on, or by the Scottish and English Parliaments at the time of the Glorious Revolution or the Acts of Union.

217. As noted earlier, the majority of the court respond to this point by drawing a distinction between changes which result from the UK's giving notice under article 50, for which a further Act of Parliament is argued to be necessary, and changes which result from any other alteration in the Treaties or in the instruments made under the Treaties, for which no further Act of Parliament is necessarily required. That distinction cannot be derived from the principle established by the *Case of Proclamations*. It has to be based on an interpretation of the 1972 Act: the matter which was discussed at paras 179-214 above. For the reasons there explained, I see no basis in the 1972 Act for drawing any such distinction. The Act simply creates a scheme under which domestic law reflects the UK's international obligations, whatever they may be.

218. It is equally questionable whether notification under article 50 will alter "the law of the land", in the sense in which judges have used that expression. That can be illustrated by reflecting on the effect of notification, and on the ability of Parliament to maintain in force the EU rights currently given effect under section 2(1) of the 1972 Act. The giving of notification does not in itself alter EU rights or the effect given to them in domestic law. Nor does it impinge on Parliament's competence to enact legislation during the intervening period before the treaties cease to have effect. Parliament can enact whatever provisions it sees fit in order to address the consequences of withdrawal from the EU, including provisions designed to protect rights which are currently derived from EU law. Parliament cannot, however, replicate EU law. It cannot establish those elements of it which involve reciprocal arrangements with the other member states, or which involve the participation of EU institutions. Nor can it create rights which have the distinguishing characteristics of EU rights, such as priority over subsequent legislation, and authoritative interpretation by the Court of Justice. The fact that notification alters no law, and that Parliament retains full competence to legislate so as to protect rights before withdrawal occurs, illustrates how different this situation is from those addressed in the cases relied upon. Equally, the fact that the enactment of EU law lies beyond the ability of Parliament illustrates how different it is from "the law of the land" as usually understood.

219. More fundamentally, however, the argument that withdrawal from the EU would alter domestic law and destroy statutory rights, and therefore cannot be undertaken without a further Act of Parliament, has to be rejected even if one accepts that the 1972 Act creates statutory rights and that withdrawal will alter the law of the land. It has to be rejected because it ignores the conditional basis on which the 1972 Act gives effect to EU law. If Parliament grants rights on the basis, express or implied, that they will expire in certain circumstances, then no further legislation is needed if those circumstances occur. If those circumstances comprise the UK's withdrawal from a treaty, the rights are not revoked by the Crown's exercise of prerogative powers: they are revoked by the operation of the Act of Parliament itself.

220. In so far as the Miller claimants place reliance on rights under EU law as given effect in the legal systems of other member states, such as the right of UK citizens to live and work in Greece, there is no rule which prevents prerogative powers being exercised in a way which alters rights arising under foreign law.

221. In so far as the Miller claimants place reliance on statutes creating rights in respect of EU institutions, such as the right to vote in elections to the European Parliament under the European Parliamentary Elections Act 2002, such statutory rights are obviously conditional on the UK's continued membership of the EU. Parliament cannot have intended them to operate on any other basis. If they cease to be effective following the UK's

withdrawal from the EU, that is inherent in the nature of the right which Parliament conferred. The only logical alternative is to hold that Parliament has created a right to remain in the EU, and none of the arguments goes that far.

Using the prerogative to revoke a source of law?

222. As explained at para 173 above, it is argued that the 1972 Act created “an entirely new, independent and overriding source of domestic law” (as it is put in the majority judgment at para 80). Since the identification of a country’s sources of law is one of the most fundamental functions of its constitution, it follows that the Crown cannot lawfully revoke a source of law in the exercise of prerogative powers. So runs the argument.

223. As put by counsel, this argument is based on the concept of the rule of recognition: that is to say, the foundational rule in a legal system which identifies the sources of law in that system and imposes a duty to give effect to laws emanating from those sources. The Lord Advocate and Ms Mountfield QC argue that the rule would be altered by withdrawal from the EU, and therefore, sooner or later, by the giving of notification under article 50.

224. The UK’s entry into the EU did not, however, alter its rule of recognition, and neither would its withdrawal. That is because EU law is not a source of law of the relevant kind: that is to say, a source of law whose validity is not dependent on some other, more fundamental, source of law, but depends on the ultimate rule of recognition. The true position was explained by Lord Mance in *Pham v Secretary of State for the Home Department* [2015] UKSC 19; [2015] 1 WLR 1591, para 80:

“For a domestic court, the starting point is, in any event, to identify the ultimate legislative authority in its jurisdiction according to the relevant rule of recognition. The search is simple in a country like the United Kingdom with an explicitly dualist approach to obligations undertaken at a supranational level. European law is certainly special and represents a remarkable development in the world’s legal history. But, unless and until the rule of recognition by which we shape our decisions is altered, we must view the United Kingdom as independent, Parliament as sovereign and European law as part of domestic law because Parliament has so willed. The question how far Parliament has so willed is thus determined by construing the 1972 Act.”

225. As Lord Mance rightly explained, it follows from the UK’s dualist approach to international law that EU law is not one of the sources of law identified by the UK’s rule of recognition. That was recognised in the cases of *Blackburn v Attorney General* and *McWhirter v Attorney General*, as explained in para 183 above. As a source of law, EU law, like legislation enacted by the devolved legislatures, or delegated legislation made by Ministers, is entirely dependent on statute (which is not, of course, to say that EU law has the same effects, as devolved or delegated legislation). It derives its legal authority from a statute, which itself derives its authority from the rule of recognition identifying Parliamentary legislation as a source of law. The recognition of its validity does not alter any fundamental principle of our constitution.

226. The fact that the 1972 Act has a prospective effect, in giving effect to laws made from time to time by the EU institutions, does not affect this analysis. Nor does the limited primacy given to EU law by the 1972 Act alter the position, since that primacy itself derives from the 1972 Act. That was recognised by Lord Bridge of Harwich in *R v Secretary of State for Transport, Ex p Factortame Ltd (No 2)* [1991] 1 AC 603:

“Under the terms of the Act of 1972 it has always been clear that it was the duty of a United Kingdom court, when delivering final judgment, to override any rule of national law found to be in conflict with any directly enforceable rule of Community law.” (p 659: emphasis supplied)

The source of law which is validated by the rule of recognition therefore remains Parliament, not the EU. Since the effect of EU law is dependent on an Act of Parliament, the rule of recognition is unchanged.

227. Parliament has itself made it clear that EU law has not altered the UK’s rule of recognition. Section 18 of the 2011 Act provides:

“Directly applicable or directly effective EU law (that is, the rights, powers, liabilities, obligations, restrictions, remedies and procedures referred to in section 2(1) of the European

Communities Act 1972) falls to be recognised and available in law in the United Kingdom only by virtue of that Act or where it is required to be recognised and available in law by virtue of any other Act.”

Since EU law has no status in UK law independent of statute, it follows that the only relevant source of law has at all times been statute.

228. This understanding underpins the discussion of the constitutional status of EU law in *R (Buckinghamshire County Council) v Secretary of State for Transport* [2014] UKSC 3; [2014] 1 WLR 324. The issue raised by a conflict between an EU directive and long-established constitutional principles of domestic law was identified as “the extent, if any, to which these principles may have been implicitly qualified or abrogated by the European Communities Act 1972” (para 78). The issue, in other words, was one of domestic law, turning on the interpretation of the 1972 Act. It was said:

“Contrary to the submission made on behalf of the claimants, that question cannot be resolved simply by applying the doctrine developed by the Court of Justice of the supremacy of EU law, since the application of that doctrine in our law itself depends upon the 1972 Act. If there is a conflict between a constitutional principle, such as that embodied in article 9 of the Bill of Rights, and EU law, that conflict has to be resolved by our courts as an issue arising under the constitutional law of the United Kingdom.” (para 79)

The implication is that EU law is not itself an independent source of domestic law, but depends for its effect in domestic law on the 1972 Act: an Act which does not confer effect upon it automatically and without qualification, but has to be interpreted and applied in the wider context of the constitutional law of the UK. Accordingly, although no-one can doubt the importance of EU law, the effect given to it by the 1972 Act has not altered any fundamental constitutional principle in respect of the identification of sources of law.

229. The majority of the court respond that this analysis is unrealistic. Although it is accepted that the effect of EU law in domestic law is dependent on the 1972 Act, they argue that for EU law to cease to have effect in our domestic law would be a major change in the UK’s constitution. As I understand it, the argument is concerned with the effect of the 1972 Act. Whether the 1972 Act has that effect depends on its interpretation, which simply takes one back to the issues discussed at paras 179-214 above.

230. A further reason for rejecting the argument that the 1972 Act created a new source of law, which cannot be revoked without further legislation, is one that applies even if it is accepted that the 1972 Act created a new source of law (in some sense or other). Since the 1972 Act gives effect to EU law only as long as the Treaties apply to the UK, as explained at paras 189-204 above, that source of law is inherently contingent on the UK’s continued membership of the EU. EU law’s ceasing to have effect as a result of the UK’s withdrawal from the Treaties is something which follows from the 1972 Act itself, and does not require further legislation.

The analogy with the *De Keyser* case

231. Although the majority judgment does not adopt the Miller claimants’ argument based on a supposed analogy with the *De Keyser* case, it is nevertheless necessary to address it. As explained earlier, that case established that where Parliament has regulated a matter by statute, the Crown cannot have recourse to a prerogative power in respect of the same matter. The argument by analogy asserts that, since notification under article 50 will eventually render the 1972 Act redundant, it follows that notification cannot be given in the exercise of prerogative powers. I am unable to accept that argument, for a number of reasons.

232. First, the *De Keyser* principle denies that prerogative power can be exercised where a parallel statutory scheme exists. It does not follow from that principle that a prerogative power cannot be exercised where the eventual consequence will be that a statutory provision will cease to have a practical application. The latter proposition cannot be derived from *De Keyser*, but must be derived from some other source. The only obvious candidate is Parliament’s intention in enacting the statutory provisions in question: an intention, it has to be argued, to impose a limitation on the exercise of the prerogative power. That simply takes one back to the argument as to whether an intention to strip the Crown of its prerogative powers in respect of adherence to the EU treaties can be derived from the 1972 Act: an argument which was addressed at paras 201-204 above.

233. Secondly, the 1972 Act does not, in any event, regulate withdrawal from the EU: it recognises the existence of article 50, as explained in paras 198-202 above, but it says nothing about how or by whom a decision to invoke article 50 should be taken.

234. Thirdly, the difference between the present situation and that with which the *De Keyser* principle is concerned is also evident at the level of remedies. In *De Keyser* itself, the remedy was a declaration that the owners were entitled to compensation under the statutory scheme. The remedy flowed from the logic of the principle: Ministers were obliged to comply with the statutory scheme. No comparable remedy can be granted in the present case, since there is no statutory scheme governing the operation of article 50.

The Rees-Mogg case

235. Finally, in relation to the Miller claimants' arguments, it should be noted that this is not the first time that the courts have had to address these arguments. In *R v Secretary of State for Foreign Affairs, Ex p Rees-Mogg*, one of counsel's arguments in support of a challenge to the ratification of the Maastricht Treaty was recorded by Lloyd LJ as follows:

"He submits that by ratifying the Protocol on Social Policy, the Government would be altering Community law under the EEC Treaty ... It is axiomatic that Parliament alone can change the law. Mr Pannick accepts, of course, that treaties are not self-executing. They create rights and obligations on the international plane, not on the domestic plane. He accepts also that the treaty-making power is part of the Royal Prerogative ... But the EEC Treaty is, he says, different. For section 2(1) of the European Communities Act 1972 provides ...

If the Protocol on Social Policy is ratified by all member states, it will become part of the EEC Treaty, which is one of the Treaties referred to in section 2(1): see the definition of 'the Treaties' in section 1(2) of the Act of 1972. Accordingly the Protocol will have effect not only on the international plane but also, by virtue of section 2(1) of the Act of 1972, on the domestic plane as well. By enacting section 2(1), Parliament must therefore have intended to curtail the prerogative power to amend or add to the EEC Treaty. There is no express provision to that effect. But that is, according to the argument, the necessary implication ... Where Parliament has by statute covered the very same ground as was formerly covered by the Royal Prerogative, the Royal Prerogative is to that extent, by necessary implication, held in abeyance: see *Attorney General v De Keyser's Royal Hotel Ltd* [1920] AC 508; *Laker Airways Ltd v Department of Trade* [1977] QB 643, 718,720, per Roskill LJ." (p 567)

So one sees here the same arguments: that the prerogative power in relation to treaties cannot be used to alter rights in domestic law; that the effect of section 2(1) of the 1972 Act is to transform rights arising under the EU treaties into rights in domestic law; that section 2(1) therefore impliedly curtailed the prerogative power in relation to the EU treaties; and the supposed analogy with the *De Keyser* principle.

236. The Divisional Court rejected this argument:

"We find ourselves unable to accept this far-reaching argument. When Parliament wishes to fetter the Crown's treaty-making power in relation to Community law, it does so in express terms, such as one finds in section 6 of the Act of 1978. Indeed, as was pointed out, if the Crown's treaty-making power were impliedly excluded by section 2(1) of the Act of 1972, section 6 of the Act of 1978 would not have been necessary. There is in any event insufficient ground to hold that Parliament has by implication curtailed or fettered the Crown's prerogative to alter or add to the EEC Treaty." (p 567)

The court also rejected the challenge on the basis that the protocol in question was not, in any event, one of "the Treaties" to which the 1972 Act applied (p 568). Contrary to counsel's submission in the present case, it is plain that these two reasons for rejecting the challenge to ratification were independent of one another. The first reason was that section 2(1) did not impliedly curtail the Crown's treaty-making power. The second was that the protocol in question did not in any event fall within the ambit of section 2(1).

237. I agree with the Divisional Court's reasoning in the passage which I have cited, and in particular with the final sentence: even apart from the inference which might be drawn from examples of express provisions restricting the exercise of prerogative powers in relation to EU law, there is in any event insufficient ground to hold that Parliament has by implication curtailed or fettered the Crown's prerogative powers in relation to the Treaties.

What if there had been no referendum, or a vote to remain?

238. Finally, in relation to the Miller appeal, it is argued by the majority at para 91 that the Secretary of State's contentions cannot be correct since, if they were, it would have been open to Ministers to invoke prerogative powers to withdraw from the EU even if there had been no referendum, or indeed even if any referendum had resulted in a vote to remain.

239. There are two answers to this point. First, it does not necessarily follow from my conclusions that Ministers could properly have invoked article 50 whenever they pleased, or, more specifically, in the event of a vote to remain. As Lord Carnwath makes clear at para 266 below, there has been no discussion in this appeal of the question whether there might be any circumstances in which the exercise of the prerogative power in question might be open to review, such as if the referendum held under the 2015 Act had resulted in a vote to remain, and I express no view on that point.

240. Secondly, and more fundamentally, controls over the exercise of ministerial powers under the British constitution are not solely, or even primarily, of a legal character, as Lord Carnwath explains in his judgment. Courts should not overlook the constitutional importance of ministerial accountability to Parliament. Ministerial decisions in the exercise of prerogative powers, of greater importance than leaving the EU, have been taken without any possibility of judicial control: examples include the declarations of war in 1914 and 1939. For a court to proceed on the basis that if a prerogative power is capable of being exercised arbitrarily or perversely, it must necessarily be subject to judicial control, is to base legal doctrine on an assumption which is foreign to our constitutional traditions. It is important for courts to understand that the legalisation of political issues is not always constitutionally appropriate, and may be fraught with risk, not least for the judiciary.

Conclusion in relation to the Miller appeal

241. For all the foregoing reasons, I would have allowed the Secretary of State's appeal in the Miller case.

The Northern Irish cases

242. Given my disagreement with the decision of the majority of the court as to the necessity for an Act of Parliament before article 50 can be invoked, it follows that I would also have dealt with the devolution issues raised in the Northern Irish cases differently. So far as those cases raise issues which are distinct from those arising in the Miller appeal, however, I agree with the way in which the majority have dealt with them. Nothing in the Northern Ireland Act bears on the question whether the giving of notification under article 50 can be effected under the prerogative or requires authorisation by an Act of Parliament. More specifically, neither section 1 nor section 75 of the Northern Ireland Act has any relevance in the present context. Nor does a political convention, such as the Sewel Convention plainly is in its application to Northern Ireland, give rise to a legally enforceable obligation.

LORD CARNWATH: (dissenting)

243. For the reasons given by Lord Reed, I would have allowed the appeal by the Secretary of State in the main proceedings. In view of the importance of the case, and the fact that we are differing from the Divisional Court and the majority in this court, I shall add some comments of my own from a slightly different legal perspective. I agree with the majority judgment in respect of the Northern Irish cases and the other devolution issues.

Constitutional principles

244. At the heart of the case is the classic statement of principle by Lord Oliver in the *Tin Council* case (*JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418):

“... as a matter of the constitutional law of the United Kingdom, the Royal Prerogative, whilst it embraces the making of treaties, does not extend to altering the law or conferring rights upon individuals or depriving individuals of rights which they enjoy in domestic law without the intervention of Parliament ...” (Lord Oliver pp 499E-500D)

245. In the *Tin Council* case Lord Oliver was speaking only of the “making of treaties”, not withdrawal. Lord Templeman had earlier made clear that the prerogative enables the Government to “negotiate, conclude, construe, observe, breach, repudiate or terminate a treaty ...” (p 476F-H). However, there was no discussion of how the classic statement might need modification or development in the context of termination or withdrawal. In principle the same basic rule should apply. Just as the Executive cannot without statutory authority create new rights or obligations in domestic law by entering into a treaty, so it cannot by termination of a treaty take away rights or obligations which currently exist. However, that tells one nothing about the process by which this result is to be achieved, nor at what stage of that process the intervention of Parliament is required.

246. Precedents are hard to find. Counsel have taken us on an interesting journey through cases and legal sources from four centuries and different parts of the common law world. The only example we were shown of withdrawal from a treaty was a recent decision of the Canadian Federal Court: *Turp v Ministry of Justice & Attorney General of Canada* 2012 FC 893. That was an unsuccessful challenge by the executive to the use of its prerogative powers to withdraw from the Kyoto Protocol on Climate Change, against the background of a statute (passed against the opposition of government) requiring the preparation of plans giving effect to the Protocol. On its face it is a striking example of the use of the prerogative to frustrate the apparent intention of Parliament as expressed in legislation. However, the authority is of limited assistance in the present context, since it had been held in a previous case (*Friends of the Earth v Canada (Governor in Council)*, 2008 FC 118) that the obligations under the statute were not justiciable in the domestic courts.

247. In the end the search through the authorities tells one little that is not sufficiently expressed by the classic rule. It also confirms the lack of any direct precedent for withdrawal from a treaty previously given effect in domestic law, let alone one which has played such a vital part in the development of our laws over more than 40 years. However, lack of precedent is not a reason for inventing new principles, nor is there a need to do so. The existing principles correctly applied provide a clear and coherent framework for effective resolution of all the competing considerations, including the referendum result.

The balance of power

248. In considering that framework it is important to recognise the sensitivity in our constitution of the balance between the respective roles of Parliament, the Executive and the courts. The Divisional Court saw this principally in binary terms: the Executive versus Parliament. Under the general heading, “the sovereignty of Parliament and the prerogative powers of the Crown”, they referred on the one hand to “the most fundamental rule that the Crown in Parliament is sovereign” (para 20), and on the other to the “general rule” that “the conduct of international relations and the making and unmaking of treaties” are “matters for the Crown in the exercise of its prerogative powers” (para 30), the balance between the two being as explained by Lord Oliver in the *Tin Council* case (paras 32-33).

249. Although the *Tin Council* principles as such are not in doubt, they are only part of the story. It is wrong to see this as a simple choice between Parliamentary sovereignty, exercised through legislation, and the “untrammelled” exercise of the prerogative by the Executive. Parliamentary sovereignty does not begin or end with the *Tin Council* principles. No less fundamental to our constitution is the principle of Parliamentary accountability. The Executive is accountable to Parliament for its exercise of the prerogative, including its actions in international law. That account is made through ordinary Parliamentary procedures. Subject to any specific statutory restrictions (such as under the Constitutional Reform and Governance Act 2010), they are a matter for Parliament alone. The courts may not inquire into the methods by which Parliament exercises control over the Executive, nor their adequacy.

The FBU case

250. Defining the proper boundaries between the respective responsibilities of Parliament, the Executive and the courts lay at the heart of the dispute in the *FBU* case (*R v Secretary of State for the Home Department Ex p Fire Brigades Union* [1995] 2 AC 513). That case concerned statutory provisions (under the Criminal Justice

Act 1988) providing for compensation for criminal injuries, intended to replace a previous non-statutory scheme established under the prerogative. Section 171 provided that the new scheme should come into force on “such day as the Secretary of State may by order ... appoint”. No such date was appointed, but instead after some years the Secretary of State announced that a new non-statutory scheme would be introduced, which was inconsistent with the scheme provided for by the Act. The House of Lords held by 3-2 that this action was an abuse of power and so unlawful. In the leading judgment Lord Browne-Wilkinson noted that the new scheme was to be brought into effect -

“... at a time when Parliament has expressed its will that there should be a scheme based on the tortious measure of damages, such will being expressed in a statute which Parliament has neither repealed nor (for reasons which have not been disclosed) been invited to repeal.

..., it would be most surprising if, at the present day, prerogative powers could be validly exercised by the executive so as to frustrate the will of Parliament expressed in a statute and, to an extent, to pre-empt the decision of Parliament whether or not to continue with the Statutory scheme even though the old scheme has been abandoned. It is not for the executive ... to state as it did in the White Paper (paragraph 38) that the provisions in the Act of 1988 ‘will accordingly be repealed when a suitable legislative opportunity occurs.’ It is for Parliament, not the executive, to repeal legislation ...” (p 552D-E)

He concluded:

“By introducing the tariff scheme he debars himself from exercising the statutory power for the purposes and on the basis which Parliament intended. For these reasons, in my judgment the decision to introduce the tariff scheme at a time when the statutory provisions and his power under section 171(1) were on the statute book was unlawful and an abuse of the prerogative power.” (p 554G)

The minority, by contrast, regarded the majority’s decision (in Lord Keith’s words - p 544) as “a most improper intrusion into a field which lies peculiarly within the province of Parliament”.

251. In a recent article (*A dive into deep constitutional waters: article 50, the Prerogative and Parliament* (2016) 79(6) MLR 1064-1089), Professor Gavin Phillipson considers some lessons from that decision for the present case. As he points out (*ibid* p 1082), the apparently fundamental difference of approach between majority and minority came down ultimately to a narrow issue of statutory construction of section 171: whether the section imposed no duty owed to the public (p 544F per Lord Keith), or rather, as the majority thought (p 551D, per Lord Browne Wilkinson), it imposed a continuing obligation on the Secretary of State to consider whether to bring the statutory scheme into force, which was frustrated by implementation of the inconsistent non-statutory scheme.

252. Professor Phillipson also draws attention to the important observations by Lord Mustill on the balance between the three organs of the state, and in particular the means by which Parliament exercises control of the Executive, not restricted to legislative control. Although stated in a minority judgment, the underlying principles are not I believe controversial. Lord Mustill said:

“It is a feature of the peculiarly British conception of the separation of powers that Parliament, the executive and the courts each have their distinct and largely exclusive domain. Parliament has a legally unchallengeable right to make whatever laws it thinks right. The executive carries on the administration of the country in accordance with the powers conferred on it by law. The courts interpret the laws, and see that they are obeyed. This requires the courts on occasion to step into the territory which belongs to the executive, not only to verify that the powers asserted accord with the substantive law created by Parliament, but also, that the manner in which they are exercised conforms with the standards of fairness which Parliament must have intended. Concurrently with this judicial function *Parliament has its own special means of ensuring that the executive, in the exercise of delegated functions, performs in a way which Parliament finds appropriate. Ideally, it is these latter methods which should be used to check executive errors and excesses; for it is the task of Parliament and the executive in tandem, not of the courts, to govern the country ...*” (p 567D-F, emphasis added)

253. Lord Mustill went on to comment on the development over the previous 30 years of court procedures to fill gaps where the exercise of such “specifically Parliamentary remedies” has been perceived as falling short, and “to avoid a vacuum in which the citizen would be left without protection against a misuse of executive powers”. He thought these judicial developments were welcome but not without risks:

“As the judges themselves constantly remark, it is not they who are appointed to administer the country. Absent a written constitution much sensitivity is required of the parliamentarian, administrator and judge if the delicate balance of the unwritten rules evolved (I believe successfully) in recent years is not to be disturbed ...” (p 567H)

254. Professor Phillipson comments:

“... the British constitution works most effectively when parliamentary and judicial forms of control and accountability, rather than being framed as antagonistic alternatives, or mutually exclusive directions of travel, work together, but with clearly defined, differentiated and mutually complementary roles.” (p 1089)

255. That observation is particularly pertinent having regard to the debate which took place on the opposite side of Parliament Square on the last day of the hearing in the Supreme Court. That led to the motion, passed by a large majority of the House of Commons, the terms of which have been set out by Lord Reed (para 163). In particular, it recognised that it is “Parliament’s responsibility to properly scrutinise the Government while respecting the decision of the British people to leave the European Union”, and ended by “call(ing) on the Government to invoke article 50 by 31 March 2017”. Of course the House of Commons is not the same as “the Queen in Parliament”, whose will is represented exclusively by primary legislation. However, the motion lends support to the view that, at least at this initial stage of service of a notice under article 50(2), the formality of a Bill is unnecessary to enable Parliament to fulfil its ordinary responsibility for scrutinising the government’s conduct of the process of withdrawal.

Application of the principles to the present case

256. The logical starting point for consideration of the present case is the power which is in issue: that is, the power under article 50 of the Lisbon treaty to initiate the procedure for withdrawal by a decision in accordance with our “constitutional requirements”, followed by service of a notice. The existence of that power in international law is not in doubt. The issues for the court are, first, who has the right under UK constitutional principles to exercise it, and, secondly, subject to what constitutional requirements. As to the first, under *Tin Council* principles the position is clear. In the absence of any statutory provision to the contrary, the power to make or withdraw from an international treaty lies with the Executive, exercising the prerogative power of the Crown. As to the second, it is necessary to consider whether that power is subject to any restrictions by statute, express or implied, or in the common law.

257. In agreement with Lord Reed, and for the same reasons, I find no such restrictions in the EU statutes. I agree with Mr Eadie that this issue must be considered by reference to the statutory scheme as it exists at the time the power in question is to be exercised. The 1972 Act of course provided the framework for what followed. But I find it illogical to search in that Act for a presumed Parliamentary intention in respect of withdrawal, at a time when the treaty contained no express power to withdraw, and there was no reason for Parliament to consider it. The 1972 Act did not remove the Crown’s treaty-making prerogative in respect of European matters, whether expressly or by implication (as under the *De Keyser* principle: majority judgment para 48). No-one doubts the power of the Executive in 2008 to enter into the Lisbon Treaty, including article 50.

258. The critical issue is how Parliament dealt with that matter for the purposes of domestic law. In the 2008 Act Parliament recognised the Lisbon treaty (including article 50) by its inclusion in the treaties listed in section 1 of the 1972 Act. Thereafter it became (by virtue of 1972 Act section 2(1)) part of the statutory framework “in accordance with” which, and therefore subject to which, any rights and obligations derived from EU law by virtue of that Act were to be enjoyed in domestic law. Unlike other powers in the treaty, the 2008 Act did not impose any restriction on the exercise of article 50 by the Executive. That position was confirmed by the 2011 Act, which made specific reference to article 50(3) but placed no restriction on article 50(2). There the matter rests today.

259. Turning to the common law, the *Tin Council* rule is simple and uncontroversial: the prerogative does not extend “to altering the law or conferring rights upon individuals or depriving individuals of rights which they enjoy in domestic law without the intervention of Parliament”. Judged by that test the answer again is clear. Service of an article 50(2) notice will not, and does not purport to, change any laws or affect any rights. It is merely the start of an essentially political process of negotiation and decision-making within the framework of that article. True it is that it is intended to lead in due course to the removal of EU law as a source of rights and obligations in domestic law. That process will be conducted by the Executive, but it will be accountable to Parliament for the course of those negotiations and the contents of any resulting agreement. Furthermore, whatever the shape of the ultimate agreement, or even in default of agreement, there is no suggestion by the Secretary of State that the process can be completed without primary legislation in some form.

260. This analysis was in substance adopted by Maguire J in the *McCord* proceedings, in line with the submissions of the Attorney General for Northern Ireland (repeated in this court). He said:

“In the present case, it seems to the court that there is a distinction to be drawn between what occurs upon the triggering of article 50(2) and what may occur thereafter. As the Attorney General for Northern Ireland put it, the actual notification does not in itself alter the law of the United Kingdom. Rather, it is the beginning of a process which ultimately will probably lead to changes in United Kingdom law. On the day after the notice has been given, the law will in fact be the same as it was the day before it was given. The rights of individual citizens will not have changed - though it is, of course, true that in due course the body of EU law as it applies in the United Kingdom will, very likely, become the subject of change. But at the point when this occurs the process necessarily will be one controlled by parliamentary legislation, as this is the mechanism for changing the law in the United Kingdom.” (para 105)

261. The Divisional Court (para 17) took a different approach. They in effect adopted the analysis proposed by Lord Pannick, taking account of the agreed (albeit possibly controversial) assumption that the article 50(2) notice is irrevocable. On that footing, even if it has no immediate effect, it will lead inexorably to actual withdrawal at latest two years later (subject to agreement to defer). Lord Pannick drew the analogy of a trigger being pulled (written case para 11-12):

“... it is the giving of the notice which triggers the legal effects under article 50(3). Those effects are that once notification is given, ‘[t]he Treaties shall cease to apply to the state in question’, from the date of a withdrawal agreement, or - if no such agreement is reached - at the latest within two years from notification, unless an extension of time is unanimously agreed by the European Council and the member state concerned. Notification is ... the pulling of the trigger which causes the bullet to be fired, with the consequence that the bullet will hit the target and the Treaties will cease to apply.”

262. Lord Pannick’s trigger/bullet analogy is superficially attractive, but (with respect) fallacious. A real bullet does not take two years to reach its target. Nor is its progress accompanied by an intense period of negotiations over the form of protection that should be available to the victim by the time it arrives. The treaties will indeed cease to apply, and domestic law will change; but it is clearly envisaged that the final form of the changes will be governed by legislation. As the Secretary of State has explained, the intention is that the legislation will where possible reproduce existing European-based rights in domestic law, but otherwise ensure that there is no legal gap.

263. Although there is no evidence from any government witness on the intended role of Parliament, we were shown without objection or contradiction the statement made by the Secretary of State to Parliament on 10 October 2016 (Hansard Vol 615). Having described the “mandate” for Britain to leave the European Union as “clear, overwhelming and unarguable”, he explained the government’s plans for a “great repeal Bill”:

“We will start by bringing forward a great repeal Bill that will mean the European Communities Act 1972 ceases to apply on the day we leave the EU ...

The great repeal Act will convert existing European Union law into domestic law, wherever practical. That will provide for a calm and orderly exit, and give as much certainty as possible to employers, investors, consumers and workers ...

In all, there is more than 40 years of European Union law in UK law to consider, and some of it simply will not work on exit. We must act to ensure there is no black hole in our statute book. It will then be for this House - I repeat, this House - to consider changes to our domestic legislation to reflect the outcome of our negotiation and our exit, subject to international treaties and agreements with other countries and the EU on matters such as trade ...”

264. On the assumption that such a Bill becomes law by the time of withdrawal, there will be no breach of the rule in its classic form. The extent to which existing laws are changed or rights taken away will be determined by the legislation. Ultimately of course that result depends on the will of Parliament; it is not in the gift of the executive. But there is no basis for making the opposite assumption. Lord Pannick’s argument in effect requires the classic rule to be reformulated: “the prerogative does not extend to any act which will necessarily lead to the alteration of the domestic law, or of rights under it, whether or not that alteration is sanctioned by Parliament”. We were shown no authority to support a rule as so stated, nor any principled basis for the court to invent it. In any event, that process, like the service of the article 50 notice, will be subject to Parliamentary scrutiny in whatever way Parliament chooses. It will be for Parliament and the Executive acting in partnership to determine the timing and content of the legislative programme.

Pre-empting the will of Parliament

265. One possible answer to the analysis in the previous paragraph is that it would involve the Executive unlawfully “frustrating” or “pre-empting” the will of Parliament. This point is touched on in the majority judgment by reference in particular to the Lord Browne-Wilkinson’s statements in the *FBU* case (see para 250 above). They are said to establish the principle that ministers cannot “frustrate” the purpose of a statute “for example by emptying it of content or preventing its effectual operation”; and that it is -

“... inappropriate for ministers to base their actions (or to invite the court to make any decision) on the basis of an anticipated repeal of a statutory provision as that would involve ministers (or the court) pre-empting Parliament’s decision whether to enact that repeal.” (majority judgment para 51)

266. As I understand the majority judgment, however, this line of argument does not ultimately form part of their reasoning, in my view rightly so. In the first place, the *FBU* case was about abuse, not absence, of power. There was no doubt as to the existence of the prerogative power. But it was held to be an abuse to use it for a purpose inconsistent with the will of Parliament, as expressed in a statute which it had neither repealed nor been invited to repeal. Such issues do not arise in this case. The Miller respondents base their case unequivocally on absence of a prerogative power to nullify the statutory scheme set up by the 1972 Act, rather than abuse (see Lord Pannick’s response to Lord Reed: Day 2 Transcript, p 158, lines 8-25).

267. Further, Lord Browne-Wilkinson was not purporting to lay down any general principle about the relevance of future legislation in relation to the exercise of the prerogative. His comments were directed to the facts of the particular case, in which the new scheme was being introduced without any reference at all to Parliament. Similar arguments in the present case would have to be seen in a quite different context, which (as Lord Pannick accepts) would include the 2015 Act and the referendum result. It is one thing, as in the *FBU* case, to use the prerogative to introduce a scheme which is directly contrary to an extant Act, and which Parliament has had no chance to consider. It is quite another to use it to give effect to a decision the manner of which has been determined by Parliament itself, and in the implementation of which Parliament will play a central role. In such circumstances talk of frustrating or pre-empting the will of Parliament would be wide of the mark. Conversely, it would be wrong to assume (as the majority appears to do: para 91) that the courts would necessarily have been powerless in the (politically inconceivable) event of the Executive initiating withdrawal entirely of its own motion, or even in defiance of a referendum vote to remain.

Protection of individual interests

268. I would not wish to leave the case without acknowledging the important submissions made by the other respondents and interveners, particularly as to the scale and significance of the interests which will be affected by withdrawal. It is not clear, however, how a requirement for statutory authority for the article 50(2) notice will do anything to safeguard those interests, nor indeed to advance the process of Parliamentary scrutiny which will ultimately be critical to their protection.

269. I take as representative the cases for the third and fourth respondents, presented by Ms Mountfield QC and Mr Gill QC. Their submissions provide vivid illustrations of the variety of ways in which individual and group interests will be profoundly affected by implementation of the decision to leave the EU. Ms Mountfield for example provides a detailed breakdown of “fundamental” and “non-replicable” EU citizenship rights. The list starts with the “fundamental status” of EU citizenship (Citizens’ Directive 2004/38/EC preamble), leading to more specific rights, such as the right to move, reside, work and study throughout the member states, the right to vote in European elections, the rights to diplomatic protection, and the right to equal pay, and to non-discriminatory healthcare free at the point of use. She categorises the government’s case as an assertion of -

“untrammelled prerogative power to do away with the entire corpus of European law rights currently enjoyed under UK law, and render a whole suite of constitutional statutes meaningless, without any Parliamentary authority in the form of a statute.”

While there is no reason to question her account of the profound effect of the prospective changes, I do not for the reasons already given accept that this can be describe as “untrammelled” use of executive power, nor that the control of Parliament will be improperly bypassed. Nor does she explain how that impact will be mitigated by a statute which does no more than authorise service of the notice.

270. Similar arguments are made by Mr Gill for the fourth respondents (the AB parties). They are representative, among others, of the very large numbers of EEA nationals and their children living in this country, whose rights to continued residence will be threatened unless adequate arrangements are made to protect them. Mr Gill refers in particular to the important right under the Citizens’ Directive for those who have lived in the UK for five years to apply for citizenship in the following year, a right which will be lost on withdrawal. Section 7 of the Immigration Act 1988 provides that a person shall not require leave to enter or remain in the United Kingdom “in any case in which he is entitled to do so by virtue of an enforceable EU right”.

271. Typical is Mrs KK, a Polish national resident and working here since 2014, married to a third country national, with a Polish national child born in the UK in 2015. She feels “in a complete state of limbo” having received no assurance from the Secretary of State as to what her status will be during and after the withdrawal negotiations, nor how her husband and child will be affected. Such people, says Mr Gill, will have made life-changing decisions and moved permanently to the UK with the ultimate intention of acquiring permanent residence. They may also find themselves exposed to criminal liability under the Immigration Act 1971 if their status is removed. Mr Gill recognises that Parliament may prior to actual withdrawal put in place a statutory protection mechanism; but that depends on the will of Parliament, which, he says, the Secretary of State cannot lawfully pre-empt. It is, he submits, a misuse of the prerogative to “foist” such a situation on Parliament; the rights to remain “must be addressed by Parliament before the giving of the article 50(2) notice.”

272. There are two problems with that submission. First, it is difficult to talk of the Executive “foisting” on Parliament a chain of events which flows directly from the result of the referendum which it authorised in the 2015 Act. Secondly, however desirable it would be for issues of detail such as those affecting his clients to be addressed at this stage, it is wholly inconsistent with the structure of article 50. That assumes the initiation of the process by a simple notice under article 50(2), to be followed by detailed negotiations leading if possible to an agreement on the terms of withdrawal. The details of the protections available for Mr Gill’s clients must depend, at least in part, on the outcome of those negotiations.

273. No doubt for this reason such an extreme argument is not adopted by the other respondents. They accept that, at this stage of the article 50 process, they cannot reasonably expect anything more than bare statutory authorisation for the service of the notice. That is realistic. But it also underlines the point that successful defence of the Divisional Court’s order will do nothing to resolve the many practical issues which will need to be addressed over the coming period, nor to protect the rights of those directly affected. Those problems, and the need for Parliament to address them, will remain precisely the same with or without statutory authorisation for the article 50 notice. If that is what the law requires, so be it. But some may regard it as an exercise in pure legal formalism.

Conclusion

274. Shortly after the 1972 Act came into force, Lord Denning famously spoke of the European Treaty as “like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back ...” (*Bulmer Ltd v Bollinger* [1974] Ch 401, 418F). That process is now to be reversed. Hydrologists may be able to suggest an

appropriate analogy. On any view, the legal and practical challenges will be enormous. The respondents have done a great service in bringing these issues before the court at the beginning of the process. The very full debate in the courts has been supplemented by a vigorous and illuminating academic debate conducted on the web (particularly through the UK Constitutional Law Blog site). Unsurprisingly, given the unprecedented nature of the undertaking there are no easy answers. In the end, in respectful disagreement with the majority, I have reached the clear conclusion that the Divisional Court took too narrow a view of the constitutional principles at stake. The article 50 process must and will involve a partnership between Parliament and the Executive. But that does not mean that legislation is required simply to initiate it. Legislation will undoubtedly be required to implement withdrawal, but the process, including the form and timing of any legislation, can and should be determined by Parliament not by the courts. That involves no breach of the constitutional principles which have been entrenched in our law since the 17th century, and no threat to the fundamental principle of Parliamentary sovereignty.

LORD HUGHES: (dissenting)

275. Some observers, who have not been provided with the very detailed arguments which have been debated before us (or the something over 20,000 pages of documents which supported those arguments) might easily think that the principal question in this case is: “Does the 2016 referendum result not conclude the issue, and mean that the country is bound to leave the EU?” In fact, that is not the principal question. No-one suggests that the referendum by itself has the legal effect that a Government notice to leave the EU is made lawful. Specifically, that is not the contention of the Government, speaking through the Secretary of State for exiting the EU. The referendum result undoubtedly has enormous political impact, but it is not suggested by the Government that it has direct legal effect.

276. The principal question in this case is not whether the UK ought or ought not to leave the EU. That is a matter for political judgment, which is where the referendum comes in. Courts do not make political judgments. The question in this case is not *whether*, but *how*, the UK may lawfully set about leaving the EU, if that is the political decision made. It is about the legal mechanics of leaving.

277. As the foregoing judgments show, this case is capable of stimulating discussion on a number of legally interesting topics. There are also supplementary questions arising out of the legal positions of Scotland, Northern Ireland and Wales. But, at some risk of over-simplifying, the main question centres on two very well understood constitutional rules, which in this case apparently point in opposite directions. They are these:

Rule 1

the executive (government) cannot change law made by Act of Parliament, nor the common law;

and

Rule 2

the making and unmaking of treaties is a matter of foreign relations within the competence of the government.

278. Nobody questions either of these two rules. Mrs Miller relies on the first. The government relies on the second. The government contends that Rule 2 operates to recognise its power, as the handler of foreign relations, to unmake the European Treaties. Mrs Miller contends that Rule 1 shows that the power to handle foreign relations stops short at the point where UK statute law is changed.

279. Mrs Miller’s case is that because there was an Act of Parliament (the European Communities Act 1972) to give effect to our joining the (then) EEC and to make European rules part of UK law, there has to be another Act of Parliament to authorise service of notice to leave. This is the effect, she says, of Rule 1. Thus, she says, Rule 2 is true, but does not apply.

280. The government’s case is that the European Communities Act 1972, which did indeed make European rules into laws of the UK, will simply cease to operate if the UK leaves. The Act was only ever designed to have effect whilst we were members of the EU. It agrees that as a government it cannot alter the law of the UK which statute has made, but it says that if it serves notice to leave the EU, and in due course we leave, it would not be

altering the statute; the statute would simply cease to apply because there would no longer be rules under treaties to which the UK was a party. Thus, it says, Rule 1 does not apply and Rule 2 does.

281. Which of these arguments is correct depends in the end on the true reading of the European Communities Act 1972. Clearly, either reading is possible. The majority judgment gives cogent expression to the conclusion that it is Mrs Miller's reading which is correct. For my part, for the reasons which Lord Reed very clearly sets out, I would have preferred the view that this Act was only ever to be operative for so long as the UK was a member of (first) the EEC, and now the EU. It is not helpful, particularly because this is a minority view, to repeat the analysis which Lord Reed expounds. I agree with his judgment. In short, because of Rule 1 the Act was necessary to convert the UK's international obligations under the various European treaties into law with domestic effect. Without the Act, those European rules would have had effect between States at the international level but would not have been part of domestic UK law and so would not have bound UK citizens individually. But the Act is couched in terms which give legal effect to the obligations and rules which arise under the treaties. If the UK leaves the EU, there are no longer any treaties to which this country is a party. It seems to me to follow that the Act will cease to import any of the rules which presently it does. The Act is not changed; it does, however, cease to operate because there are no longer any treaty rules for it to bite upon.

282. Thus I would, for myself, have allowed the appeal of the Secretary of State from the decision of the (English) Divisional Court. I agree that on either view of the principal Miller appeal, the devolution questions raised should all be answered "no", for the reasons set out in the majority judgment. I likewise agree with the majority's treatment of the Sewel convention.

283. It remains only to add that the arguments before us made it clear that whatever the outcome of the Miller appeal, much the same legislative programme will be required in Parliament, upon the UK's departure from the EU, to deal with the multifarious legal rules presently operative via the 1972 Act. The issues before this court do not touch this exercise, which will be a matter in any event for Parliament. The court is concerned only with the necessary procedure for the service of an article 50 notice to leave.

URL: <http://www.bailii.org/uk/cases/UKSC/2017/5.html>