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JUDGMENT OF THE COURT (Second Chamber)
13 December 1989 *

In Case C-100/88

Augustin Oyowe and Amadou Traore, members of staff of the European Association for Cooperation, an international non-profit-making association set up under Belgian law, represented by Edmond Lebrun, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Tony Biever, 85 boulevard Grande-Duchesse-Charlotte

applicants,

v

Commission of the European Communities, represented by Hendrik van Lier, a member of its Legal Department, acting as Agent, assisted by Claude Verbraeken, of the Brussels Bar, with an address for service in Luxembourg at the office of Georgios Kremlis, a member of the Commission's Legal Department, Wagner Centre, Kirchberg,

defendant,

APPLICATION:

(a) for a declaration that the applicants are members of staff of the Commission within the meaning of Article 2(c) of the Conditions of Employment of Other Servants of the European Communities (hereinafter referred to as 'the Conditions of Employment'), with all legal consequences entailed thereby;

(b) for an order that the Commission should appoint the applicants officials or, at the very least, initiate in respect of them the procedure for appointment as officials;

* Language of the case: French

(c) in the alternative, for an order that the Commission should guarantee that they will enjoy the full benefit of their pensions regardless of the country in which they may reside in the future;

(d) for the annulment of the decision rejecting their complaint,

THE COURT (Second Chamber)

composed of: F. A. Schockweiler, President of Chamber, G. F. Mancini and T. F. O'Higgins, Judges,

Advocate General: M. Darmon
Registrar: J. A. Pompe, Deputy Registrar

having regard to the Report for the Hearing and further to the hearing on 27 June 1989,

after hearing the Opinion of the Advocate General delivered at the sitting on 11 October 1989,

gives the following

Judgment

1 By application lodged at the Court Registry on 24 March 1988, Augustin Oyowe, a Nigerian national, and Amadou Traore, of Malian and French nationality, members of the staff of the European Association for Cooperation (hereinafter referred to as 'the Association'), both working as journalists on the bi-monthly publication *The Courier: Africa-Caribbean-Pacific-European Community* (hereinafter referred to as the 'Courier'), brought an action seeking a declaration that they were members of the staff of the Commission, an order that the Commission should appoint them officials or initiate in respect of them the procedure for appointment as officials and, in the alternative, for an order that the Commission should guarantee that they will enjoy the full benefit of their pensions regardless of the country in which they may reside in the future.

2 The applicants are members of the 'cooperation staff' of, and bound by 'cooperation staff contracts' to, the Association, which is an international non-profit-making association set up under Belgian law with the aim of facilitating cooperation between the Community and the developing countries. The Association has three categories of staff: headquarters staff, overseas staff, and staff recruited by the Association under special contracts (hereinafter referred to as 'special contract staff') and seconded to the Commission.

3 It must be noted that the distinction between special contract staff and cooperation staff is a budgetary one — the former are paid by the Association out of its global resources, while the salaries of the latter are financed by the European Development Fund, in connection with the implementation of a particular project.

4 It is common ground that the applicants, as cooperation staff bound by a contract of employment with an association governed by Belgian private law, come under Belgian pensions law, under which they cease to receive a pension if they leave Belgium. In such an event, they cannot obtain any reimbursement of the pension contributions they have paid.

5 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the course of the procedure and the submissions and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

Admissibility

6 The Commission contends that the Court has no jurisdiction to hear the case inasmuch as the applicants do not have the status of officials or other servants of the Communities.

7 It must be pointed out that the Court has on numerous occasions held (see, *inter alia*, the judgments of 13 July 1989 in Case 286/83 *Alexis and Others* v *Commission* [1989] ECR 2445, and Case 161/86 *Jaeger* v *Commission* [1989] ECR 2467) that it is not only persons who have the status of officials or of employees other than local staff who may bring an action before the Court to contest a decision adversely affecting them, but also persons claiming that status.

9 The objection of inadmissibility raised by the Commission must therefore be rejected.

Substance

9 In their principal claim the applicants allege a breach of general principles of law, in particular the principles of fairness and equality. They maintain that the Association is their employer in appearance only, their real employer being the Commission, and claim that they are the only members of the Association's staff not to have been appointed officials of the Commission. In the alternative, they argue that the Commission has assumed responsibility for them inasmuch as they can receive payment of their pensions only if they remain in Belgium.

10 In support of the first claim, the applicants refer to the Association's relationship with the Commission and, in particular, the fact that the publisher of the Courier is one of the Commission's Directors-General, that the Courier appears in the organization chart of Directorate-General VIII of the Commission, that the applicants' contracts of employment contain clauses under which they are placed at the disposal of the Commission and, finally, that the Commission has the power to manage and direct the Courier.

11 In that connection, it must be pointed out that the situation of the applicants, in the specific context of the Courier, has not disclosed any new factor concerning the legal status of the Association which, as the Court has consistently held (see, most recently, the judgments of 13 July 1989 in *Alexis* and *Jaeger*, cited above), is an international, non-profit-making association governed by Belgian law and cannot be regarded as an administrative unit of the Commission. The applicants' employer is therefore the Association, and not the Commission. That claim must consequently be dismissed.

12 The applicants claim, further, that there is discrimination between them and the other members of the Association's staff, who have all been established by the Commission as officials of the Communities.

12 The Commission considers that the fact that it has not established the applicants is justified objectively by the consideration that the status of Community official is not compatible with the role of representing the perspective of the African, Caribbean and Pacific States (hereinafter referred to as 'the ACP States') fulfilled by the applicants within the joint editorial team of the Courier. The original reason for the applicants' recruitment is evidence of the special role which they fulfil. The duty of allegiance to the Community imposed on all officials under the Staff Regulations of Officials of the Communities (hereinafter referred to as 'the Staff Regulations') cannot be reconciled with the duties which Mr Oyowe and Mr Traore are called upon to carry out within the Courier's editorial team.

13 It must be noted, first, that the editorial team of the Courier is made up partly of Commission officials including, in particular, one journalist of European origin, a former member of the special contract staff who was established in 1981. According to the Commission, the contracts governing the employment relationship between the Association and special contract or cooperation staff are similar and the duties of staff of a given grade are not markedly different, the difference between the two categories of staff members being essentially of a budgetary character. It follows that the applicants' situation under their cooperation staff contract with the Association is not appreciably different from that of their colleagues who are members of the special contract staff.

14 It must also be pointed out that it is clear from the documents before the Court that, although the original reason for recruiting the applicants can be traced to an initiative on the part of the Committee of ACP Ambassadors, nevertheless, under the rules of professional conduct adopted on 3 October 1978 by the Courier's joint committee and applicable to all the members of its editorial staff, journalists with the Courier, whatever their country of origin, do not defend the points of view and interests of either the ACP States or the Member States, but all work for the common cause of cooperation between the ACP States and the Community. Consequently, journalists on the Courier, whether Community officials or members of the Association's staff originating from an ACP State, are governed by the same code of practice, and at the most the applicants represent the perspective of their places of origin within the Courier's editorial team, just as their colleagues who are European officials do by reason of their origin in a Member State. Within the joint ACP-EEC editorial team, the role of representing the perspective of either the ACP States or a Member State is not incompatible with the status of an official, and cannot constitute a justification for the Commission's rejection of the applicants' request to be established.

18 Finally, it must be borne in mind that in any event the duty of allegiance to the Communities imposed on officials in the Staff Regulations cannot be interpreted in such a way as to conflict with freedom of expression, a fundamental right which the Court must ensure is respected in Community law, which is particularly important in cases, such as the present, concerning journalists whose primary duty is to write in complete independence of the views of either the ACP States or the Communities.

19 In view of all those considerations, it must be concluded that the Commission has been unable to provide any objective justification for its refusal to grant the applicants' request to be established either because of their special position arising out of the nature of their contracts of employment with the Association or because the applicants represent the perspective of the ACP States within the Courier's editorial team.

20 The implied decision rejecting the applicants' complaint must therefore be annulled.

21 It must be stated, however, that it is not for the Court to order the administration to appoint the applicants as officials (judgment of 26 January 1989 in Case 224/87 *Kourchoumoff* v *Commission* [1989] ECR 99). The claims to that effect must therefore be dismissed. It is to be stressed, nevertheless, that the Commission must take the steps necessary in order to implement this judgment.

22 In view of the foregoing considerations, the alternative claim is no longer relevant.

Costs

23 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Commission has failed in its main submissions, it must be ordered to pay the costs.

On those grounds,

THE COURT (Second Chamber)

hereby:

(1) **Annuls the implied decision of the Commission rejecting the applicants' complaint of 4 November 1987;**

(2) **Dismisses the remainder of the application;**

(3) **Orders the Commission to pay the costs.**

Schockweiler Mancini O'Higgins

Delivered in open court in Luxembourg on 13 December 1989.

J.-G. Giraud
Registrar

F. A. Schockweiler
President of the Second Chamber

JUDGMENT OF THE COURT (Fifth Chamber)

28 October 1992 *

In Case C-219/91,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Arrondissementsrechtbank (District Court), Leeuwarden (Netherlands), for a preliminary ruling in the criminal proceedings before that court against

Johannes Stephanus Wilhelmus Ter Voort

on the interpretation of the first subparagraph of Article 1(2) of Council Directive 65/65/EEC of 26 January 1965 on the approximation of provisions laid down by law, regulation or administrative action relating to proprietary medicinal products (OJ, English Special Edition 1965-66, p. 20),

THE COURT (Fifth Chamber),

composed of: G. C. Rodríguez Iglesias, President of the Chamber, M. Zuleeg, R. Joliet, J. C. Moitinho de Almeida and F. Grévisse, Judges,

Advocate General: G. Tesauro,
Registrar: L. Hewlett, Administrator,

* Language of the case: Dutch.

after considering the written observations submitted on behalf of:

— Mr Ter Voort, the appellant in the main proceedings, by G. van de Wal, Advocate with the right of audience at the Hoge Raad der Nederlanden (Supreme Court of the Netherlands),

— the Netherlands Government, by B. R. Bot, Secretary-General of the Ministry for Foreign Affairs, acting as Agent,

— the Belgian Government, by R. Van Hellemont, Head of the Directorate for Administration of European Affairs in the Ministry for Foreign Affairs, acting as Agent,

— the Italian Government, represented by Luigi Ferrari Bravo, Head of the Department for Contentious Diplomatic Affairs of the Ministry for Foreign Affairs, acting as Agent, assisted by Oscar Fiumara, Avvocato dello Stato,

— the Commission of the European Communities, by Berend Jan Drijber, of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Ter Voort and the Commission of the European Communities at the hearing on 9 July 1992,

after hearing the Opinion of the Advocate General at the sitting on 22 September 1992,

gives the following

Judgment

1 By order of 15 August 1991, which was received at the Court on 26 August 1991, the Arrondissementsrechtbank, Leeuwarden (Netherlands), referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty four questions on the interpretation of the term 'medicinal product' within the meaning of the first subparagraph of Article 1(2) of Council Directive 65/65/EEC of 26 January 1965 on the approximation of provisions laid down by law, regulation or administrative action relating to proprietary medicinal products (OJ, English Special Edition 1965-66, p. 20, hereinafter referred to as 'Directive 65/65').

2 The questions arose in criminal proceedings brought against Mr Ter Voort, who was prosecuted for having, from the end of 1987 until 29 November 1988, or at least on that date, imported, held, prepared, sold or held in stock at Leeuwarden or, at least, in the Netherlands, proprietary medicinal products contrary to the provisions of Article 3(5) of the Netherlands Law on the Supply of Medicinal Products (Wet op de Geneesmiddelenvoorziening).

3 It appears from the case-file that Mr Ter Voort, trading as 'Fitness Foundations Nederland', markets in Leeuwarden herbal teas imported from South America. The herbal teas are sold without any indication of any therapeutic properties. However, a foundation, 'Stichting Nieuwe Horizon', which is based at Harlingen (Netherlands), sends consumers on request brochures describing the therapeutic or prophylactic properties of the herbal teas.

4 According to Article 3(5) of the Netherlands Law on the Supply of Medicinal Products, proprietary pharmaceutical products and preparations may not be prepared, sold, imported or held in stock until they have been registered by the public authorities.

5 Article 1(1) of that law contains the following definition:

"(e) medicinal product: any substance or combination of substances which is intended to be used or which is in any way indicated or recommended as being suitable for:

1. Healing, treating or preventing any infection, disease, symptom, pain, wound or deficiency in human beings;

2. Restoring, correcting or modifying the function of bodily organs in human beings;

3. Making a medical diagnosis by its administration to or use upon human beings;

...

(h) proprietary medicinal product: a medicinal product in the form of a pharmaceutical product placed on the market under a special name and in a special pack ...".

6 In the Dutch courts, Mr Ter Voort argued in his defence that the herbal teas in question could not be described as medicinal products within the meaning of the Netherlands legislation without disregarding the provisions of Article 1(2) of Directive 65/65, cited above.

7 Since the Arrondissementsrechtbank, Leeuwarden, considered that an interpretation of the Community provisions was necessary, it stayed the proceedings and referred the following questions to the Court for a preliminary ruling:

'(1) Is a product such as a herbal tea which in general is regarded as a foodstuff and in accordance with current scientific knowledge does not possess any pharmacological properties but is presented as having therapeutic or prophylactic properties a medicinal product within the meaning of the first subparagraph of Article 1(2) of Directive 65/65/EEC?

(2) Does it make any difference to the answer to the first question:

(a) If the description or properties on the packaging, label or enclosed leaflets, but only in documentation (a brochure) which is sent upon request by the supplier of the product or by a third party (other than the supplier)?

(b) If the description or properties of the product are not mentioned on the packaging, label or enclosed leaflets, but are described in a publication (a brochure) whose distribution is unconnected with the sale of the product and/or is arranged by or on the direction of a third party who is not the seller or supplier of the product, regard being had also to Article 10 of the European Convention on Human Rights?

(3) Does the word "presented" in the first subparagraph of Article 1(2) of Directive 65/65/EEC mean that there must be a link between the product and the presentation?

(4) Is it compatible with the first subparagraph of Article 1(2) of Directive 65/65/EEC for the legislation of Member States to regard as medicinal products, in addition to products presented as medicinal products within the meaning of that provision, foodstuffs to which therapeutic or prophylactic properties are ascribed by the seller or third parties, although in the light of present-day scientific knowledge those products possess no pharmacological properties?'

8 Reference is made to the Report for the Hearing for a fuller account of the facts of the main proceedings, the applicable Community legislation, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

9 It should be pointed out *in limine* that Article 1(1) of Directive 65/65, as amended on several occasions, defines 'proprietary medicinal product' as 'any ready-prepared medicinal product placed on the market under a special name and in a special pack'.

10 According to the first subparagraph of Article 1(2) of Directive 65/65, a 'medicinal product' is 'any substance or combination of substances presented for treating or preventing disease in human beings or animals'; according to the second subparagraph of Article 1(2), 'any substance or combination of substances which may be administered to human beings or animals with a view to making a medical diagnosis or to restoring, correcting or modifying physiological functions in human beings or animals' is likewise to be considered a medicinal product.

11 Consequently, as the Court has consistently held (see, *inter alia*, the judgment in Case C-60/89 *Monteil and Samanni* [1991] ECR I-1547, paragraph 11), the directive thus gives two definitions of medicinal products: a definition 'by virtue of their presentation' and a definition 'by virtue of their functions'. A product is a medicinal product if it falls within either of those definitions.

12 In this case, it appears from the wording of the order for reference that the national court's questions relate not to whether the products in question are medicinal products 'by virtue of their function', but only to whether they must be regarded as such 'by virtue of their presentation'. In their observations to the Court, Mr Ter Voort, the Belgian, Italian and Netherlands Governments and the Commission also agree that the questions relate solely to the interpretation of the provisions of the first subparagraph of Article 1(2) of Directive 65/65.

The first question

11 By its first question, the national court seeks to establish whether a product which in general is regarded as a foodstuff and does not possess any known pharmacological property must be regarded as a medicinal product 'by virtue of its presentation' within the meaning of Directive 65/65 if it is presented as having therapeutic or prophylactic properties.

14 Mr Ter Voort argues that a product which in general is regarded as a foodstuff and as not having any therapeutic effect cannot be categorized as a 'medicinal product' within the meaning of the directive unless its inherent characteristics are such as to cause it to be regarded as having therapeutic or prophylactic properties by an averagely well-informed consumer.

15 According to the Commission and the Belgian, Italian and Netherlands Governments, a product presented as having therapeutic or prophylactic properties is a medicinal product 'by virtue of its presentation' even if in general it is regarded as a foodstuff and even if it has no known therapeutic property.

16 As the Court has consistently held (see, most recently, the judgment in Case C-112/89 *Upjohn* [1991] ECR I-1703, paragraph 16), the 'presentation' criterion used in the first subparagraph of Article 1(2) of Directive 65/65 is designed to catch not only medicinal products having a genuine therapeutic or medical effect but also those which are not sufficiently effective or do not have the effect which their presentation might lead to expect, in order to preserve consumers not only from harmful or toxic medicinal products as such but also from a variety of products used instead of the proper remedies.

17 As the Court has also consistently held (see, *inter alia*, the judgment in *Monteil and Samanni*, cited above, paragraph 23), a product is 'presented for treating or preventing disease' within the meaning of Directive 65/65 in particular when it is

expressly 'indicated' or 'recommended' as such, possibly by means of labels, leaflets or oral representation.

19 Consequently, a product expressly indicated or recommended as having therapeutic or prophylactic properties has to be regarded as a medicinal product 'by virtue of its presentation' even if it has no known therapeutic effect.

20 The Court has also held, in the judgments in Case C-369/88 *Delattre* [1991] ECR I-1487, paragraph 22, and in *Monteil and Samanni*, cited above, paragraph 17, that, even if it comes within the scope of other, less stringent Community rules, such as the rules on cosmetic products, a product must be held to be a medicinal product and be made subject to the corresponding rules if it is presented as possessing therapeutic or prophylactic properties or if it is intended to be administered with a view to restoring, correcting or modifying physiological functions.

21 No more can the fact that a product is in the nature of a foodstuff prevent it from being categorized as a 'medicinal product' within the meaning of the provisions of the first subparagraph of Article 1(2) of Directive 65/65 in so far as the indication or recommendation of its therapeutic or prophylactic properties is in itself of such a kind as to cause it to be regarded as a product presenting the characteristic properties of a therapeutic substance, that is to say, a medicinal product.

22 Accordingly the reply to be given to the national court's first question should be that a product recommended or indicated as having prophylactic or therapeutic properties is a medicinal product within the meaning of the provisions of the first subparagraph of Article 1(2) of Directive 65/65, even if it is generally regarded as a foodstuff and even if in the current state of scientific knowledge it has no known therapeutic effect.

The second and third questions

22 By its second and third questions, which are closely connected and should therefore be considered together, the national court essentially asks whether a product may be categorized as a medicinal product 'by virtue of its presentation' within the meaning of the first subparagraph of Article 1(2) of Directive 65/65 where its therapeutic properties are indicated solely in a publication, such as a brochure, which is sent to the purchaser at his request after the product has been sold or is distributed by a third party independently of the sale of the product, having regard, in the latter case, to the provisions of Article 10 of the European Convention on Human Rights concerning freedom of expression.

23 Mr Ter Voort considers that a product is presented as a medicinal product within the meaning of Directive 65/65 where the presentation is made by the seller, the manufacturer or a third party acting on their behalf if it discloses an intention to market the product as a medicinal product and if it gives the averagely well-informed consumer the impression that a therapeutic substance is involved. He argues that, whereas the dispatch, at the purchaser's request, of information concerning the therapeutic properties of the product may be evidence — moreover not conclusive evidence — of the seller's or the manufacturer's intention to market that product as a medicinal product, that is not the case where the information is disseminated by a third party independently of the seller or the manufacturer.

24 According to the Commission and the Belgian, Italian and Netherlands Governments, a product is presented as a medicinal product within the meaning of Directive 65/65 where there is a direct or indirect link between the presentation and the product. In particular, a publication, sent to the purchaser at his request and setting out the therapeutic properties of the product, constitutes a presentation of the product within the meaning of the directive where it emanates from the supplier or the seller of the product or from a third party acting on behalf of or in connection with the supplier or the seller. The Netherlands Government submits that that may be the case, *inter alia*, where the seller or the supplier does not expressly disassociate himself from a publication made by a third party of which he has had notice.

27 It follows from paragraph 16 above that the provisions of Directive 65/65 are designed among other things to avoid products being placed on the market which do not have therapeutic effects but, for a commercial purpose, are presented as medicinal products by the manufacturer or the seller.

28 The conduct, action and approaches of the manufacturer or the seller which disclose his intention to make the product he markets appear to be a medicinal product in the eyes of an averagely well-informed consumer may therefore be conclusive for the purposes of deciding whether a product should be regarded as a medicinal product by virtue of its presentation.

29 In particular, the fact that the manufacturer or the seller sends the purchaser of the product a publication describing or recommending it as having therapeutic effects constitutes conclusive evidence of the manufacturer's or the seller's intention to market it as a medicinal product.

30 The mere fact that the publication is sent to the purchaser only at his request is not capable of rebutting such an intention on the part of the manufacturer or the seller. The information contained in a publication of the type referred to in the national court's order is of such a kind as to cause the product to appear to be a medicinal product in the eyes of an averagely well-informed consumer who asked to receive the publication and, moreover, in the eyes of any consumers who might learn of the existence of the publication.

31 Likewise, the fact that the publication is sent, not by the manufacturer or the seller, but by a third party acting on their behalf or in connection with them cannot rule out any intention on the part of the seller or the manufacturer to market the product as a medicinal product.

30 In particular, the product may appear to be a medicinal product in the eyes of an averagely well-informed consumer where he is encouraged by the manufacturer or the seller, in particular by indications on the product, to obtain information about its properties from the third party.

31 In contrast, the dissemination of information about the product, in particular about its therapeutic or prophylactic properties, by a third party acting on his own initiative and completely independently, *de jure* and *de facto*, of the manufacturer or the seller does not constitute by itself a 'presentation' within the meaning of the directive, since it does not disclose an intention on the part of the manufacturer or the seller to market the product as a medicinal product.

32 It is for the national court to assess, having regard to the circumstances in question, whether a publication such as a brochure containing indications regarding the therapeutic and prophylactic properties of a product is made completely independently of the manufacturer or the seller of the product and, if it is not so made, whether when the publication is sent to the purchaser of the product at his request it discloses an intention on the part of the manufacturer or the seller to make the product appear to be a medicinal product in the eyes of an averagely well-informed consumer.

33 However, in the event that the publication is disseminated by a third party independently of the sale of the product, the national court's questions refer to Article 10 of the European Convention on Human Rights concerning freedom of expression

34 As the Court has consistently held (see, *inter alia*, the judgment in Case C-260/89 *Elliniki Radiophonia Tileorassi AE* [1991] ECR I-2925, paragraph 41), fundamental rights form an integral part of the general principles of law, the observance of which the Court observes. 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 of which they are signatories. The

European Convention on Human Rights has special significance in that respect. It follows that the Community cannot accept measures which are incompatible with observance of human rights thus recognized and guaranteed.

15 Freedom of expression, as embodied in Article 10 of the European Convention on Human Rights, is among the general principles of law the observance of which is ensured by the Court (judgment in *Elliniki Radiophonia Tileorassi AE*, cited above, paragraph 44).

16 But the freedom of expression of a third party who, in accordance with that which has been stated in paragraph 31 above, acts completely independently of the manufacturer or the seller is not affected, directly or indirectly, by the application of Directive 65/65. The presentation made by such a third party of a product has no bearing on the definition of that product in accordance with the directive.

17 In general, the definition of 'medicinal product' set out in the directive neither aims at, or has the effect of, restricting the freedom of expression of a third party disseminating information about the product. The directive does not prevent or hamper the dissemination of such information. It merely lays down the consequences which the dissemination of that information may possibly have as regards the placing of the product on the market, which will then be subject to special rules.

18 Moreover, even assuming — a not altogether unsurprising assumption since the aim of the involvement of the third party is to bring out the nature of the product as a medicinal product — that the freedom of expression of a third party acting on behalf of the manufacturer or the seller or in connection with one of them can be regarded as limited, and hence as affected, by the risk of bringing the product within the definition of a medicinal product laid down in Directive 65/65, it should be borne in mind that the inherent requirements of the exercise of that freedom must be judged against the requirements of the objective of the protection of public health pursued by Directive 65/65. Moreover, Article 10(2) of the European Convention on Human Rights provides that the exercise of freedom of expression

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 health ...'.

39 Accordingly, the reply to be given to the national court's second and third questions should be that a product whose therapeutic properties are indicated solely in a publication, such as a brochure, which is sent, at his request, to the purchaser after sale by the manufacturer or the seller of the product or by a third party — in the latter case, where the third party does not act completely independently of the manufacturer or the seller — may be categorized as a medicinal product within the meaning of the provisions of the first subparagraph of Article 1(2) of Directive 65/65.

The fourth question

40 The fourth question is concerned with whether a product which is not a medicinal product within the meaning of the provisions of Article 1(2) of Directive 65/65 may nevertheless be subject in the domestic law of a Member State to the rules governing medicinal products.

41 In the judgment in Case 35/85 *Tissier* [1986] ECR 1207, paragraph 22, the Court held that, subject to Article 30 et seq. of the Treaty concerning products imported from other Member States, Community law does not affect the right of Member States to subject substances not meeting the Community definition of medicinal product to controls or to require prior authorization in accordance with their own national law on medicinal products.

42 Accordingly, the reply to be given to the fourth question should be that a product which is not a medicinal product within the meaning of the provisions of Article 1(2) of Directive 65/65 may, subject to Article 30 et seq. of the Treaty concerning products imported from other Member States, be subject in the domestic law of a Member State to the rules governing medicinal products.

Costs

45 The costs incurred by the Governments of the Kingdom of the Netherlands, the Kingdom of Belgium, the Italian Republic and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the Arrondissementsrechtbank, Leeuwarden, by order of 15 August 1991, hereby rules:

1. **A product recommended or indicated as having prophylactic or therapeutic properties is a medicinal product within the meaning of the provisions of the first subparagraph of Article 1(2) of Council Directive 65/65/EEC of 26 January 1965 on the approximation of provisions laid down by law, regulation or administrative action relating to proprietary medicinal products, even if it is generally regarded as a foodstuff and even if in the current state of scientific knowledge it has no known therapeutic effect;**

2. **A product whose therapeutic properties are indicated solely in a publication, such as a brochure, which is sent, at his request, to the purchaser after sale by the manufacturer or the seller of the product or by a third party — in the latter case, where the third party does not act completely independently of the manufacturer or the seller — may be categorized as a medicinal product within the meaning of the provisions of the first subparagraph of Article 1(2) of Directive 65/65;**

3. A product which is not a medicinal product within the meaning of the provisions of Article 1(2) of Directive 65/65 may, subject to Article 30 et seq. of the Treaty concerning products imported from other Member States, be subject in the domestic law of a Member State to the rules governing medicinal products.

Rodríguez Iglesias Zuleeg

Joliet Mota Machado Grévisse

Delivered in open court in Luxembourg on 28 October 1992.

J.-G. Giraud G. C. Rodríguez Iglesias

Registrar President of the Fifth Chamber

ARRÊT DU TRIBUNAL (première chambre)
19 mai 1999 *

«Fonctionnaires – Procédure disciplinaire – Révocation – Articles 11, 12 et 17 du statut – Liberté d'expression – Devoir de loyauté et de dignité de la fonction»

Dans les affaires jointes T-34/96 et T-163/96,

Bernard Connolly, ancien fonctionnaire de la Commission des Communautés européennes, demeurant à Everberg (Belgique), représenté par Me Jacques Sambon et Pierre-Paul Van Gehuchten, avocats au barreau de Bruxelles, ayant élu domicile à Luxembourg en l'étude de Me Louis Schultz, 2, rue du Fort Rheinsheim,

partie requérante,

contre

Commission des Communautés européennes, représentée par MM Gianluigi Valsesia, conseiller juridique principal, et Julian Currall, membre du service juridique, en qualité d'agents, ayant élu domicile à Luxembourg auprès de M. Carlos Gómez de la Cruz, membre du service juridique, Centre Wagner, Kirchberg,

partie défenderesse,

ayant pour objet, d'une part, une demande d'annulation de l'avis du conseil de discipline du 7 décembre 1995 et de la décision de la Commission du 16 janvier 1996, portant révocation du requérant, et, d'autre part, une demande de dommages-intérêts,

* Langue de procédure : le français.

LE TRIBUNAL DE PREMIÈRE INSTANCE
DES COMMUNAUTÉS EUROPÉENNES (première chambre),

composé de MM. B. Vesterdorf, président, J. Pirrung et M. Vilaras, juges,

greffier: M. H. Jung,

vu la procédure écrite et à la suite de la procédure orale du 10 février 1999,

rend le présent

Arrêt

Faits à l'origine du litige

A la date des faits, le requérant, M. Connolly, était fonctionnaire, de grade A 4, échelon 4, de la Commission et chef de l'unité 3 «SME, politiques monétaires nationales et communautaire» au sein de la direction D «affaires monétaires» de la direction générale des affaires économiques et financières (DG II) (ci-après «unité II.D.3»).

2 A partir de 1991, M. Connolly a présenté, à trois reprises, des projets d'articles relatifs, respectivement, à l'application de théories monétaires, à l'évolution du système monétaire européen et aux implications monétaires du livre blanc sur l'avenir de l'Europe, pour lesquels il s'est vu refuser l'autorisation préalable de publication, prévue par l'article 17, second alinéa, du statut des fonctionnaires des Communautés européennes (ci-après «statut»).

3 Le 24 avril 1995, M. Connolly a présenté, en application de l'article 40 du statut, une demande de congé de convenance personnelle, pour une période de trois mois à compter du 3 juillet 1995, en déclarant que les raisons d'une telle demande étaient: a) d'assister son fils, pendant les vacances scolaires, dans sa préparation à l'entrée dans une université du Royaume-Uni, b) de permettre à son père de passer quelque temps avec sa famille, c) de consacrer du temps à la réflexion sur des sujets de théorie économique et de politique et de «rétablir sa relation avec la littérature». La Commission lui a accordé ce congé par décision du 2 juin 1995.

4 Par lettre du 18 août 1995, M. Connolly a demandé à être réintégré dans les services de la Commission à la fin de son congé de convenance personnelle. La Commission l'a réintégré dans son emploi, à partir du 4 octobre 1995, par décision du 27 septembre 1995.

5 Pendant son congé de convenance personnelle, M. Connolly a publié un livre intitulé *The rotten heart of Europe. The dirty war for Europe's money*, sans demander d'autorisation préalable.

6 Au début du mois de septembre, notamment du 4 au 10 septembre 1995, une série d'articles concernant ce livre a été publiée dans la presse européenne et surtout britannique.

7 Par lettre du 6 septembre 1995, le directeur général du personnel et de l'administration, en sa qualité d'autorité investie du pouvoir de nomination (ci-après «AIPN»), a informé le requérant de sa décision d'ouvrir une procédure disciplinaire contre lui pour violation des articles 11, 12 et 17 du statut, et l'a convoqué à une audition préalable, en application de l'article 87 du statut.

9 Le 12 septembre 1995 a eu lieu une première audition du requérant au cours de laquelle celui-ci a déposé une déclaration écrite indiquant qu'il ne répondrait à aucune question sans connaître préalablement les manquements spécifiques qui lui étaient reprochés.

10 Par lettre du 13 septembre, l'AIPN a indiqué au requérant que les manquements allégués faisaient suite à la publication de son livre, à sa parution par extraits dans le quotidien *The Times*, ainsi qu'aux propos tenus par lui à cette occasion dans un entretien paru dans le même journal, en l'absence d'autorisation préalable, et l'a de nouveau convoqué pour qu'il soit entendu sur ces faits à la lumière de ses obligations découlant des articles 11, 12 et 17 du statut.

11 Le 26 septembre 1995, lors de sa seconde audition, le requérant a refusé de répondre aux questions qui lui étaient posées et a présenté une déclaration écrite dans laquelle il faisait valoir qu'il estimait possible de publier un ouvrage sans autorisation préalable dès lors qu'il était en congé de convenance personnelle. Le requérant ajoutait que la parution des extraits de son ouvrage dans la presse relevait de la responsabilité de son éditeur et que certains des propos relatés dans l'entretien visé lui étaient attribués à tort. Enfin, M. Connolly mettait en cause le caractère objectif de la procédure disciplinaire engagée contre lui, au regard, notamment, de déclarations à la presse le concernant par le président et le porte-parole de la Commission, ainsi que le respect de la confidentialité de ladite procédure.

12 Par décision du 27 septembre 1995, prise en vertu de l'article 88 du statut, l'AIPN a suspendu le requérant de ses fonctions à compter du 3 octobre 1995, avec retenue de la moitié de son traitement de base pendant la période de suspension.

13 Le 4 octobre 1995, l'AIPN a décidé de saisir le conseil de discipline, en application de l'article 1er de l'annexe IX du statut (ci-après «annexe IX»).

14 Par lettre du 18 octobre 1995, enregistrée au secrétariat général de la Commission le 27 octobre suivant, le requérant a saisi l'AIPN d'une réclamation, au titre de l'article 90, paragraphe 2, du statut, contre les décisions d'engager une procédure disciplinaire et de saisir le conseil de discipline, ainsi que contre la décision du 27 septembre 1995 de le suspendre de ses fonctions.

15 Par requête déposée au greffe du Tribunal le 27 octobre 1995, le requérant a introduit un recours, en vertu de l'article 91, paragraphe 4, du statut, ayant pour objet l'annulation des trois décisions de l'AIPN susvisées, ainsi que la condamnation de la Commission au paiement de dommages-intérêts (affaire T-203/95). Par acte séparé, déposé au greffe du Tribunal le même jour, le requérant a introduit une demande de mesures provisoires.

16 Par ordonnance du président du Tribunal du 12 décembre 1995, Connolly/Commission (T-203/95 R, Rec. p. II-847), la Commission a été invitée à prendre toutes les mesures nécessaires pour qu'aucune information relative à la carrière de M. Connolly, à sa personnalité, à ses opinions ou à sa santé, et qui soit de nature à porter atteinte, directement ou indirectement, à sa réputation personnelle et professionnelle, ne soit divulguée par son personnel dans le cadre de contacts avec la presse ou de toute autre manière. La demande de mesures provisoires a été rejetée pour le surplus.

17 Le 7 décembre 1995, le conseil de discipline a émis son avis, notifié au requérant le 15 décembre suivant, dans lequel il recommandait d'infliger à celui-ci la sanction de la révocation, sans perte des droits à la pension d'ancienneté (ci-après «avis du conseil de discipline» ou «avis»).

18 Le 9 janvier 1996, le requérant a été entendu par l'AIPN, en application de l'article 7, troisième alinéa, de l'annexe IX.

18 Par décision en date du 16 janvier 1996, l'AIPN a infligé au requérant la sanction visée à l'article 86, paragraphe 2, sous f), du statut, à savoir la révocation sans suppression ni réduction des droits à la pension d'ancienneté (ci-après «décision de révocation»).

19 La décision de révocation est motivée dans les termes suivants:

«considérant que M. Connolly a été nommé, le 16 mai 1990, chef de l'unité [II D.3];

considérant que, de par ses fonctions, M. Connolly était appelé, entre autres, à préparer et à participer aux travaux du comité monétaire, du sous-comité de politique monétaire et du comité des gouverneurs, à suivre les politiques monétaires dans les États membres et à analyser les implications monétaires de la mise en œuvre de l'Union économique et monétaire;

considérant que M. Connolly a écrit un ouvrage qui a été publié au début de septembre 1995 sous le titre *The Rotten Heart of Europe*;

considérant que cet ouvrage porte sur l'évolution du processus d'intégration européenne au cours des dernières années dans le domaine économique et monétaire et qu'il a été élaboré par M. Connolly sur la base de son expérience professionnelle dans l'exercice de ses fonctions au sein de la Commission;

considérant que M. Connolly n'a pas demandé l'autorisation à l'AIPN de faire publier le livre en question conformément aux dispositions de l'article 17 du statut auxquelles tout fonctionnaire reste soumis;

considérant que M. Connolly ne pouvait ignorer que cette autorisation lui serait refusée pour les mêmes raisons que celles qui avaient dicté le refus d'autorisations antérieures de publier des articles où il avait déjà exposé ses lignes de pensée qui constituent le contenu essentiel du présent ouvrage;

considérant que M. Connolly mentionne dans la préface de son livre *The Rotten Heart of Europe* que celui-ci avait son origine dans le fait qu'il avait demandé une autorisation de publication d'un chapitre sur le SME pour un autre livre; que l'autorisation lui a été refusée et qu'il a estimé qu'il serait important de retravailler ce chapitre et d'en faire un livre entier;

considérant que M. Connolly a approuvé et collaboré activement à la promotion de son livre notamment en accordant une interview au journal *The Times* le 4 septembre 1995, date à laquelle le *Times* a également publié des extraits de son livre, et en écrivant un article pour le *Times* publié le 6 septembre 1995.

considérant que M. Connolly ne pouvait pas ignorer que la publication de son ouvrage reflétait une opinion personnelle, discordante de la ligne de conduite adoptée par la Commission en tant qu'institution de l'Union européenne, responsable de la poursuite d'un objectif majeur et d'un choix politique fondamental inscrit dans le traité de l'Union qui est l'Union économique et monétaire;

considérant que, de par sa conduite, M. Connolly a gravement lésé les intérêts des Communautés et porté préjudice à l'image et à la réputation de l'institution;

considérant que M. Connolly reconnaît avoir perçu les droits d'auteur qui lui ont été payés par ses éditeurs en contrepartie de la publication de son œuvre;

considérant que l'ensemble du comportement de M. Connolly a porté atteinte à la dignité de sa fonction en tant que fonctionnaire devant régler sa conduite en ayant uniquement en vue les intérêts de la Commission,

considérant que, ayant été souvent confronté à des refus d'autorisation de publication, la nature et la gravité de tels manquements ne sauraient échapper à un fonctionnaire normalement diligent, de son grade et de ses responsabilités;

considérant que, à aucun moment, au mépris des devoirs de loyauté et d'honnêteté à l'égard de l'institution, M. Connolly n'a averti ses supérieurs hiérarchiques de son intention de faire publier l'ouvrage en question alors qu'il demeurait soumis, en tant que fonctionnaire en congé de convenance personnelle, à ses obligations de réserve;

considérant que le comportement de M. Connolly, de par sa gravité, a rompu de façon irréparable la confiance que la Commission est en droit d'exiger de ses fonctionnaires et, en conséquence, rend impossible le maintien d'une quelconque relation de travail avec l'institution;

[...]»

20 Par lettre du 7 mars 1996, enregistrée au secrétariat général de la Commission le 14 mars suivant, le requérant a introduit une réclamation au titre de l'article 90, paragraphe 2, du statut, contre l'avis du conseil de discipline et contre la décision de révocation.

Procédure

21 Par requête déposée au greffe du Tribunal le 13 mars 1996, le requérant a introduit un recours visant à l'annulation de l'avis du conseil de discipline (affaire T-34/96).

22 Par acte déposé au greffe du Tribunal le 13 avril 1996, la Commission a, dans l'affaire T-34/96, soulevé une exception d'irrecevabilité, au titre de l'article 114, paragraphe 1, du règlement de procédure. Par ordonnance du Tribunal (deuxième chambre) du 9 juillet 1996, l'exception a été jointe au fond.

23 Le 18 juillet 1996, le requérant s'est vu notifier la décision explicite de rejet de la réclamation qu'il avait introduite contre l'avis du conseil de discipline et la décision de révocation.

24 Par requête déposée au greffe du Tribunal le 18 octobre 1996, le requérant a introduit un recours visant à obtenir l'annulation de l'avis du conseil de discipline et de la décision de révocation ainsi que l'octroi de dommages-intérêts (affaire T-163/96).

25 Par requête déposée au greffe le 23 décembre 1996, le requérant a saisi le Tribunal d'une demande de réparation des préjudices qu'il aurait subis à la suite de la publication dans la presse d'informations et de déclarations le concernant (affaire T-214/96).

26 Par ordonnance du président de la deuxième chambre du Tribunal du 10 juin 1998, les affaires T-203/95, T-34/96, T-163/96 et T-214/96 ont été jointes aux fins de la procédure orale.

27 Par décision du Tribunal du 21 septembre 1998, le juge rapporteur a été affecté à la première chambre, à laquelle les affaires T-203/95, T-34/96, T-163/96 et T-214/96 ont, par conséquent, été attribuées.

28 Sur rapport du juge rapporteur, le Tribunal (première chambre) a décidé d'ouvrir la procédure orale sans procéder à des mesures d'instruction préalables. Toutefois, la défenderesse a été invitée à produire, au titre des mesures d'organisation de la procédure, un exemplaire, dans sa version originale, de l'ouvrage ayant donné lieu à la sanction faisant l'objet du recours dans l'affaire T-163/96.

29 Les parties ont été entendues en leurs plaidoiries et en leurs réponses aux questions posées par le Tribunal lors de l'audience publique du 10 février 1999.

30 Lors de l'audience, il a été pris acte de ce que les demandes et les moyens invoqués dans le recours T-34/96 étaient intégralement repris dans le recours T-163/96 et que, en conséquence, le requérant se désistait de son recours dans l'affaire T-34/96.

Conclusions des parties

10 Dans l'affaire T-163/96, le requérant conclut à ce qu'il plaise au Tribunal:

- annuler l'avis du conseil de discipline,
- annuler la décision de révocation,
- annuler la décision de rejet de sa réclamation qui lui a été notifiée le 18 juillet 1996;
- condamner la Commission au paiement de 7 500 000 BFR en réparation de son préjudice matériel, et de 1 500 000 BFR en réparation de son préjudice moral;
- condamner la Commission aux dépens.

11 La Commission conclut à ce qu'il plaise au Tribunal:

- rejeter le recours comme non fondé;
- statuer comme de droit sur les dépens.

Sur les conclusions en annulation

12 Le requérant invoque sept moyens à l'appui de ses conclusions en annulation. Le premier est tiré d'irrégularités dans le déroulement de la procédure disciplinaire. Le deuxième est tiré d'un défaut de motivation et de la violation, par le conseil de discipline, de l'article 7 de l'annexe IX, des droits de la défense, ainsi que du principe de bonne administration. Les troisième, quatrième et cinquième moyens sont tirés, respectivement, de la violation des articles 11, 12 et 17 du statut. Le sixième moyen est pris d'une erreur manifeste d'appréciation et de la violation du

principe de proportionnalité. Enfin, le septième moyen est tiré d'un détournement de pouvoir.

Sur le premier moyen tiré d'irrégularités dans le déroulement de la procédure disciplinaire

34 Ce moyen s'articule en quatre branches. La première est tirée de la prise en compte dans l'avis du conseil de discipline et la décision de révocation d'éléments qui n'ont pas été soumis à la procédure disciplinaire. La deuxième est tirée du caractère irrégulier de l'audition du directeur général de la DG II par le conseil de discipline. La troisième est tirée du défaut d'établissement d'un rapport devant le conseil de discipline. La quatrième est tirée de la participation irrégulière du président du conseil de discipline à la procédure.

Sur la prise en compte d'éléments non soumis à la procédure disciplinaire

– Arguments des parties

35 Le requérant soutient que deux des éléments sur lesquels le conseil de discipline et l'AIPN se sont fondés, dans l'avis et la décision de révocation, n'ont été mentionnés ni lors des auditions préalables ni dans le rapport de saisine du conseil de discipline, de sorte qu'il n'a pas été en mesure de se justifier sur ces points lors de la procédure disciplinaire. Il en résulterait une violation de l'article 87, second alinéa, du statut et de l'article 1er de l'annexe IX, ainsi qu'une violation du principe du contradictoire.

36 En premier lieu, le requérant fait valoir que la considération de l'avis du conseil de discipline et de la décision de révocation, selon laquelle son ouvrage refléterait une opinion discordante de la politique de la Commission en vue de la réalisation de l'Union économique et monétaire, constitue un grief qui n'aurait jamais été mentionné lors des auditions préalables, ni dans le cadre des correspondances échangées avec l'AIPN. Le rapport de saisine du conseil de discipline se limiterait, à cet égard, à faire état de violations formelles des articles 11, 12 et 17 du statut, du fait de la publication de son livre sans autorisation préalable, sans pour autant

évoquer le contenu de son ouvrage. Le caractère critique de l'ouvrage aurait, certes, été mentionné dans la décision de suspension du 27 septembre 1995 et dans les déclarations faites à la presse par des membres de la Commission. Néanmoins, dans la mesure où cet élément n'a pas été repris au cours de la procédure disciplinaire elle-même et notamment dans le rapport de saisine du conseil de discipline, le requérant aurait considéré que l'AIPN avait choisi de n'incriminer que les violations formelles des articles 11, 12 et 17 du statut. Par la suite, le requérant n'aurait pas été interrogé par le conseil de discipline sur la prétendue non-conformité de son ouvrage à la politique de la Commission.

59 Dans sa réplique, le requérant admet que l'objet du livre était, certes, évoqué dans le rapport de saisine du conseil de discipline, mais uniquement en vue d'établir que l'ouvrage concernait la Communauté européenne et relevait donc de l'article 17, second alinéa, du statut. Quant aux pièces jointes en annexes à ce rapport, parmi lesquelles les extraits du livre parus dans la presse et les entretiens accordés par lui à un journal britannique, elles seraient sans incidence sur l'étendue de la saisine du conseil de discipline.

60 En second lieu, le requérant reproche au conseil de discipline d'avoir visé, dans son avis, le fait qu'il avait écrit un article, publié le 6 septembre 1995 dans le quotidien *The Times*, et participé à un programme de télévision le 26 septembre suivant, alors que ces faits n'étaient pas non plus évoqués dans le rapport de saisine du conseil de discipline. De même, la décision de révocation se référerait à tort à l'article du 6 septembre 1995.

61 La Commission réplique, en premier lieu, que le rapport de saisine du conseil de discipline se réfère expressément, comme la décision de suspension du 27 septembre 1995, au contenu du livre, et non au seul fait de sa publication, ainsi qu'au préjudice porté aux intérêts des Communautés. Les étapes suivantes de la procédure disciplinaire démontreraient, de la même manière, que le requérant avait connaissance du reproche qui lui était fait à l'égard du contenu de son ouvrage. En effet, le requérant aurait lui-même justifié sa conduite devant le conseil de discipline en faisant l'apologie de son livre et de ses analyses. S'agissant, en second lieu, des interventions du requérant dans la presse et dans un programme télévisé, la

Commission réfutent qu'elles sont mentionnées dans le rapport de saisine du conseil de discipline.

– Appréciation du Tribunal

46 Il y a lieu de rappeler que l'article 87, second alinéa, du statut exige qu'un fonctionnaire soit entendu par l'AIPN avant que celle-ci n'engage la procédure prévue à l'annexe IX. L'audition prévue à ce stade de la procédure disciplinaire, à la demande de l'AIPN, doit permettre au fonctionnaire de s'expliquer sur les griefs qui lui sont adressés et à l'AIPN d'apprécier la gravité de ces griefs à la lumière des explications fournies par l'intéressé. Lorsque, à la suite de cette audition, des faits pouvant donner lieu à des sanctions plus graves que l'avertissement ou le blâme sont retenus à la charge du fonctionnaire, le conseil de discipline est saisi et l'intéressé doit alors bénéficier de toutes les garanties prévues à l'annexe IX (arrêt de la Cour du 11 juillet 1985, R./Commission, 255/83 et 256/83, Rec. p. 2473, points 20 et 21). A cet égard, l'article 1er de l'annexe IX dispose que le rapport de l'AIPN portant saisine du conseil de discipline doit indiquer clairement les faits reprochés et, s'il y a lieu, les circonstances dans lesquelles ils ont été commis.

47 Il convient dès lors de vérifier si, dans le cas d'espèce, l'AIPN n'a pas méconnu les droits de la défense, tels qu'ils sont garantis par l'article 87, second alinéa, du statut et l'article 1er de son annexe IX.

48 S'agissant de la violation alléguée de l'article 87, second alinéa, du statut, il convient de relever que, après avoir convoqué le requérant à une première audition préalable, au cours de laquelle celui-ci a déposé une déclaration écrite faisant état de l'absence d'accusations précises, l'AIPN l'a de nouveau invité, par lettre du 13 septembre 1995, à être préalablement entendu sur d'éventuels manquements aux articles 11, 12 et 17 du statut. L'AIPN lui précisait que les manquements qui lui étaient reprochés concernaient la publication de l'ouvrage dont il était l'auteur, sa parution par extraits dans le quotidien *The Times*, depuis le 4 septembre 1995, ainsi que les propos qu'il avait tenus à cette occasion dans un entretien paru dans le même journal, en l'absence d'autorisation préalable. L'AIPN l'invitait, en

conséquence, à s'expliquer sur toutes les circonstances de cette affaire à la lumière des obligations résultant des dispositions susvisées.

47 Or, il ressort du dossier que, lors de cette seconde audition préalable du 26 septembre 1995, qui, au surplus, avait été reportée à deux reprises à sa demande, le requérant a de nouveau refusé de répondre à toute question et s'est limité à déposer une nouvelle déclaration écrite, dans laquelle, en tout état de cause, il s'expliquait sur les faits qui lui étaient reprochés. Il résulte de ces éléments que le requérant a été préalablement entendu, conformément à l'article 87, second alinéa, du statut, et, en raison de son attitude, celui-ci ne saurait valablement se prévaloir de ce que, lors de ces auditions, l'AIPN ne lui aurait pas expressément fait part de son appréciation quant au contenu de l'ouvrage publié.

48 Il convient également de rejeter l'argument du requérant selon lequel le rapport de l'AIPN portant saisine du conseil de discipline ne viserait pas le contenu du livre parmi les faits reprochés, mais se limiterait à faire état de violations formelles des articles 11, 12 et 17 du statut. A cet égard, il y a lieu de constater que ledit rapport faisait apparaître, sans ambiguïté, que le contenu de l'ouvrage en cause, et notamment son caractère polémique, constituait l'un des faits reprochés au requérant. En particulier, aux points 23 et suivants du rapport, l'AIPN invoquait un manquement à l'article 12 du statut, aux motifs que «la publication du livre en elle-même porte atteinte à la dignité de la fonction de M. Connolly, puisqu'il a été chef de l'unité [II.D.3] chargée, au sein de la Commission, des questions évoquées dans son livre», et que «en outre, dans son livre, M. Connolly se livre à certaines attaques désobligeantes et non étayées envers des commissaires et d'autres membres du personnel de la Commission de manière à porter atteinte à la dignité de sa fonction et à discréditer la Commission», en violation des obligations qui lui incombent en vertu de l'article 12. Le rapport citait ensuite expressément certains des propos tenus par le requérant dans son ouvrage, et comportait, en annexe, de nombreux extraits du livre en cause.

45 Il s'ensuit que, conformément à l'article 1er de l'annexe IX, le rapport de l'AIPN exposait de manière suffisamment claire les faits reprochés au requérant pour qu'il soit en mesure d'exercer ses droits de la défense.

46 Cette interprétation est en outre confirmée par le fait que, ainsi qu'il ressort du procès-verbal de l'audition du requérant devant le conseil de discipline, celui-ci s'est, à cette occasion, expliqué à plusieurs reprises sur l'objet et le contenu de son ouvrage.

47 Par ailleurs, il y a lieu de relever que le requérant, lors de sa dernière audition par l'AIPN, le 9 janvier 1996, n'a pas prétendu que l'avis du conseil de discipline était fondé sur des griefs devant être considérés comme des faits nouveaux, ni demandé la réouverture de la procédure disciplinaire comme l'article 11 de l'annexe IX lui en reconnaissait le droit (voir, en ce sens, l'arrêt du Tribunal du 26 janvier 1995, D/Commission, T-549/93, RecFP p. II-43, point 55).

48 Quant à l'argument selon lequel le fait qu'il ait publié un article en vue de la promotion de son livre, le 6 septembre 1995, et qu'il ait participé à une émission télévisée le 26 septembre 1995 ne lui aurait pas non plus été reproché dans le rapport de saisine du conseil de discipline, il suffit de constater que, contrairement à ce qu'il allègue, l'AIPN y avait fait expressément référence au point 19 dudit rapport.

49 Au vu de l'ensemble de ces éléments, la première branche du moyen doit, par conséquent, être rejetée.

Sur le caractère irrégulier de l'audition du directeur général de la DG II par le conseil de discipline

— Arguments des parties

50 Le requérant soutient que l'audition du directeur général de la DG II par le conseil de discipline est irrégulière à plusieurs égards.

51 En premier lieu, ce témoin à charge a été cité par le conseil de discipline et non par la Commission, en violation des articles 4 et 5 de l'annexe IX, en vertu desquels ce droit n'est conféré qu'au fonctionnaire poursuivi et à la Commission. Le requérant ajoute qu'il avait protesté auprès du conseil de discipline contre cette audition, comme l'attesterait le mémoire complémentaire qu'il avait déposé. Dans sa réplique, le requérant conclut qu'en procédant de la sorte le conseil de discipline a, de facto, engagé une enquête complémentaire au sens de l'article 6 de l'annexe IX, ce qui exigeait, en tout état de cause, que cette enquête soit contradictoire.

52 En deuxième lieu, ce témoignage violerait les dispositions de l'annexe IX, ainsi que le principe du contradictoire. Tout d'abord, le requérant n'aurait pas été informé suffisamment tôt par le conseil de discipline de la convocation de ce témoin. Le préavis de deux heures, invoqué par la Commission, aurait été insuffisant pour permettre au requérant de préparer sa défense puisqu'il a été consacré à son audition.

53 Ensuite, le compte rendu de l'audition du directeur général de la DG II devant le conseil de discipline lui aurait été transmis tardivement, de sorte qu'il n'aurait pas pu exercer ses droits de la défense. L'argument selon lequel il n'aurait pas invoqué ce grief devant l'AIPN serait sans fondement, dès lors qu'il avait formellement protesté contre cette audition et que, en tout état de cause, l'AIPN n'était pas en mesure de remédier à ce vice, eu égard à l'indépendance du conseil de discipline.

55 Enfin, le compte rendu de cette audition serait incomplet sur plusieurs points et en donnerait une impression inexacte. Ainsi, la question posée au témoin, par l'un des membres du conseil de discipline, pour savoir si le livre contenait des informations confidentielles, ne serait pas retranscrite. Le fait que, selon le témoin, aucune remarque négative officielle ne lui avait été adressée à propos de ce livre ne serait pas non plus mentionné. De même, ne seraient pas consignées les protestations du requérant contre les déclarations du témoin, selon lesquelles l'ouvrage ne contenant aucune analyse économique, et étant mal perçu par les fonctionnaires de la DG II

56 La Commission fait valoir que le requérant et son conseil ont été informés de la décision du conseil de discipline d'entendre le directeur général de la DG II, environ deux heures avant l'audition de ce dernier, et que le requérant a eu la possibilité de commenter les déclarations du témoin. Quant au compte rendu de l'audition du témoin, le requérant n'aurait jamais signalé les erreurs alléguées auprès de l'AIPN. A supposer même qu'elles aient existé, de telles erreurs n'auraient pas pu influer sur l'appréciation des membres du conseil, dès lors que ces derniers avaient eux-mêmes procédé à l'audition du témoin.

Appréciation du Tribunal

57 Il y a lieu de rappeler, à titre liminaire, que les articles 4 et 5 de l'annexe IX reconnaissent au fonctionnaire incriminé et à l'institution concernée le droit de citer des témoins devant le conseil de discipline.

58 Par ailleurs, aux termes de l'article 6, premier alinéa, de l'annexe IX, le conseil de discipline peut, s'il ne se juge pas suffisamment éclairé sur les faits reprochés à l'intéressé, ou sur les circonstances dans lesquelles ces faits ont été commis, ordonner une enquête contradictoire. Or, selon la jurisprudence, le conseil de discipline dispose, en vertu de cette disposition, d'un pouvoir d'appréciation sur la nécessité de certaines mesures d'instruction complémentaires, telles que la requête de pièces ou la citation de témoins (arrêt R./Commission, précité, point 24). Il résulte, en outre, des dispositions de l'annexe IX que le conseil de discipline est un organe d'instruction qui, en cette qualité, a pour mission d'effectuer les enquêtes destinées à constater les infractions disciplinaires et à déterminer les circonstances

essentielles pour établir le degré de sanction à infliger (arrêt de la Cour du 29 janvier 1985, F./Commission, 228/83, Rec. p. 275, point 16, ci-après «arrêt F./Commission»).

58 En l'espèce, il ressort des procès-verbaux versés au dossier que le conseil de discipline a estimé nécessaire de procéder à l'audition du supérieur hiérarchique du requérant, en vue d'être éclairé sur les circonstances ayant accompagné la publication de l'ouvrage de M. Connolly. Ce témoin n'ayant pas été préalablement cité par les parties, il y a donc lieu de considérer que l'audition dudit témoin par le conseil de discipline constituait une mesure d'instruction complémentaire, à laquelle, conformément à la jurisprudence susvisée, celui-ci pouvait avoir recours dans le cadre du pouvoir d'appréciation dont il dispose en vertu de l'article 6 de l'annexe IX, afin de mener à bien la mission d'organe d'instruction qui lui est assignée par le statut. Il en résulte que, ce faisant, le conseil de discipline a engagé une enquête au sens de l'article 6 susvisé, ainsi qu'il y était habilité.

59 Il importe néanmoins d'examiner si, ainsi qu'il est allégué, l'audition de ce témoin devant le conseil de discipline a été effectuée en violation du principe du caractère contradictoire de la procédure disciplinaire, qui constitue la garantie du respect des droits de la défense, et auquel l'article 6 de l'annexe IX fait expressément référence.

60 S'agissant, tout d'abord, de l'argument tiré de l'absence d'un préavis suffisamment long pour informer le requérant de l'audition du témoin en cause, cette circonstance ne saurait, en soi, démontrer une violation du principe du contradictoire.

61 A cet égard, il y a lieu de rappeler que le respect du caractère contradictoire de la procédure, dans le cadre d'une enquête telle que celle visée à l'article 6 de l'annexe IX, exige que le fonctionnaire incriminé ou son défenseur soit mis en mesure d'assister aux auditions de témoins auxquelles il est procédé et de poser à ces derniers les questions qui lui paraissent utiles à sa défense (arrêt de la Cour du 20 juin 1985, De Compte/Parlement, 141/84, Rec. p. 1951, point 17, et D/Commission, précité, point 59).

82 Or, en l'espèce, le requérant se limite à invoquer le retard avec lequel il a été informé de l'audition du témoin sans préciser en quoi cette circonstance l'a effectivement empêché d'exercer ses droits de la défense au sens de la jurisprudence susvisée. Il ressort au contraire du dossier que, malgré la brièveté du délai allégué, le requérant et son conseil non seulement ont été mis en mesure d'assister à l'audition du témoin cité par le conseil de discipline, mais ont pu également poser les questions qu'ils estimaient utiles à la défense, de même que présenter des observations sur le témoignage recueilli. En outre, le requérant n'a pas demandé au conseil de discipline de convoquer à nouveau ce témoin afin qu'il réponde à des questions que son conseil, ou lui-même, n'auraient pas eu le temps matériel de préparer pour la première audition.

83 Par conséquent, en l'espèce, il n'est pas établi que le fait pour le requérant d'avoir été averti tardivement de l'audition du témoin en cause ait porté atteinte au caractère contradictoire de la procédure disciplinaire et à l'exercice des droits de la défense.

84 De même, l'argument tiré de ce que le compte rendu de l'audition du témoin a été communiqué tardivement au requérant, à savoir une semaine après que le conseil de discipline a émis son avis, n'est pas non plus de nature à démontrer une violation du principe du contradictoire et doit être écarté. En effet, selon la jurisprudence, la transmission tardive de comptes rendus d'auditions de témoins ne porte pas atteinte au caractère contradictoire de la procédure et aux droits de la défense lorsque, comme en l'espèce, ces comptes rendus concernent uniquement des auditions auxquelles le requérant et ses conseils ont assisté, et lorsque le fonctionnaire poursuivi n'a pas été privé de la possibilité de présenter des observations utiles pour la constatation des faits lors de la procédure disciplinaire (arrêt F./Commission, points 27 et 28).

85 S'agissant de la teneur du compte rendu, elle n'est contestée par le requérant que sur des points qui ne remettent pas en cause le contenu des déclarations du témoin, ni la réalité des faits poursuivis. Ainsi, concernant la question, prétendument omise, portant sur le point de savoir si le livre contenait des informations confidentielles, le compte rendu souligne que le témoin a déclaré n'avoir pas lu le livre, de sorte que ses déclarations à cet égard ne pouvaient servir de fondement au grief tiré d'une

violation du devoir de discrétion, grief qui n'a, en tout état de cause, pas été retenu par l'AIPN dans la décision de révocation (voir ci-dessous point 136). Est également dénué de pertinence l'argument selon lequel il ne serait pas précisé que les commentaires de tiers concernant l'ouvrage, que le témoin a déclaré avoir entendus, auraient été exprimés à titre officieux, dès lors que le compte rendu ne prétend pas que le témoin les aurait qualifiés d'officiels. Quant à la circonstance que ne seraient pas consignées les protestations du requérant à l'égard de certaines déclarations du témoin, concernant le sentiment des fonctionnaires de la DG II et l'absence d'analyse économique dans l'ouvrage, il suffit de relever que le compte rendu en cause porte sur le témoignage de M. Ravasio, et non sur l'opinion du requérant, laquelle a été exposée dans le compte rendu de son audition.

Enfin, le requérant, comme il l'admet lui-même, n'a pas fait état des omissions alléguées lorsqu'il s'est vu notifier le compte rendu contesté, lors de son audition par l'AIPN le 9 janvier 1996 en application de l'article 7, troisième alinéa, de l'annexe IX.

Dans ces conditions, l'argument tiré du caractère incomplet de ce compte rendu ne saurait non plus être accueilli.

Il résulte de ces éléments que la deuxième branche du moyen doit être rejetée.

Sur le défaut d'établissement d'un rapport devant le conseil de discipline

– Arguments des parties

Le requérant estime que les articles 3 et 6 de l'annexe IX, ainsi que les principes exprimés aux points 4.6 et 4.7 d'une note du 24 novembre 1983 du président de la Commission, ont été méconnus aux motifs qu'aucun rapport sur l'ensemble de l'affaire n'a été effectué par l'un des membres du conseil de discipline et que les fonctions de rapporteur n'ont pas été exercées. A l'argument selon lequel l'établissement d'un rapport ne serait qu'une simple faculté, le requérant oppose

que, en décidant lui-même d'entendre un témoin, le conseil de discipline a, de fait, engagé une enquête supplémentaire au sens de l'article 6 de l'annexe IX, lequel imposerait que l'enquête soit conduite par un rapporteur.

- La Commission soutient que l'annexe IX n'impose pas qu'un rapport soit formellement établi et que, en tout état de cause, il faudrait démontrer, pour justifier l'annulation de la décision de révocation, que l'établissement d'un tel rapport aurait entraîné une autre sanction. S'agissant de l'argument tiré de l'absence d'un rapporteur, elle renvoie à l'acte de nomination de ce dernier.

— Appréciation du Tribunal

- En vertu de l'article 3 de l'annexe IX, «lors de la première réunion du conseil de discipline, le président charge l'un de ses membres de faire rapport sur l'ensemble de l'affaire». L'article 6 de l'annexe susvisée dispose, par ailleurs, que l'enquête contradictoire «est conduite par le rapporteur».

- Il y a lieu de souligner, à titre liminaire, que ces dispositions constituent, à l'instar d'autres dispositions de l'annexe IX, des règles de bonne administration et non des formalités substantielles dont la méconnaissance entraînerait, à elle seule, la nullité des actes accomplis durant la procédure disciplinaire (voir, par analogie, en ce qui concerne les délais prévus à l'article 7 de l'annexe IX, les arrêts de la Cour du 4 février 1970, Van Eick/Commission, 13/69, Rec. p. 3, points 3 et 4, F./Commission, point 30, et du 19 avril 1988, M./Conseil, 175/86 et 209/86, Rec. p. 1891, point 16; voir également l'arrêt du Tribunal du 26 novembre 1991, Williams/Cour des comptes, T-146/89, Rec. p. II-1293, point 49, ci-après «arrêt Williams/Cour des comptes»). En effet, l'objet de ces dispositions est de permettre au conseil de discipline, dans le cadre de son organisation interne, de procéder à une enquête suffisamment complète présentant pour l'intéressé toutes les garanties voulues par le statut.

71 En l'espèce, il ressort du procès-verbal de la première séance du conseil de discipline que, conformément à l'article 3 de l'annexe IX, le président a désigné l'un de ses membres comme rapporteur, afin qu'il soit fait rapport sur l'ensemble de l'affaire. Si les procès-verbaux versés au dossier font, certes, apparaître que celui-ci n'a pas été le seul des membres du conseil de discipline à interroger le requérant et le témoin lors des auditions, il ne saurait pour autant en être déduit que les fonctions de rapporteur n'ont pas été exercées.

72 S'agissant, par ailleurs, du grief selon lequel il n'aurait pas été fait rapport sur l'ensemble de l'affaire, il convient de souligner que l'article 3 de l'annexe IX se limite à prévoir la mission du rapporteur sans prescrire de formalités particulières pour l'exécution de celle-ci, comme la production d'un rapport écrit ou encore la communication aux parties d'un tel rapport. Par conséquent, il n'est pas exclu qu'un rapport puisse être présenté oralement par le rapporteur aux autres membres du conseil de discipline. En l'espèce, il n'est pas établi par le requérant qu'un tel rapport n'a pas été présenté. En outre, le requérant ne fournit pas le moindre élément de nature à démontrer que le conseil de discipline n'a pas procédé à une enquête suffisamment complète, présentant pour lui toutes les garanties voulues par le statut (voir l'arrêt F./Commission, point 30, et l'arrêt du Tribunal du 28 juin 1996, Y/Cour de justice, T-500/93, Rec. FP p. II-977, point 52), et, partant, qu'il n'a pas pu statuer en pleine connaissance de cause. Dans ces conditions, l'argumentation du requérant doit être rejetée.

73 Quant aux extraits cités par le requérant de la note du 24 novembre 1983, adressée aux membres de la Commission par le président de cette institution et par le membre en charge des questions de personnel, il convient de relever qu'ils concernent les «possibilités d'amélioration» du fonctionnement de la procédure disciplinaire alors envisagées au sein de la Commission [point 4, sous b)] et qu'il s'agit de simples propositions, adressées aux seuls membres de la Commission, et non de règles de droit que le requérant serait fondé à invoquer. Il y a lieu de constater, en outre, que les extraits cités ne comportent aucun élément permettant de considérer que les règles de la procédure devant le conseil de discipline auraient, en l'espèce, été méconnues.

90 En conséquence, la troisième branche du moyen doit être rejetée.

Sur la participation irrégulière du président du conseil de discipline à la procédure

– Arguments des parties

91 Le requérant fait valoir, tout d'abord, que l'avis du conseil de discipline a été adopté avec la participation active de son président et, partant, en violation de l'article 8 de l'annexe IX. En outre, le président du conseil aurait fait preuve de partialité à l'occasion de l'audition du requérant, puisqu'il aurait qualifié son comportement de «malhonnête et déloyal», et aurait essayé de nier l'importance d'éléments produits à sa décharge.

92 La Commission répond qu'il n'a pas été nécessaire, en l'espèce, d'avoir recours au vote du président du conseil de discipline, dès lors que l'avis a été adopté à la majorité des membres du conseil. Il ne serait d'ailleurs même pas allégué que le président du conseil de discipline a participé au vote.

– Appréciation du Tribunal

93 En vertu de l'article 4 de l'annexe II du statut, «le ou les conseils de discipline sont composés d'un président et de quatre autres membres».

94 Aux termes de l'article 8, premier alinéa, de l'annexe IX, «le président du conseil de discipline ne participe pas aux décisions du conseil, sauf lorsqu'il s'agit de questions de procédure ou en cas de partage égal de voix».

81 Selon la jurisprudence, cette disposition a pour but de permettre au système paritaire, qui inspire la constitution des conseils de discipline, de fonctionner dans toute la mesure où les conseils sont capables, sur cette base, de former en leur sein une majorité. Elle doit donc être interprétée en ce sens que le président du conseil de discipline n'est appelé à participer, par son vote, qu'en cas de partage égal des voix et, pour le surplus, dans les décisions de procédure. Le président jouit toutefois, en vertu de sa qualité même, de tous les pouvoirs nécessaires en vue d'assurer le fonctionnement normal du conseil de discipline. En conséquence, lorsque le président du conseil de discipline n'a pas eu l'occasion d'intervenir, par son vote, dans la décision sur l'avis motivé, mais s'est limité à accomplir les divers actes relatifs à la procédure disciplinaire relevant de l'exercice normal de ses prérogatives, il ne saurait lui être reproché d'avoir pris une part active aux délibérations, en violation de l'article 8 susvisé (arrêts de la Cour du 30 mai 1973, De Greef/Commission, 46/72, Rec. p. 543, points 35 à 41, et Dreyfus/Commission, 49/72, Rec. p. 565, points 24 à 30).

82 En l'espèce, il ressort du texte même de l'avis du conseil de discipline que le président du conseil de discipline n'a pas eu à participer au vote sur l'avis motivé et que ce dernier a été adopté à la majorité des quatre autres membres. Il ressort également des procès verbaux versés au dossier que, à l'ouverture du délibéré, le président du conseil de discipline s'est limité à inviter les membres de celui-ci à apprécier si les faits reprochés étaient établis et à déterminer le degré de sanction à infliger, ce qui relève de l'exercice normal de ses prérogatives. Dès lors, le requérant ne saurait valablement invoquer une violation de l'article 8 de l'annexe IX, au motif que le président du conseil de discipline aurait pris une part active aux délibérations.

83 En tout état de cause, il y a lieu de souligner que la présence du président aux délibérations du conseil de discipline s'avère nécessaire afin, notamment, de lui permettre, le cas échéant, de participer au vote en pleine connaissance de cause en cas de partage des voix ou lors de l'adoption de décisions de procédure.

44 Quant à la prétendue partialité du président du conseil de discipline à l'égard du requérant durant les auditions, elle n'est corroborée par aucun élément de preuve. Par conséquent, dans la mesure où, en outre, il n'est ni allégué ni démontré que le conseil de discipline aurait manqué au devoir qui est le sien, en sa qualité d'organe d'instruction, de statuer de manière indépendante et impartiale (voir, à cet égard, arrêt F./Commission, point 16, et arrêt du Tribunal du 19 mars 1998, Tzoanos/Commission, T-74/96, RecFP p. II-343, point 140), l'argumentation du requérant doit être rejetée.

45 Partant, la quatrième branche du moyen ne saurait être accueillie.

46 Il résulte de l'ensemble de ces éléments que le premier moyen doit être rejeté.

Sur le deuxième moyen, tiré d'un défaut de motivation et de la violation, par le conseil de discipline, de l'article 7 de l'annexe IX, des droits de la défense, ainsi que du principe de bonne administration

Arguments des parties

47 Le requérant estime que, sous couvert d'une motivation formelle, l'avis du conseil de discipline et la décision de révocation sont, en réalité, entachés d'un défaut de motivation, dans la mesure où les moyens qu'il avait soulevés à l'appui de sa défense sont restés sans réponse.

48 Selon le requérant, ni le conseil de discipline ni l'AIPN n'auraient répondu à ses arguments concernant l'inapplicabilité aux fonctionnaires en congé de convenance personnelle de l'article 17, second alinéa, du statut et l'interprétation erronée, par l'AIPN, de l'article 12 du statut. Il n'aurait pas non plus été répondu à son argument concernant le caractère irrégulier de certaines déclarations faites par les responsables de la Commission, qui préjugeaient de l'issue de la procédure.

89 En outre, l'avis du conseil de discipline et la décision de révocation se limiteraient, sans motivation, à constater l'existence d'une contrariété entre son ouvrage et la politique de la Commission, alors que le requérant avait signalé l'imprécision du rapport de saisine du conseil à ce sujet, ainsi que la nécessité d'une audition préalable par l'AIPN avant tout examen des griefs de fond. Dans sa réplique, le requérant conteste la citation, extraite de l'avis du conseil de discipline, selon laquelle il aurait fait part de sa décision de rendre public le danger que représentait la politique de la Commission.

90 En tout état de cause, le requérant estime que le conseil de discipline n'a pas pu procéder à un examen sérieux de tous ces arguments, qui étaient développés dans des mémoires qu'il avait déposés lors de son audition, le 5 décembre 1995, puisque l'avis a été adopté le même jour. Le procès-verbal de la réunion du conseil de discipline attesterait d'ailleurs de l'absence de débat sur le dossier de la défense. En conséquence, le conseil de discipline aurait méconnu l'article 7 de l'annexe IX et violé les droits de la défense ainsi que le principe de bonne administration.

91 La Commission considère que le conseil de discipline et l'AIPN ont satisfait à l'obligation de motivation en exposant les éléments qu'ils estimaient pertinents et en répondant aux arguments essentiels soulevés pendant la procédure.

Appréciation du Tribunal

92 En vertu de l'article 7 de l'annexe IX, le conseil de discipline doit, au vu des pièces produites devant lui et compte tenu, le cas échéant, des déclarations écrites ou verbales de l'intéressé et des témoins, ainsi que des résultats de l'enquête à laquelle il a pu être procédé, émettre un avis motivé sur la sanction que lui paraissent devoir entraîner les faits reprochés.

53 Par ailleurs, il résulte d'une jurisprudence constante que la motivation d'une décision faisant grief doit permettre au juge communautaire d'exercer son contrôle sur sa légalité et de fournir à l'intéressé les indications nécessaires pour savoir si la décision est bien fondée (arrêts de la Cour du 20 février 1997, Daffix/Commission, C-166/95 P, Rec. p. I-983, point 23, et du 20 novembre 1997, Commission/V., C-188/96 P, Rec. p. I-6561, point 26; arrêt du Tribunal du 16 juillet 1998, Y/Parlement, T-144/96, Rec. FP p. II-1153, point 21). La question de savoir si la motivation de l'acte en cause satisfait aux exigences du statut doit être appréciée au regard non seulement de son libellé, mais également de son contexte ainsi que de l'ensemble des règles juridiques régissant la matière concernée (arrêt Y/Parlement, précité, point 22). Il y a lieu de souligner, à cet égard, que si le conseil de discipline et l'AIPN sont tenus de mentionner les éléments de fait et de droit dont dépend la justification légale de leurs décisions et les considérations qui les ont amenés à les prendre, il n'est pas pour autant exigé qu'ils discutent tous les points de fait et de droit qui ont été soulevés par l'intéressé au cours de la procédure (voir, par analogie, arrêt de la Cour du 17 janvier 1984, VBVB et VBBB/Commission, 43/82 et 63/82, Rec. p. 19, point 22).

54 En l'espèce, s'agissant de l'application de l'article 17, paragraphe 2, du statut, le conseil de discipline et l'AIPN l'ont motivée en considérant que «tout fonctionnaire [y] reste soumis», après qu'il a été explicitement relevé, dans l'avis du conseil de discipline, que le requérant la contestait au motif qu'il était en congé de convenance personnelle. L'application de l'article 12 du statut est également motivée à suffisance de droit. En effet, l'avis du conseil de discipline et la décision de révocation rappellent les fonctions du requérant, soulignent la teneur des propos contenus dans son ouvrage, ainsi que la manière dont ce dernier s'était assuré de sa publication, et en concluent que l'ensemble du comportement du requérant a nui à la dignité de sa fonction. L'avis et la décision de révocation mettent donc clairement en rapport le comportement du requérant avec le contenu de l'interdiction de l'article 12 du statut et exposent les raisons essentielles pour lesquelles le conseil de discipline et l'AIPN ont estimé que les dispositions de cet article avaient été violées. La question de savoir si une telle appréciation est adéquate relève de l'examen au fond, et non de celui du caractère suffisant ou non de la motivation.

« S'agissant du grief tiré de ce qu'il n'aurait pas été répondu à l'argument selon lequel certaines déclarations de membres de la Commission mettaient en cause l'impartialité de la procédure engagée contre lui, il ressort du dossier que, par cet argument, le requérant s'était limité à faire valoir, devant le conseil de discipline, que «cette situation appel[ait] donc une vigilance et une indépendance toute particulière [de celui-ci]» (annexe A.1 à la requête, p. 17). Or, le requérant n'allègue pas que, en l'espèce, le conseil de discipline a manqué au devoir qui est le sien, en sa qualité d'organe d'instruction, de statuer de manière indépendante et impartiale. Par conséquent, ce grief est dépourvu de pertinence.

« Au surplus, il importe de relever que l'argument en cause n'évoquant pas d'élément de fait ou de droit dont dépendait la justification de la sanction recommandée, de sorte que la décision de révocation ne saurait être entachée d'un défaut de motivation sur ce point. En effet, les déclarations citées par le requérant envisageaient uniquement la possibilité que des sanctions soient adoptées contre lui au terme de la procédure disciplinaire et ne pouvaient pas altérer la régularité de cette procédure dans laquelle, en tout état de cause, l'administration est la partie qui prend l'initiative. A cet égard, il y a lieu de souligner que, d'une part, le conseil de discipline connaît la position de l'administration par le biais de documents bien plus exhaustifs que ces déclarations à la presse, et que, d'autre part, la constatation d'un éventuel manquement du fonctionnaire poursuivi à ses obligations, et l'adoption en conséquence d'une sanction disciplinaire, appartiennent à l'administration elle-même, après une procédure contradictoire au cours de laquelle l'intéressé peut faire valoir son point de vue (voir l'ordonnance Connolly/Commission, précitée, point 38).

« Doit également être rejeté l'argument du requérant selon lequel l'avis du conseil de discipline et la décision de révocation seraient insuffisamment motivés dans la mesure où ils considèrent que le requérant «ne pouvait ignorer que la publication de son ouvrage refléterait une opinion personnelle, discordante de la ligne de conduite adoptée par la Commission en tant qu'institution de l'Union européenne responsable de la poursuite d'un objectif majeur et d'un choix politique irréversible inscrit dans le traité de l'Union qui est l'Union économique et monétaire». En effet, il convient de relever que le litige concernait un conflit d'opinion évident et connu entre le requérant et la Commission quant à la politique monétaire de l'Union (ordonnance Connolly/Commission, précitée, point 36), dont l'ouvrage en cause, ainsi qu'il

ressort du dossier, constitue l'expression manifeste, le requérant y écrivant, notamment, que «[sa] thèse centrale est que le MTC [le mécanisme des taux de change] et l'UEM ne sont pas seulement inefficaces, mais aussi antidémocratiques, un danger, non seulement pour [la] richesse [de l'Union], mais aussi pour les quatre libertés et, finalement, pour la paix» (p. 12 du livre) [«My central thesis is that ERM and EMU are not only inefficient but also undemocratic: a danger not only to our wealth but to our four freedoms and, ultimately, our peace»].

« Il convient d'ajouter que l'avis et la décision de révocation constituent l'aboutissement de la procédure disciplinaire, dont les détails étaient suffisamment connus de l'intéressé (arrêt Daffix/Commission, précité, point 34). Or, ainsi qu'il ressort de l'avis du conseil de discipline, le requérant avait lui-même exposé, lors de son audition le 5 décembre 1995, que, pendant plusieurs années, il avait fait état, dans des documents rédigés dans le cadre de ses fonctions de chef de l'unité II.D.3, «des contradictions qu'il avait détectées dans les orientations de la Commission en matière économique et monétaire», et que, «ses analyses et propositions s'étant heurtées à l'opposition de ses supérieurs, il avait décidé, étant donné l'importance vitale du sujet en question et le danger que la politique poursuivie par la Commission comportait pour le futur de l'Union, de les rendre publiques». Bien que, dans sa réplique, le requérant ait contesté ces considérations de l'avis du conseil de discipline, il y a lieu néanmoins de constater qu'elles sont clairement confirmées par le procès-verbal de son audition, dont il ne conteste pas le contenu (voir, précisément, p. 4 à 7 du procès verbal d'audition).

« Au regard de ces éléments, la motivation de l'avis du conseil de discipline et de la décision de révocation ne sauraient, par conséquent, être considérées comme insuffisantes sur ce point.

« Quant à la thèse du requérant selon laquelle le conseil de discipline n'aurait pas été en mesure de procéder à un examen sérieux de tous ses arguments, elle ne saurait non plus être accueillie. D'une part, il ressort clairement du procès-verbal de l'audition du requérant que celui-ci a exposé l'ensemble des arguments développés dans ses mémoires déposés auprès du conseil de discipline, de sorte que ce dernier a pu prendre connaissance de tous les éléments invoqués à l'appui de sa défense.

D'autre part, il résulte de ce qui précède que, conformément à l'article 7 de l'annexe IX, l'avis du conseil de discipline indique de manière suffisamment précise les faits retenus à la charge du requérant et les considérations l'ayant amené à recommander la sanction de la révocation, tout en répondant aux arguments essentiels soulevés pendant la procédure.

101 Enfin, compte tenu des éléments exposés ci-dessus, une violation du principe de bonne administration et des droits de la défense ne saurait être alléguée au motif que le conseil de discipline a délibéré le jour même de l'audition du requérant, une telle circonstance étant de nature à démontrer que cet organe a, au contraire, agi de manière diligente. Il convient, en outre, de constater que l'avis du conseil de discipline a été définitivement adopté deux jours après cette audition.

102 Il découle de l'ensemble de ces considérations que le moyen doit être rejeté.

Sur le troisième moyen, tiré de la violation de l'article 11 du statut

Arguments des parties

103 Le requérant estime que l'avis du conseil de discipline et la décision de révocation sont fondés sur une interprétation erronée de l'article 11 du statut. Cette disposition aurait pour objet non pas d'interdire aux fonctionnaires de percevoir des droits d'auteur du fait de la publication de leurs ouvrages, mais de garantir leur indépendance en leur défendant d'accepter des instructions de personnes extérieures à leur institution. Or, en percevant des droits d'auteur, le requérant ne se serait mis sous l'autorité d'aucune personne extérieure à la Commission. L'interprétation donnée, en l'espèce, de l'article 11 du statut serait d'autant plus erronée qu'elle conduirait à interdire toutes les rémunérations de quelque source extérieure que ce soit, en ce compris les revenus de valeurs mobilières, et serait, dès lors, contraire à l'article 1er du protocole additionnel n° 1 de la convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales (ci-après «CEDH»), relatif au droit de propriété. En outre, une telle interprétation serait en contradiction avec la pratique de la Commission, qui serait d'admettre la perception de droits

d'auteur, par les fonctionnaires, pour des services rendus lors de congés de convenance personnelle.

104 Dans sa réplique, le requérant soutient que la Commission elle-même reconnaît l'absence de gravité de l'infraction alléguée en admettant que ce fait n'aurait jamais, à lui seul, entraîné la sanction de la révocation.

105 La Commission soutient que, dans la mesure où la perception de droits d'auteur n'aurait certes pas entraîné, à elle seule, la révocation du requérant, le fait d'avoir accepté cette rémunération d'une source extérieure à l'institution n'en est pas moins contraire à l'article 11, second alinéa, du statut. Contrairement à la thèse du requérant, il ne s'agirait pas d'un revenu assimilable à celui provenant de valeurs mobilières, mais d'une rémunération extérieure.

Appréciation du Tribunal

106 L'article 11 du statut dispose:

«Le fonctionnaire doit s'acquitter de ses fonctions et régler sa conduite en ayant uniquement en vue les intérêts des Communautés, sans solliciter ni accepter d'instructions d'aucun gouvernement, autorité, organisation ou personne extérieure à son institution.

Le fonctionnaire ne peut accepter d'aucun gouvernement ni d'aucune source extérieure à l'institution à laquelle il appartient, sans autorisation de l'[A]PN, une distinction honorifique, une décoration, une faveur, un don, une rémunération, de quelque nature qu'ils soient, sauf pour services rendus soit avant sa nomination, soit au cours d'un congé spécial pour service militaire ou national, et au titre de tels services.»

107 En l'espèce, tant le conseil de discipline que l'AIPN ont, dans l'avis et la décision de révocation, retenu une violation de l'article 11 du statut à la charge du requérant. La décision de révocation relève, en particulier, que «M. Connolly reconnaît avoir perçu les droits d'auteur qui lui ont été payés par ses éditeurs en contrepartie de la publication de son œuvre».

108 A cet égard, il ressort des déclarations du requérant au conseil de discipline, ainsi que de l'attestation de son éditeur qu'il avait alors produite, que des «royalties» sur les ventes de son ouvrage lui ont effectivement été versées par ce dernier. Dès lors, ne saurait être accueilli l'argument du requérant selon lequel l'article 11 du statut ne serait pas violé, au motif que la perception de ces rémunérations n'impliquait pas qu'il fût sous l'influence d'une personne extérieure à son institution d'appartenance. En effet, une telle argumentation méconnaît les conditions objectives de la prohibition prévue par l'article 11, second alinéa, du statut, à savoir l'acceptation d'une rémunération, de quelque nature qu'elle soit, de la part d'une personne extérieure à l'institution, sans autorisation de l'AIPN. Or, force est de constater que ces conditions étaient réunies en l'espèce.

109 Le requérant ne peut valablement soutenir que cette interprétation de l'article 11, second alinéa, du statut conduit à une violation du droit de propriété tel qu'il est consacré par l'article 1er du protocole additionnel n° 1 de la CEDH.

110 Tout d'abord, il convient de relever qu'il n'y a eu, en l'espèce, aucune atteinte au droit de propriété, la Commission n'ayant pas privé le requérant des sommes qu'il a perçues en rémunération de son ouvrage.

111 Il y a lieu de souligner, en outre, que, selon la jurisprudence, l'exercice de droits fondamentaux tels que le droit de propriété peut être soumis à des restrictions, à condition que celles-ci répondent à des objectifs d'intérêt général poursuivis par la Communauté et ne constituent pas une intervention démesurée et intolérable portant atteinte à la substance même des droits garantis (voir l'arrêt de la Cour du 11 juillet 1989, Schräder HS Kraftfutter, 265/87, Rec. p. 2237, point 15, et la jurisprudence

citée). Or, les prescriptions de l'article 11 du statut, dont il résulte que le fonctionnaire doit régler sa conduite en ayant uniquement en vue les intérêts des Communautés, répondent au souci légitime de garantir non seulement l'indépendance, mais aussi la loyauté du fonctionnaire à l'égard de son institution (voir, à cet égard, l'arrêt du Tribunal du 15 mai 1997, N/Commission, T-273/94, RecFP p. II-289, points 128 et 129, ci-après «arrêt N/Commission»), objectif dont la poursuite justifie l'inconvénient mineur d'obtenir une autorisation de l'AIPN pour la réception de sommes provenant de sources extérieures à l'institution d'appartenance.

112 L'argumentation du requérant selon laquelle le manquement n'était pas suffisamment grave pour entraîner, à lui seul, sa révocation est dénuée de pertinence dans le cadre du présent moyen, en ce qu'elle n'est pas non plus de nature à infirmer la constatation d'un manquement à l'obligation en cause. La question de savoir si la sanction imposée était disproportionnée relève du sixième moyen et doit être examinée dans le cadre de celui-ci au regard de l'ensemble des faits reprochés.

113 Quant à l'existence prétendue d'une pratique de la Commission consistant à admettre la perception de droits d'auteur, pour des services rendus par des fonctionnaires lors de congés de convenance personnelle, force est de constater qu'elle n'est nullement démontrée. Cette argumentation n'est, de surcroît, pas pertinente dès lors qu'il n'est pas allégué que la pratique en question aurait visé la publication d'ouvrages n'ayant pas reçu l'autorisation préalable visée à l'article 17 du statut. Le requérant ne soutient donc pas qu'il existait des assurances précises ayant éventuellement pu créer, dans son chef, des espérances fondées de ne pas avoir à solliciter l'autorisation prévue à l'article 11 du statut.

114 Au vu de l'ensemble de ces éléments, le moyen doit être rejeté.

Sur le quatrième moyen, tiré de la violation de l'article 12 du statut

Arguments des parties

115 Le requérant fait valoir que le grief concernant une violation de l'article 12 du statut est illicite au motif qu'il est contraire au principe de la liberté d'expression, consacré explicitement par l'article 10 de la CEDH. En effet, l'interprétation de l'article 12 du statut à laquelle a procédé l'AIPN conduirait à interdire au fonctionnaire toute opinion personnelle, même en dehors du cadre professionnel. La jurisprudence de la Cour européenne des droits de l'homme démontrerait d'ailleurs que la liberté d'expression d'un fonctionnaire ne peut être limitée que dans les cas visés à l'article 10, paragraphe 2, de la CEDH. Or, aucune des exceptions visées à cet article n'aurait été invoquée par l'AIPN pour justifier la sanction infligée.

116 Par ailleurs, ce grief manquerait en fait. L'ouvrage en cause constituerait, tout d'abord, un travail d'analyse économique, l'analyse n'excluant toutefois pas la polémique. Ensuite, il ne serait pas établi que l'analyse contenue dans son ouvrage est contraire aux intérêts de la Communauté, d'autant plus que le requérant ne s'est pas opposé aux objectifs du traité. Comme l'attesteraient, au contraire, les notes internes qu'il avait élaborées, il se serait toujours conformé au devoir d'assistance et de conseil qui était le sien, en vertu de l'article 21 du statut, en signalant à ses supérieurs le caractère dangereux des moyens choisis pour parvenir à l'Union économique et monétaire.

117 Le requérant estime que la Commission dénature la portée de l'obligation de loyauté. En effet, celle-ci impliquerait de la part du fonctionnaire une certaine loyauté à l'égard des traités, mais pas un lien de confiance personnel dans l'institution qui l'emploie. En outre, le grief tiré d'une violation du devoir de loyauté viserait, selon la jurisprudence, l'article 21 du statut (arrêt Williams/Cour des comptes 1), et non l'article 12. Aucune violation de l'article 21 du statut, n'ayant été formulée dans le rapport de l'AIPN portant saisine du conseil de discipline, il en résulterait une extension injustifiée de la procédure disciplinaire.

18 Quant aux références de la Commission aux observations faites dans son livre à l'égard de certaines personnes, le requérant rétorque que ni l'avis du conseil de discipline ni la décision de révocation n'ont finalement retenu le grief, formulé dans le rapport de l'AIPN, tiré de l'existence, dans son livre, d'attaques personnelles désobligeantes non étayées. Ces «légèretés de plume» étant intervenues dans un contexte d'analyse économique, elles devraient, de toute façon, être distinguées des injures et des diffamations qui faisaient l'objet de l'arrêt Williams/Cour des comptes I, dans lequel la sanction infligée était en outre, plus modérée qu'en l'espèce.

19 La Commission fait valoir que le grief retenu à l'encontre du requérant, au titre de l'article 12 du statut, vise aussi plus largement le manquement à l'obligation de loyauté incombant aux fonctionnaires à l'égard de l'institution qui les emploie, obligation dont l'article 12 du statut constituerait, à l'instar des articles 11 et 17, une manifestation particulière (arrêt de la Cour du 14 décembre 1966, Alfieri/Parlement, 3/66, Rec. p. 633, arrêts du Tribunal Williams/Cour des comptes I, point 72, et du 7 mars 1996, Williams/Cour des comptes, T-146/94, RecFP p. II-329, points 98 et 99, ci-après «arrêt Williams/Cour des comptes II»).

20 Dans ce contexte, l'argumentation du requérant méconnaîtrait le fait que la liberté d'expression doit être conciliée avec les limites imposées par la relation de travail et le statut de fonctionnaire. A supposer même que la CEDH soit directement applicable, la jurisprudence de la Commission et de la Cour européenne des droits de l'homme confirmerait d'ailleurs que la révocation d'un fonctionnaire s'étant exprimé publiquement, de façon incompatible avec sa fonction, n'est pas contraire à l'article 10 de la CEDH (arrêts du 28 août 1986, Kosiek/Allemagne, série A n° 105, et du 26 septembre 1995, Vogt/Allemagne, série A n° 323).

21 S'agissant de la nature même de l'ouvrage, la Commission estime qu'il s'agit d'un récit à vocation polémique, et non d'un traité d'économie. Elle renvoie, à titre d'exemple, à plusieurs extraits du livre (annexe 3 au mémoire en défense) et souligne que le requérant lui-même a qualifié son livre de «polémique» dans un article paru dans le quotidien britannique *The Times*, le 6 septembre 1995. Le livre comporterait, notamment, des observations péjoratives à l'égard de certains

responsables de l'époque, comme l'attesteraient certains passages dans lesquels, par exemple, le chancelier allemand H. Kohl est qualifié de «Bismarck in a cardigan» (p. 337 du livre), le Premier ministre britannique J. Major de «clueless amateur» (p. 126 et 282), et le président de la Commission J. Delors, de meneur (p. 71) et «Euroracist» (p. 294), ce dernier étant en outre assimilé à un économiste nazi («Nazi professor») (p. 231). Seraient également formulées des appréciations non étayées sur, notamment, le prétendu «rôle ambigu» de la Cour de justice des Communautés européennes (p. 208) ou le fait que le personnel de la Commission serait toujours le défenseur des intérêts français (p. 4). Enfin, l'illustration choisie pour la couverture du livre serait difficilement compatible avec l'allégation selon laquelle il s'agirait d'un ouvrage d'analyse économique.

122 Outre le caractère insultant de l'ouvrage, la gravité du manquement du requérant à ses obligations statutaires résulterait du fait que, par ce livre, il se serait opposé, de manière publique, à la politique qu'il avait la responsabilité de promouvoir. L'argument selon lequel le fait d'avoir des opinions personnelles non conformes serait interdit au sein de la Commission serait également dénué de fondement. Comme l'attesteraient les notes produites par le requérant lui-même, les opinions de ce dernier étaient déjà connues auparavant, sans que cela ait jamais donné lieu à une procédure disciplinaire. Seul le fait d'avoir porté ces idées sur la place publique aurait été sanctionné.

Appréciation du Tribunal

123 Aux termes de l'article 12, premier alinéa, du statut, «le fonctionnaire doit s'abstenir de tout acte et, en particulier, de toute expression publique d'opinions qui puisse porter atteinte à la dignité de sa fonction».

124 Selon une jurisprudence constante, cette disposition vise, tout d'abord, à garantir que les fonctionnaires communautaires présentent, dans leur comportement, une image de dignité conforme à la conduite particulièrement correcte et respectable que l'on est en droit d'attendre des membres d'une fonction publique internationale (arrêts du Tribunal Williams/Cour des comptes II, point 65, N/Commission, point 127, et du 17 février 1998, E/CES, T-183/96, RecFP p. II-159, point 39.

ci-après «arrêt E/CES»). Il en résulte, notamment, que des injures exprimées publiquement par un fonctionnaire, et portant atteinte à l'honneur des personnes auxquelles elles se réfèrent, constituent en soi une atteinte à la dignité de la fonction au sens de l'article 12, premier alinéa, du statut (ordonnance de la Cour du 21 janvier 1997, Williams/Cour des comptes, C 156/96 P, Rec. p. I-239, point 21; arrêts Williams/Cour des comptes I, point 76 et 80, et Williams/Cour des comptes II, point 66).

105 En l'espèce, il ressort du dossier et des extraits du livre cités par la Commission que l'ouvrage litigieux contient de nombreuses affirmations agressives, dénigrantes, et souvent injurieuses, portant atteinte à l'honneur des personnes et des institutions auxquelles elles se réfèrent, et qui ont connu une publicité importante, notamment par voie de presse. Contrairement à ce que prétend le requérant, les propos cités par la Commission, et visés dans le rapport de l'AIPN portant saisine du conseil de discipline, ne sauraient être qualifiés de simples «légèretés de plume», mais doivent être considérés comme étant constitutifs, en soi, d'une atteinte à la dignité de la fonction.

106 L'argument selon lequel ni le conseil de discipline ni l'AIPN n'auraient finalement retenu ce dernier grief pour justifier sa révocation est dénué de fondement. Tous deux ont, en effet, expressément considéré, dans l'avis et la décision de révocation, que «l'ensemble du comportement de M. Connolly a porté atteinte à la dignité de sa fonction». Le fait que des extraits du livre ne soit pas cités expressis verbis dans la décision de révocation comme ils l'étaient dans le rapport de l'AIPN portant saisine du conseil de discipline ne saurait, dès lors, être interprété comme impliquant l'abandon du grief tiré d'une violation de l'article 12, premier alinéa, du statut. Il en est d'autant plus ainsi que la décision de révocation constitue l'aboutissement d'une procédure disciplinaire dont les détails étaient suffisamment connus de l'intéressé et au cours de laquelle, ainsi qu'il ressort des procès-verbaux versés au dossier, celui-ci a eu l'occasion de s'expliquer sur la teneur des propos contenus dans son livre.

127 Il y a lieu, ensuite, de souligner que l'article 12, premier alinéa, du statut constitue, au même titre que les articles 11 et 21, l'une des expressions spécifiques de l'obligation de loyauté qui s'impose à tout fonctionnaire (voir l'arrêt N/Commission, point 129, confirmé sur pourvoi par l'ordonnance de la Cour du 16 juillet 1998, N/Commission, C-252/97 P, Rec. p. I-4874). Contrairement à ce que fait valoir le requérant, il ne saurait être déduit de l'arrêt Williams/Cour des comptes I que cette obligation découle du seul article 21 du statut, le Tribunal ayant souligné, dans cet arrêt, que l'obligation de loyauté constitue un devoir fondamental, qui incombe à tout fonctionnaire vis-à-vis de l'institution dont il relève et de ses supérieurs, «dont l'article 21 du statut est une manifestation particulière». Par conséquent, doit être rejeté l'argument selon lequel l'AIPN ne pouvait valablement retenir, à l'encontre du requérant, une violation du devoir de loyauté, au motif que le rapport portant saisine de l'AIPN ne lui reprochait pas une violation de l'article 21 du statut.

128 De même, doit être rejetée la thèse selon laquelle le devoir de loyauté n'impliquerait pas la préservation d'un lien de confiance personnel entre le fonctionnaire et son institution, mais seulement une loyauté à l'égard des traités. En effet, l'obligation de loyauté impose non seulement que le fonctionnaire concerné s'abstienne de conduites attentatoires à la dignité de la fonction et au respect dû à l'institution et à ses autorités (voir, par exemple, l'arrêt Williams/Cour des comptes I, point 72, et l'arrêt du Tribunal du 18 juin 1996, Vela Palacios/CES, T-293/94, Rec. FP p. II-893, point 43), mais également qu'il fasse preuve, d'autant plus s'il a un grade élevé, d'un comportement au-dessus de tout soupçon, afin que les liens de confiance existant entre cette institution et lui-même soient toujours préservés (arrêt N/Commission, point 129). Or, en l'espèce, il convient de rappeler que l'ouvrage litigieux, outre le fait qu'il comportait des propos portant en soi atteinte à la dignité de la fonction, exprimait publiquement, ainsi que l'AIPN l'a constaté, une opposition fondamentale du requérant à la politique de la Commission qu'il avait pour fonction de mettre en œuvre, à savoir la réalisation de l'Union économique et monétaire, objectif, par ailleurs, assigné par le traité.

129 Le requérant ne saurait utilement invoquer, dans ce contexte, une violation du principe de la liberté d'expression. Il ressort en effet de la jurisprudence en la matière que, si la liberté d'expression constitue un droit fondamental dont jouissent également les fonctionnaires communautaires (arrêt de la Cour du 13 décembre 1989, Oyowe et Traore/Commission, C-100/88, Rec. p. 4285, point 16), il n'en

demeure pas moins que l'article 12 du statut, tel qu'interprété ci-dessus, ne constitue pas une entrave à la liberté d'expression des fonctionnaires, mais impose des limites raisonnables à l'exercice de ce droit dans l'intérêt du service (arrêt E/CES, point 41).

150 Il y a lieu de souligner, enfin, que cette interprétation de l'article 12, premier alinéa, du statut ne saurait être mise en cause au motif que, en l'espèce, la publication de l'ouvrage litigieux est intervenue lors d'une période de congé de convenance personnelle. A cet égard, il résulte de l'article 35 du statut que le congé de convenance personnelle constitue l'une des positions dans lesquelles peut être placé un fonctionnaire, de sorte que, pendant cette période, l'intéressé demeure soumis aux obligations découlant du statut, sauf dispositions contraires expresses. L'article 12 du statut visant tous les fonctionnaires, sans distinguer selon leur position, une telle circonstance ne pouvait, dès lors, exonérer le requérant des obligations que lui imposent cet article. Il en est d'autant plus ainsi que le respect dû par le fonctionnaire à la dignité de sa fonction ne se limite pas au moment particulier où il exerce telle ou telle tâche spécifique, mais s'impose à lui en toute circonstance (arrêt Williams/Cour des comptes II, point 68). Il en va de même de l'obligation de loyauté, laquelle, selon la jurisprudence, ne s'impose pas seulement dans la réalisation de tâches spécifiques, mais s'étend aussi à toute la sphère des relations existant entre le fonctionnaire et l'institution (arrêts Williams/Cour des comptes I, point 72, et E/CES, point 47).

151 Au vu de l'ensemble de ces éléments, l'AIPN a pu légitimement considérer que le requérant avait, de par son comportement, nui à la dignité de sa fonction et rompu de façon irréparable la confiance que la Commission est en droit d'exiger de ses fonctionnaires.

152 Il s'ensuit que le moyen doit être rejeté.

Sur le cinquième moyen, tiré de la violation de l'article 17 du statut

Sur la violation de l'article 17, premier alinéa, du statut

– Arguments des parties

99 Le requérant soutient que le conseil de discipline et l'AIPN ont retenu, à tort, qu'il avait violé le devoir de discrétion, prévu à l'article 17, premier alinéa, du statut, dans la mesure où, ainsi qu'il l'avait démontré lors de la procédure, les informations que le rapport de l'AIPN lui reprochait d'avoir publiées dans son livre provenaient de sources publiques.

100 En réponse à l'argument de la Commission selon lequel ce grief n'a pas été retenu dans la décision de révocation, le requérant en déduit, dans sa réplique, qu'il y a lieu de constater l'abandon de celui-ci par l'AIPN et, de fait, une aggravation de la sanction recommandée par le conseil, puisque le nombre d'incriminations était ainsi réduit. Dans la mesure où l'AIPN est tenue de motiver les raisons spécifiques pour lesquelles elle s'est écartée de l'avis du conseil de discipline, il en résulterait que la décision de révocation est entachée d'un défaut de motivation sur ce point.

101 La Commission soutient que le grief tiré d'une violation de l'article 17, premier alinéa, du statut n'a pas été retenu dans la décision de révocation et en déduit qu'il n'y a donc pas lieu de se prononcer à cet égard. En tout état de cause, l'AIPN ayant infligé au requérant la sanction recommandée par le conseil de discipline, et non pas une sanction plus grave, sa décision ne saurait être entachée d'un défaut de motivation sur ce point.

– Appréciation du Tribunal

102 Le requérant ayant pris acte, tant dans sa réplique que lors de l'audience, que l'AIPN n'avait pas retenu contre lui un manquement au devoir de discrétion dans la décision de révocation, le grief tiré d'une violation de l'article 17, premier alinéa, du statut est devenu sans objet (voir, en ce sens, l'arrêt HOGES, point 37).

68 S'agissant du grief tiré d'un défaut de motivation de la décision de révocation, pour autant qu'elle s'écarterait de l'avis du conseil de discipline en aggravant la sanction infligée, il n'a été soulevé qu'au stade de la réplique et, conformément à l'article 48, paragraphe 2, du règlement de procédure, il doit donc être rejeté comme irrecevable en tant que moyen nouveau soulevé en cours d'instance. En tout état de cause, ce grief ne pourrait être accueilli en l'espèce. D'une part, il est constant que l'AIPN a infligé au requérant la sanction recommandée par le conseil de discipline, à savoir la révocation sans perte des droits à pension, de sorte qu'aucun surcroît de motivation n'était nécessaire. D'autre part, il ressort du deuxième moyen que l'AIPN a suffisamment exposé, dans la décision de révocation, les raisons pour lesquelles elle estimait que le comportement du requérant, de par sa gravité, rendait impossible le maintien d'une quelconque relation de travail avec la Commission.

69 En conséquence, la première branche du moyen doit être rejetée.

Sur la violation de l'article 17, second alinéa, du statut

– Arguments des parties

70 Le requérant soutient, en premier lieu, que l'interprétation de l'article 17, second alinéa, du statut, sur laquelle sont fondés l'avis du conseil de discipline et la décision de révocation, est contraire au principe de la liberté d'expression, consacré par l'article 10 de la CEDH, dans la mesure où elle conduit à interdire, par principe, toute publication. Or, des entraves à la liberté d'expression ne seraient autorisées que dans les hypothèses exceptionnelles énumérées à l'article 10, paragraphe 2, de la CEDH, dont la Commission aurait néanmoins admis, dans la décision de rejet de la réclamation, précitée, qu'elles n'étaient pas applicables en l'espèce. Dès lors, l'interprétation selon laquelle un fonctionnaire devrait obtenir une autorisation préalable pour toute publication quelle qu'elle soit, en dehors même des cas visés à l'article 10, paragraphe 2, de la CEDH, constituerait une entrave injustifiée à la liberté d'expression.

140 Selon le requérant, cette analyse n'est pas démentie par le fait que l'article 17, second alinéa, du statut institue un régime d'autorisation préalable, dans la mesure où il est ainsi permis à l'institution concernée d'exercer une censure sans limites. Par ailleurs, l'argument de la Commission, selon lequel le cas d'espèce ne relèverait pas de l'article 10 de la CEDH dès lors que l'AIPN est intervenue en qualité d'employeur, et non en tant qu'autorité publique à l'égard de tiers, serait erroné, au motif que, selon la jurisprudence de la Cour européenne des droits de l'homme, les fonctionnaires peuvent se prévaloir de la CEDH en leur qualité de fonctionnaire (arrêt Vogt/Allemagne, précité).

141 En second lieu, le requérant soutient que l'article 17, second alinéa, du statut n'est pas applicable aux fonctionnaires en congé de convenance personnelle. En effet, dans la mesure où seul le premier alinéa de l'article 17 du statut précise qu'il s'impose au fonctionnaire après la cessation de ses fonctions, il en résulterait a contrario que le second alinéa du même article ne s'applique qu'aux fonctionnaires en activité. Cette interprétation serait confirmée par le fait que l'article 37 du statut, relatif à la position du fonctionnaire en détachement, dispose expressément que celui-ci reste soumis aux obligations qui lui incombent en raison de son appartenance à son institution d'origine, alors que l'article 40 du statut, relatif à la position du fonctionnaire en congé de convenance personnelle, ne contient aucune disposition similaire.

142 Le requérant soutient que, en tout état de cause, il était fondé à croire en cette interprétation de l'article 17, second alinéa, du statut, compte tenu de la pratique suivie par la Commission, à tout le moins au sein de la DG II. A cet égard, il ressortirait de l'audition de l'ancien directeur général de la DG II, déposée auprès du conseil de discipline, qu'une autorisation préalable de publication n'était jamais nécessaire pour les fonctionnaires en congé de convenance personnelle. L'argument de la Commission, selon lequel il serait alors inutile de demander aux fonctionnaires de préciser les activités qu'ils envisagent d'exercer pendant un congé de convenance personnelle, serait sans pertinence, dès lors qu'il est seulement demandé d'indiquer les motifs personnels du congé. Quant au fait, mentionné dans la décision de révocation, qu'il s'était déjà vu refuser des autorisations de publications, le requérant oppose que des autorisations lui avaient aussi été accordées.

143 La Commission réfute, en premier lieu, que, dans la mesure où la révocation d'un fonctionnaire pour manquement à son devoir de loyauté échappe au domaine d'application de la CEDH ou, en tout état de cause, n'est pas contraire à son article 10, l'obligation de demander une autorisation préalable de publication est d'autant plus justifiée qu'il s'agit d'une mesure préventive, permettant ainsi au fonctionnaire d'éviter des sanctions. En outre, l'article 17, second alinéa, du statut instaurerait un droit de publier, puisqu'un refus doit être motivé par la mise en jeu des intérêts des Communautés, ce qui serait, notamment, le cas lorsque l'opinion exprimée est incompatible avec les fonctions de l'intéressé.

144 En second lieu, la Commission fait valoir qu'un fonctionnaire en congé de convenance personnelle reste soumis à l'obligation prévue à l'article 17, paragraphe 2, du statut, dès lors que, en vertu de l'article 35 du statut, il demeure fonctionnaire pendant cette période de congé.

145 Quant à l'existence alléguée d'une pratique antérieure au sein de la Commission, elle serait démentie par le fait qu'il est toujours préalablement demandé aux fonctionnaires sollicitant un congé de convenance personnelle d'indiquer les activités qu'ils comptent avoir pendant cette période. A supposer même qu'une telle pratique ait existé au sein de la DG II, le requérant ne pouvait avoir aucune confiance légitime dans son maintien: d'une part, cela aurait supposé une promesse spécifique à son intention; d'autre part, en admettant même que le précédent supérieur hiérarchique du requérant ait formulé une telle promesse, elle serait inopposable à la Commission puisqu'elle serait illégale et émanerait d'une personne n'ayant pas la qualité d'AIPN.

Appréciation du Tribunal

146 L'article 17, second alinéa, du statut, dispose:

«Le fonctionnaire ne doit ni publier ni faire publier, seul ou en collaboration, un texte quelconque dont l'objet se rattache à l'activité des Communautés sans l'autorisation de l'[AIPN]. Cette autorisation ne peut être refusée que si la publication envisagée est de nature à mettre en jeu les intérêts des Communautés.»

142 En l'espèce, il est constant que le requérant a procédé à la publication de son ouvrage sans demander l'autorisation préalable prévue par la disposition précitée. Toutefois, le requérant, sans soulever expressément une exception d'illégalité visant à mettre en cause la validité de l'article 17, second alinéa, du statut dans son ensemble, considère que la Commission a procédé à une interprétation de cette disposition contraire au principe de la liberté d'expression.

143 A cet égard, il convient de rappeler que le droit à la liberté d'expression, consacré par l'article 10 de la CEDH, constitue, ainsi qu'il a déjà été souligné, un droit fondamental dont le juge communautaire assure le respect et dont jouissent, en particulier, les fonctionnaires communautaires (arrêts Oyowe et Traore/Commission, précité, point 16, et E/CES, point 41). Néanmoins, il résulte également d'une jurisprudence constante que les droits fondamentaux n'apparaissent pas comme des prérogatives absolues, mais peuvent comporter des restrictions, à condition que celles-ci répondent effectivement à des objectifs d'intérêt général poursuivis par la Communauté et ne constituent pas, au regard du but poursuivi, une intervention démesurée et intolérable qui porterait atteinte à la substance même des droits ainsi garantis (arrêts de la Cour Schräder HS Kraftfutter, précité, point 15, et du 5 octobre 1994, X/Commission, C-404/92 P, Rec. p. I-4737, point 18, arrêts du Tribunal du 13 juillet 1995, K/Commission, T-176/94, RecFP p. II-621, point 33, et N/Commission, point 73).

144 Examiné à la lumière de ces principes, et à l'instar de ce qui a été jugé à propos de l'article 12 du statut (voir, ci-dessus, point 129, et arrêt E/CES, point 41), l'article 17, second alinéa, tel qu'il a été interprété dans la décision de révocation, ne saurait être considéré comme imposant une restriction injustifiée à la liberté d'expression des fonctionnaires.

145 En effet, il convient, en premier lieu, de souligner que l'exigence d'une autorisation préalable de publication répond à l'objectif légitime qu'un texte ayant trait à l'activité des Communautés ne puisse pas porter atteinte à leurs intérêts et, notamment, comme en l'espèce, à la réputation et à l'image de l'une des institutions.

153 En second lieu, l'article 17, second alinéa, du statut ne constitue pas une mesure disproportionnée à l'objectif d'intérêt général que ledit article vise à sauvegarder.

154 A cet égard, il convient, tout d'abord, de relever que, contrairement à ce que soutient le requérant, il ne saurait être déduit de l'article 17, second alinéa, du statut que le régime d'autorisation préalable qu'il prévoit permet à l'institution concernée d'exercer, par ce biais, une censure sans limites. D'une part, en vertu de cette disposition, l'autorisation préalable de publication n'est exigée que lorsque le texte que le fonctionnaire intéressé envisage de publier, ou de faire publier, se rattache à l'activité des Communautés. D'autre part, il ressort de cette même disposition qu'il n'est instauré aucune prohibition absolue de publication, mesure qui, en soi, porterait atteinte à la substance même du droit à la liberté d'expression. Force est, au contraire, de constater que l'article 17, second alinéa, dernière phrase, du statut établit clairement le principe d'octroi de l'autorisation de publication en disposant expressément qu'une telle autorisation ne peut être refusée que si la publication en cause est de nature à mettre en jeu les intérêts des Communautés. Une telle décision étant, par ailleurs, susceptible de recours conformément aux articles 90 et 91 du statut, il en résulte qu'un fonctionnaire, estimant qu'un refus d'autorisation lui aurait été opposé en violation des dispositions du statut, a la possibilité de recourir aux voies de droit qui lui sont ouvertes en vue de soumettre au contrôle du juge communautaire l'appréciation de l'institution concernée.

155 Il importe également de souligner que la formalité exigée par l'article 17, second alinéa, du statut constitue une mesure préventive, permettant, d'une part, de ne pas mettre en péril les intérêts des Communautés et, d'autre part, ainsi que le fait valoir la Commission à juste titre, d'éviter, postérieurement à la publication d'un texte mettant en cause les intérêts des Communautés, l'adoption, par l'institution concernée, de sanctions disciplinaires à l'encontre du fonctionnaire ayant exercé son droit d'expression de manière incompatible avec ses fonctions.

156 En l'espèce, il y a lieu de constater que, dans la décision de révocation, l'AIPN a retenu, à l'encontre du requérant, un manquement à cette disposition aux motifs, d'une part, que l'intéressé n'avait pas demandé d'autorisation de publication pour son ouvrage, d'autre part, qu'il ne pouvait ignorer qu'une telle autorisation lui serait

refusée pour les mêmes raisons que celles ayant dicté le refus d'autorisations antérieures de publier certains articles ayant un contenu similaire et, enfin, que, par sa conduite, le requérant avait gravement lésé les intérêts des Communautés et porté préjudice à l'image et à la réputation de l'institution.

155 Dès lors, et à la lumière de l'ensemble des considérations qui précèdent, il ne peut être déduit de la décision de révocation que le manquement à l'article 17, second alinéa, du statut, reproché au requérant, aurait également été retenu en l'absence de toute atteinte à l'intérêt des Communautés, de sorte que la portée donnée à cette disposition par l'AIPN n'apparaît pas comme excédant l'objectif poursuivi et, partant, comme contraire au principe de la liberté d'expression.

156 Dans ces conditions, le grief tiré d'une violation du droit à la libre expression doit être rejeté.

157 L'argument selon lequel l'article 17, second alinéa, du statut ne serait pas applicable aux fonctionnaires en congé de convenance personnelle est également dénué de fondement. En effet, ainsi qu'il a été souligné ci-dessus (voir point 130), il résulte de l'article 35 du statut qu'un fonctionnaire en congé de convenance personnelle conserve la qualité de fonctionnaire pendant cette période et qu'il demeure donc soumis aux obligations qui découlent du statut sauf dispositions expresses contraires. Or, l'article 17, second alinéa, du statut vise tout fonctionnaire, sans distinguer selon la position de l'intéressé. Par conséquent, le fait que le requérant était en congé de convenance personnelle lors de la publication de son ouvrage ne l'exonérait pas de l'obligation que lui imposait l'article 17, second alinéa, du statut de solliciter préalablement une autorisation de publication auprès de l'AIPN.

158 Cette interprétation n'est pas contredite par le fait que, à l'inverse du second alinéa, de l'article 17, du statut, le premier alinéa du même article dispose expressément qu'un fonctionnaire demeure soumis au devoir de discrétion après la cessation de ses fonctions. En effet, un fonctionnaire en position de congé de convenance personnelle ne saurait être assimilé à celui ayant définitivement cessé ses fonctions.

visé à l'article 47 du statut, et qui, partant, ne relève pas de l'une des positions du fonctionnaire, énumérées à l'article 35 du statut.

109 Est également sans pertinence l'argument a contrario tiré de ce que, en vertu de l'article 37, second alinéa, du statut, le fonctionnaire en détachement «reste soumis aux obligations qui lui incombent en raison de son appartenance à son institution d'origine». En effet, le détachement peut impliquer une mise à la disposition d'une autre institution que l'institution d'origine (ou d'une personne exerçant un mandat au sein d'une autre institution). Cette disposition vise donc seulement à déterminer si le fonctionnaire concerné demeure également soumis à ses obligations statutaires vis-à-vis de son institution d'origine. Aucun argument ne peut, dès lors, en être déduit pour ce qui est des obligations du fonctionnaire en position de congé de convenance personnelle, pour lequel la question de l'appartenance à une autre institution communautaire ne se pose pas.

110 Il résulte de l'ensemble de ces éléments que c'est à juste titre que le conseil de discipline et l'AIPN ont considéré que le requérant avait violé l'article 17, second alinéa, du statut.

111 Enfin, la prétendue existence d'une pratique générale de la Commission, en vertu de laquelle une autorisation préalable de publication n'était pas exigée des fonctionnaires en congé de convenance personnelle, n'est nullement démontrée par la déclaration qu'invoque le requérant. Par ladite déclaration, l'ancien directeur général de la DG II se limite, en effet, à attester que M. Connolly s'était déjà vu accorder, en 1985, un congé de convenance personnelle d'une année afin de travailler au sein d'une institution financière privée et que, pendant cette période, il n'avait pas estimé devoir approuver les textes rédigés par le requérant pour le compte de cette institution, ou même émettre des observations à leur égard. Il s'ensuit que l'argument n'est pas fondé.

112 Par suite, le moyen doit être rejeté.

Sur le sixième moyen, tiré d'une erreur manifeste d'appréciation et de la violation du principe de proportionnalité

Arguments des parties

163 Le requérant estime que la décision de révocation est entachée d'une erreur manifeste d'appréciation des faits et viole le principe de proportionnalité, en ce qu'elle omet de tenir compte de plusieurs circonstances atténuantes, à savoir, d'une part, ses bons états de service, et, d'autre part, sa bonne foi quant à la liberté de publier pendant une période de congé de convenance personnelle. Il soutient, en outre, que les fonctionnaires affectés à la DG II savaient que son congé serait l'occasion de préparer un ouvrage et que certains d'entre eux lui avaient même recommandé de le rédiger. Enfin, la sanction serait d'autant plus disproportionnée que seules des infractions formelles aux articles 11, 12 et 17, du statut lui étaient initialement reprochées.

164 La Commission répond que le fait de ne pas avoir fait l'objet de procédures disciplinaires auparavant est inopérant. Par ailleurs, il serait malvenu pour le requérant d'invoquer sa bonne foi, dès lors que, dans sa demande de congé, celui-ci avait indiqué d'autres motifs que celui de la préparation d'un livre.

Appréciation du Tribunal

165 Selon une jurisprudence constante, dès lors que la réalité des faits retenus à la charge du fonctionnaire est établie, le choix de la sanction adéquate appartient à l'AIPN, et le juge communautaire ne saurait substituer son appréciation à celle de cette autorité, sauf en cas d'erreur manifeste ou de détournement de pouvoir (arrêts De Greef/Commission, précité, point 45, F./Commission, point 34, Williams/Cour des comptes I, point 83, et D./Commission, précité, point 96). Il convient de rappeler également que la détermination de la sanction à infliger est fondée sur une évaluation globale par l'AIPN de tous les faits concrets et circonstances propres à chaque cas individuel, les articles 86 et 89 du statut ne prévoyant pas de rapports fixes entre les sanctions disciplinaires indiquées et les différentes sortes de manquements et ne précisant pas dans quelle mesure l'existence de circonstances aggravantes ou atténuantes intervient dans le choix de la sanction (arrêt de la Cour

du 5 février 1987, F./Commission, 403/85, Rec. p. 645, point 26; arrêts Williams/Cour des comptes I, point 83, et Y/Parlement, précité, point 34).

66 En l'espèce, il convient de constater, tout d'abord, que la réalité des faits reprochés au requérant est établie.

67 Il y a lieu de relever, ensuite, que la sanction infligée ne saurait être considérée comme étant disproportionnée ou comme résultant d'une erreur manifeste d'appréciation. Même s'il n'est pas contesté que le requérant avait de bons états de service, l'AIPN pouvait néanmoins légitimement considérer que, eu égard à la gravité des faits retenus, au grade et aux responsabilités du requérant, une telle circonstance n'était pas susceptible d'atténuer la sanction à infliger.

68 Par ailleurs, l'argument du requérant, selon lequel il aurait dû être tenu compte de sa bonne foi quant à la portée des devoirs du fonctionnaire en congé de convenance personnelle, ne peut être accueilli. Il résulte, en effet, de la jurisprudence que les fonctionnaires sont censés connaître le statut (arrêts du Tribunal du 18 décembre 1997, Daffix/Commission, T-12/94, RecFP p. I-1197, point 116, et du 7 juillet 1998, Telchini e a./Commission, T-116/96, T-212/96 et T-215/96, RecFP p. II-947, point 59), de sorte que leur prétendue ignorance des obligations leur incombant à ce titre ne saurait être constitutive de bonne foi. L'argument est d'autant moins fondé en l'espèce qu'il est admis par le requérant que ses collègues connaissaient son intention de préparer l'ouvrage litigieux pendant son congé de convenance personnelle, alors que, dans la demande qu'il avait adressée à l'AIPN en application de l'article 40 du statut, il avait indiqué d'autres motifs que la préparation de cet ouvrage. Étant donné que de telles déclarations sont contraires aux liens de loyauté et de confiance qui doivent régir les relations entre administration et fonctionnaires, et inconciliables avec l'intégrité exigée de tout fonctionnaire (voir, en ce sens, arrêt M./Conseil, précité, point 21), l'AIPN pouvait, dès lors, considérer à juste titre que l'argument du requérant, concernant sa prétendue bonne foi, n'était pas fondé.

169 En conséquence, le moyen doit être rejeté.

Sur le septième moyen, tiré d'un détournement de pouvoir

170 Le requérant fait valoir qu'un ensemble d'indices démontre l'existence d'un détournement de pouvoir. Il invoque, à cet égard, les déclarations de certains membres de la Commission, qui démontreraient que le choix de la sanction avait déjà été décidé avant l'ouverture de la procédure disciplinaire; le fait que la Commission n'ait pas pris soin de l'avertir des problèmes posés par la publication de son ouvrage, alors qu'elle en avait connaissance par un article de presse du 10 juillet 1995; l'initiative qu'elle aurait prise, par une note du 28 juillet 1995, de modifier les modalités de calcul de la réduction des traitements en cas de suspension, les irrégularités de procédure dénoncées dans le présent recours et, enfin, l'absence de prise en considération de sa bonne foi quant au fait qu'il n'avait pas averti ses supérieurs de ses intentions.

171 Il y a lieu de rappeler que, conformément à la jurisprudence, le détournement de pouvoir consiste, pour une autorité administrative, à user de ses pouvoirs dans un but autre que celui en vue duquel ils lui ont été conférés. Dès lors, une décision n'est entachée de détournement de pouvoir que si elle apparaît, sur la base d'indices objectifs, pertinents et concordants, avoir été prise pour atteindre des fins autres que celles excipées (arrêt Williams/Cour des comptes I, points 87 et 88).

172 Sur les déclarations faites par certains membres de la Commission avant l'ouverture de la procédure disciplinaire, il suffit de rappeler que, ainsi qu'il a été souligné au point 96 ci-dessus, ces déclarations ne reflétaient qu'une appréciation provisoire de la part des membres de la Commission concernés et qu'elles ne pouvaient pas, dans les circonstances de l'espèce, altérer la régularité de la procédure disciplinaire.

173 De même, l'argument du requérant selon lequel la Commission aurait dû l'avertir des risques qu'il encourait en publiant son ouvrage ne peut davantage être accueilli. Ainsi que le fait valoir la Commission à juste titre, celle-ci ne saurait être tenue

pour responsable des initiatives que le requérant avait, en outre, pris soin de lui dissimuler lors de sa demande de congé de convenance personnelle. Par ailleurs, pour les raisons exposées dans le cadre des premier et sixième moyens, il y a lieu également de rejeter les arguments tirés de l'existence d'irrégularités dans le déroulement de la procédure disciplinaire et de la bonne foi du requérant.

111 Quant à l'argument tiré d'une modification, par la Commission, des modalités générales de calcul de la réduction des traitements en cas de suspension, il suffit de relever qu'elle ne concerne pas spécifiquement la révocation du requérant, et qu'elle ne peut donc démontrer le détournement de pouvoir allégué.

112 Dès lors, il n'est pas établi que, en infligeant la sanction prononcée, l'AIPN a poursuivi un but autre que celui de sauvegarder l'ordre interne de la fonction publique communautaire. Le septième moyen doit donc être rejeté.

113 Il découle de tout ce qui précède que les conclusions en annulation doivent être rejetées.

Sur les conclusions en indemnité

114 Le requérant soutient que les irrégularités dénoncées dans le cadre de son recours en annulation lui ont causé un préjudice matériel et moral.

115 A cet égard, il y a lieu de relever que, selon une jurisprudence constante, des conclusions tendant à la réparation du préjudice matériel ou moral doivent être rejetées dans la mesure où elles présentent un lien étroit avec les conclusions en annulation qui ont, elles-mêmes, été rejetées soit comme irrecevables, soit comme non fondées (arrêt N/Commission, point 159, et la jurisprudence citée).

179 En l'espèce, il existe un lien étroit entre les conclusions en annulation et les conclusions en indemnité, l'objet de ces dernières étant d'obtenir «réparation des irrégularités dénoncées dans le cadre du recours en annulation». Partant, dans la mesure où l'examen des moyens présentés au soutien des conclusions en annulation n'a révélé aucune illégalité commise par la Commission, et donc aucune faute de nature à engager sa responsabilité, les conclusions en indemnité doivent être rejetées.

180 Le recours doit, en conséquence, être rejeté dans son ensemble.

Sur les dépens

181 Aux termes de l'article 87, paragraphe 2, du règlement de procédure, toute partie qui succombe est condamnée aux dépens, s'il en est conclu en ce sens. Toutefois, selon l'article 88 du même règlement, dans les litiges entre les Communautés et leurs agents, les frais exposés par les institutions restent à la charge de celles-ci. Le requérant ayant succombé en ses moyens et la Commission ayant conclu à ce que le Tribunal statue sur les dépens comme de droit, chacune des parties supportera ses propres dépens.

182 En outre, aux termes de l'article 87, paragraphe 5, troisième alinéa, du règlement de procédure, en cas de désistement, et à défaut de conclusions sur les dépens, chaque partie supporte ses propres dépens.

Par ces motifs,

LE TRIBUNAL (première chambre)

déclare et arrête:

1) Les affaires T-34/96 et T-163/96 sont jointes aux fins de l'arrêt. L'affaire T-34/96 est radiée du registre du Tribunal.

2) Le recours dans l'affaire T-163/96 est rejeté.

3) Chacune des parties supportera ses propres dépens.

Vesterdorf Pirrung Vilaras

Ainsi prononcé en audience publique à Luxembourg, le 19 mai 1999.

Le greffier
H. Jung

Le président
B. Vesterdorf

ARRÊT DU TRIBUNAL (première chambre)
19 mai 1999 *

«Fonctionnaires – Procédure disciplinaire – Révocation – Articles 11, 12 et 17 du statut – Liberté d'expression – Devoir de loyauté et de dignité de la fonction»

Dans les affaires jointes T-34/96 et T-163/96,

Bernard Connolly, ancien fonctionnaire de la Commission des Communautés européennes, demeurant à Everberg (Belgique), représenté par Me Jacques Sambon et Pierre-Paul Van Gehuchten, avocats au barreau de Bruxelles, ayant élu domicile à Luxembourg en l'étude de Me Louis Schultz, 2, rue du Fort Rheinsheim,

partie requérante,

contre

Commission des Communautés européennes, représentée par MM Gianluigi Valsesia, conseiller juridique principal, et Julian Currall, membre du service juridique, en qualité d'agents, ayant élu domicile à Luxembourg auprès de M. Carlos Gómez de la Cruz, membre du service juridique, Centre Wagner, Kirchberg,

partie défenderesse,

ayant pour objet, d'une part, une demande d'annulation de l'avis du conseil de discipline du 7 décembre 1995 et de la décision de la Commission du 16 janvier 1996, portant révocation du requérant, et, d'autre part, une demande de dommages-intérêts,

* Langue de procédure : le français.

LE TRIBUNAL DE PREMIÈRE INSTANCE
DES COMMUNAUTÉS EUROPÉENNES (première chambre),

composé de MM. B. Vesterdorf, président, J. Pirrung et M. Vilaras, juges,

greffier: M. H. Jung,

vu la procédure écrite et à la suite de la procédure orale du 10 février 1999,

rend le présent

Arrêt

Faits à l'origine du litige

A la date des faits, le requérant, M. Connolly, était fonctionnaire, de grade A 4, échelon 4, de la Commission et chef de l'unité 3 «SME, politiques monétaires nationales et communautaire» au sein de la direction D «affaires monétaires» de la direction générale des affaires économiques et financières (DG II) (ci-après «unité II.D.3»).

2 A partir de 1991, M. Connolly a présenté, à trois reprises, des projets d'articles relatifs, respectivement, à l'application de théories monétaires, à l'évolution du système monétaire européen et aux implications monétaires du livre blanc sur l'avenir de l'Europe, pour lesquels il s'est vu refuser l'autorisation préalable de publication, prévue par l'article 17, second alinéa, du statut des fonctionnaires des Communautés européennes (ci-après «statut»).

3 Le 24 avril 1995, M. Connolly a présenté, en application de l'article 40 du statut, une demande de congé de convenance personnelle, pour une période de trois mois à compter du 3 juillet 1995, en déclarant que les raisons d'une telle demande étaient: a) d'assister son fils, pendant les vacances scolaires, dans sa préparation à l'entrée dans une université du Royaume-Uni, b) de permettre à son père de passer quelque temps avec sa famille, c) de consacrer du temps à la réflexion sur des sujets de théorie économique et de politique et de «rétablir sa relation avec la littérature». La Commission lui a accordé ce congé par décision du 2 juin 1995.

4 Par lettre du 18 août 1995, M. Connolly a demandé à être réintégré dans les services de la Commission à la fin de son congé de convenance personnelle. La Commission l'a réintégré dans son emploi, à partir du 4 octobre 1995, par décision du 27 septembre 1995.

5 Pendant son congé de convenance personnelle, M. Connolly a publié un livre intitulé *The rotten heart of Europe. The dirty war for Europe's money*, sans demander d'autorisation préalable.

6 Au début du mois de septembre, notamment du 4 au 10 septembre 1995, une série d'articles concernant ce livre a été publiée dans la presse européenne et surtout britannique.

7 Par lettre du 6 septembre 1995, le directeur général du personnel et de l'administration, en sa qualité d'autorité investie du pouvoir de nomination (ci-après «AIPN»), a informé le requérant de sa décision d'ouvrir une procédure disciplinaire contre lui pour violation des articles 11, 12 et 17 du statut, et l'a convoqué à une audition préalable, en application de l'article 87 du statut.

9 Le 12 septembre 1995 a eu lieu une première audition du requérant au cours de laquelle celui-ci a déposé une déclaration écrite indiquant qu'il ne répondrait à aucune question sans connaître préalablement les manquements spécifiques qui lui étaient reprochés.

10 Par lettre du 13 septembre, l'AIPN a indiqué au requérant que les manquements allégués faisaient suite à la publication de son livre, à sa parution par extraits dans le quotidien *The Times*, ainsi qu'aux propos tenus par lui à cette occasion dans un entretien paru dans le même journal, en l'absence d'autorisation préalable, et l'a de nouveau convoqué pour qu'il soit entendu sur ces faits à la lumière de ses obligations découlant des articles 11, 12 et 17 du statut.

11 Le 26 septembre 1995, lors de sa seconde audition, le requérant a refusé de répondre aux questions qui lui étaient posées et a présenté une déclaration écrite dans laquelle il faisait valoir qu'il estimait possible de publier un ouvrage sans autorisation préalable dès lors qu'il était en congé de convenance personnelle. Le requérant ajoutait que la parution des extraits de son ouvrage dans la presse relevait de la responsabilité de son éditeur et que certains des propos relatés dans l'entretien visé lui étaient attribués à tort. Enfin, M. Connolly mettait en cause le caractère objectif de la procédure disciplinaire engagée contre lui, au regard, notamment, de déclarations à la presse le concernant par le président et le porte-parole de la Commission, ainsi que le respect de la confidentialité de ladite procédure.

12 Par décision du 27 septembre 1995, prise en vertu de l'article 88 du statut, l'AIPN a suspendu le requérant de ses fonctions à compter du 3 octobre 1995, avec retenue de la moitié de son traitement de base pendant la période de suspension.

13 Le 4 octobre 1995, l'AIPN a décidé de saisir le conseil de discipline, en application de l'article 1er de l'annexe IX du statut (ci-après «annexe IX»).

14 Par lettre du 18 octobre 1995, enregistrée au secrétariat général de la Commission le 27 octobre suivant, le requérant a saisi l'AIPN d'une réclamation, au titre de l'article 90, paragraphe 2, du statut, contre les décisions d'engager une procédure disciplinaire et de saisir le conseil de discipline, ainsi que contre la décision du 27 septembre 1995 de le suspendre de ses fonctions.

15 Par requête déposée au greffe du Tribunal le 27 octobre 1995, le requérant a introduit un recours, en vertu de l'article 91, paragraphe 4, du statut, ayant pour objet l'annulation des trois décisions de l'AIPN susvisées, ainsi que la condamnation de la Commission au paiement de dommages-intérêts (affaire T-203/95). Par acte séparé, déposé au greffe du Tribunal le même jour, le requérant a introduit une demande de mesures provisoires.

16 Par ordonnance du président du Tribunal du 12 décembre 1995, Connolly/Commission (T-203/95 R, Rec. p. II-847), la Commission a été invitée à prendre toutes les mesures nécessaires pour qu'aucune information relative à la carrière de M. Connolly, à sa personnalité, à ses opinions ou à sa santé, et qui soit de nature à porter atteinte, directement ou indirectement, à sa réputation personnelle et professionnelle, ne soit divulguée par son personnel dans le cadre de contacts avec la presse ou de toute autre manière. La demande de mesures provisoires a été rejetée pour le surplus.

17 Le 7 décembre 1995, le conseil de discipline a émis son avis, notifié au requérant le 15 décembre suivant, dans lequel il recommandait d'infliger à celui-ci la sanction de la révocation, sans perte des droits à la pension d'ancienneté (ci-après «avis du conseil de discipline» ou «avis»).

18 Le 9 janvier 1996, le requérant a été entendu par l'AIPN, en application de l'article 7, troisième alinéa, de l'annexe IX.

18 Par décision en date du 16 janvier 1996, l'AIPN a infligé au requérant la sanction visée à l'article 86, paragraphe 2, sous f), du statut, à savoir la révocation sans suppression ni réduction des droits à la pension d'ancienneté (ci-après «décision de révocation»).

19 La décision de révocation est motivée dans les termes suivants:

«considérant que M. Connolly a été nommé, le 16 mai 1990, chef de l'unité [II D.3];

considérant que, de par ses fonctions, M. Connolly était appelé, entre autres, à préparer et à participer aux travaux du comité monétaire, du sous-comité de politique monétaire et du comité des gouverneurs, à suivre les politiques monétaires dans les États membres et à analyser les implications monétaires de la mise en œuvre de l'Union économique et monétaire;

considérant que M. Connolly a écrit un ouvrage qui a été publié au début de septembre 1995 sous le titre *The Rotten Heart of Europe*;

considérant que cet ouvrage porte sur l'évolution du processus d'intégration européenne au cours des dernières années dans le domaine économique et monétaire et qu'il a été élaboré par M. Connolly sur la base de son expérience professionnelle dans l'exercice de ses fonctions au sein de la Commission;

considérant que M. Connolly n'a pas demandé l'autorisation à l'AIPN de faire publier le livre en question conformément aux dispositions de l'article 17 du statut auxquelles tout fonctionnaire reste soumis;

considérant que M. Connolly ne pouvait ignorer que cette autorisation lui serait refusée pour les mêmes raisons que celles qui avaient dicté le refus d'autorisations antérieures de publier des articles où il avait déjà exposé ses lignes de pensée qui constituent le contenu essentiel du présent ouvrage;

considérant que M. Connolly mentionne dans la préface de son livre *The Rotten Heart of Europe* que celui-ci avait son origine dans le fait qu'il avait demandé une autorisation de publication d'un chapitre sur le SME pour un autre livre; que l'autorisation lui a été refusée et qu'il a estimé qu'il serait important de retravailler ce chapitre et d'en faire un livre entier;

considérant que M. Connolly a approuvé et collaboré activement à la promotion de son livre notamment en accordant une interview au journal *The Times* le 4 septembre 1995, date à laquelle le *Times* a également publié des extraits de son livre, et en écrivant un article pour le *Times* publié le 6 septembre 1995.

considérant que M. Connolly ne pouvait pas ignorer que la publication de son ouvrage reflétait une opinion personnelle, discordante de la ligne de conduite adoptée par la Commission en tant qu'institution de l'Union européenne, responsable de la poursuite d'un objectif majeur et d'un choix politique fondamental inscrit dans le traité de l'Union qui est l'Union économique et monétaire;

considérant que, de par sa conduite, M. Connolly a gravement lésé les intérêts des Communautés et porté préjudice à l'image et à la réputation de l'institution;

considérant que M. Connolly reconnaît avoir perçu les droits d'auteur qui lui ont été payés par ses éditeurs en contrepartie de la publication de son œuvre;

considérant que l'ensemble du comportement de M. Connolly a porté atteinte à la dignité de sa fonction en tant que fonctionnaire devant régler sa conduite en ayant uniquement en vue les intérêts de la Commission,

considérant que, ayant été souvent confronté à des refus d'autorisation de publication, la nature et la gravité de tels manquements ne sauraient échapper à un fonctionnaire normalement diligent, de son grade et de ses responsabilités;

considérant que, à aucun moment, au mépris des devoirs de loyauté et d'honnêteté à l'égard de l'institution, M. Connolly n'a averti ses supérieurs hiérarchiques de son intention de faire publier l'ouvrage en question alors qu'il demeurait soumis, en tant que fonctionnaire en congé de convenance personnelle, à ses obligations de réserve;

considérant que le comportement de M. Connolly, de par sa gravité, a rompu de façon irréparable la confiance que la Commission est en droit d'exiger de ses fonctionnaires et, en conséquence, rend impossible le maintien d'une quelconque relation de travail avec l'institution;

[...]»

20 Par lettre du 7 mars 1996, enregistrée au secrétariat général de la Commission le 14 mars suivant, le requérant a introduit une réclamation au titre de l'article 90, paragraphe 2, du statut, contre l'avis du conseil de discipline et contre la décision de révocation.

Procédure

21 Par requête déposée au greffe du Tribunal le 13 mars 1996, le requérant a introduit un recours visant à l'annulation de l'avis du conseil de discipline (affaire T-34/96).

22 Par acte déposé au greffe du Tribunal le 13 avril 1996, la Commission a, dans l'affaire T-34/96, soulevé une exception d'irrecevabilité, au titre de l'article 114, paragraphe 1, du règlement de procédure. Par ordonnance du Tribunal (deuxième chambre) du 9 juillet 1996, l'exception a été jointe au fond.

23 Le 18 juillet 1996, le requérant s'est vu notifier la décision explicite de rejet de la réclamation qu'il avait introduite contre l'avis du conseil de discipline et la décision de révocation.

24 Par requête déposée au greffe du Tribunal le 18 octobre 1996, le requérant a introduit un recours visant à obtenir l'annulation de l'avis du conseil de discipline et de la décision de révocation ainsi que l'octroi de dommages-intérêts (affaire T-163/96).

25 Par requête déposée au greffe le 23 décembre 1996, le requérant a saisi le Tribunal d'une demande de réparation des préjudices qu'il aurait subis à la suite de la publication dans la presse d'informations et de déclarations le concernant (affaire T-214/96).

26 Par ordonnance du président de la deuxième chambre du Tribunal du 10 juin 1998, les affaires T-203/95, T-34/96, T-163/96 et T-214/96 ont été jointes aux fins de la procédure orale.

27 Par décision du Tribunal du 21 septembre 1998, le juge rapporteur a été affecté à la première chambre, à laquelle les affaires T-203/95, T-34/96, T-163/96 et T-214/96 ont, par conséquent, été attribuées.

28 Sur rapport du juge rapporteur, le Tribunal (première chambre) a décidé d'ouvrir la procédure orale sans procéder à des mesures d'instruction préalables. Toutefois, la défenderesse a été invitée à produire, au titre des mesures d'organisation de la procédure, un exemplaire, dans sa version originale, de l'ouvrage ayant donné lieu à la sanction faisant l'objet du recours dans l'affaire T-163/96.

29 Les parties ont été entendues en leurs plaidoiries et en leurs réponses aux questions posées par le Tribunal lors de l'audience publique du 10 février 1999.

30 Lors de l'audience, il a été pris acte de ce que les demandes et les moyens invoqués dans le recours T-34/96 étaient intégralement repris dans le recours T-163/96 et que, en conséquence, le requérant se désistait de son recours dans l'affaire T-34/96.

Conclusions des parties

10 Dans l'affaire T-163/96, le requérant conclut à ce qu'il plaise au Tribunal:

- annuler l'avis du conseil de discipline,
- annuler la décision de révocation,
- annuler la décision de rejet de sa réclamation qui lui a été notifiée le 18 juillet 1996;
- condamner la Commission au paiement de 7 500 000 BFR en réparation de son préjudice matériel, et de 1 500 000 BFR en réparation de son préjudice moral;
- condamner la Commission aux dépens.

11 La Commission conclut à ce qu'il plaise au Tribunal:

- rejeter le recours comme non fondé;
- statuer comme de droit sur les dépens.

Sur les conclusions en annulation

12 Le requérant invoque sept moyens à l'appui de ses conclusions en annulation. Le premier est tiré d'irrégularités dans le déroulement de la procédure disciplinaire. Le deuxième est tiré d'un défaut de motivation et de la violation, par le conseil de discipline, de l'article 7 de l'annexe IX, des droits de la défense, ainsi que du principe de bonne administration. Les troisième, quatrième et cinquième moyens sont tirés, respectivement, de la violation des articles 11, 12 et 17 du statut. Le sixième moyen est pris d'une erreur manifeste d'appréciation et de la violation du

principe de proportionnalité. Enfin, le septième moyen est tiré d'un détournement de pouvoir.

Sur le premier moyen tiré d'irrégularités dans le déroulement de la procédure disciplinaire

34 Ce moyen s'articule en quatre branches. La première est tirée de la prise en compte dans l'avis du conseil de discipline et la décision de révocation d'éléments qui n'ont pas été soumis à la procédure disciplinaire. La deuxième est tirée du caractère irrégulier de l'audition du directeur général de la DG II par le conseil de discipline. La troisième est tirée du défaut d'établissement d'un rapport devant le conseil de discipline. La quatrième est tirée de la participation irrégulière du président du conseil de discipline à la procédure.

Sur la prise en compte d'éléments non soumis à la procédure disciplinaire

– Arguments des parties

35 Le requérant soutient que deux des éléments sur lesquels le conseil de discipline et l'AIPN se sont fondés, dans l'avis et la décision de révocation, n'ont été mentionnés ni lors des auditions préalables ni dans le rapport de saisine du conseil de discipline, de sorte qu'il n'a pas été en mesure de se justifier sur ces points lors de la procédure disciplinaire. Il en résulterait une violation de l'article 87, second alinéa, du statut et de l'article 1er de l'annexe IX, ainsi qu'une violation du principe du contradictoire.

36 En premier lieu, le requérant fait valoir que la considération de l'avis du conseil de discipline et de la décision de révocation, selon laquelle son ouvrage refléterait une opinion discordante de la politique de la Commission en vue de la réalisation de l'Union économique et monétaire, constitue un grief qui n'aurait jamais été mentionné lors des auditions préalables, ni dans le cadre des correspondances échangées avec l'AIPN. Le rapport de saisine du conseil de discipline se limiterait, à cet égard, à faire état de violations formelles des articles 11, 12 et 17 du statut, du fait de la publication de son livre sans autorisation préalable, sans pour autant

évoquer le contenu de son ouvrage. Le caractère critique de l'ouvrage aurait, certes, été mentionné dans la décision de suspension du 27 septembre 1995 et dans les déclarations faites à la presse par des membres de la Commission. Néanmoins, dans la mesure où cet élément n'a pas été repris au cours de la procédure disciplinaire elle-même et notamment dans le rapport de saisine du conseil de discipline, le requérant aurait considéré que l'AIPN avait choisi de n'incriminer que les violations formelles des articles 11, 12 et 17 du statut. Par la suite, le requérant n'aurait pas été interrogé par le conseil de discipline sur la prétendue non-conformité de son ouvrage à la politique de la Commission.

59 Dans sa réplique, le requérant admet que l'objet du livre était, certes, évoqué dans le rapport de saisine du conseil de discipline, mais uniquement en vue d'établir que l'ouvrage concernait la Communauté européenne et relevait donc de l'article 17, second alinéa, du statut. Quant aux pièces jointes en annexes à ce rapport, parmi lesquelles les extraits du livre parus dans la presse et les entretiens accordés par lui à un journal britannique, elles seraient sans incidence sur l'étendue de la saisine du conseil de discipline.

60 En second lieu, le requérant reproche au conseil de discipline d'avoir visé, dans son avis, le fait qu'il avait écrit un article, publié le 6 septembre 1995 dans le quotidien *The Times*, et participé à un programme de télévision le 26 septembre suivant, alors que ces faits n'étaient pas non plus évoqués dans le rapport de saisine du conseil de discipline. De même, la décision de révocation se référerait à tort à l'article du 6 septembre 1995.

61 La Commission réplique, en premier lieu, que le rapport de saisine du conseil de discipline se réfère expressément, comme la décision de suspension du 27 septembre 1995, au contenu du livre, et non au seul fait de sa publication, ainsi qu'au préjudice porté aux intérêts des Communautés. Les étapes suivantes de la procédure disciplinaire démontreraient, de la même manière, que le requérant avait connaissance du reproche qui lui était fait à l'égard du contenu de son ouvrage. En effet, le requérant aurait lui-même justifié sa conduite devant le conseil de discipline en faisant l'apologie de son livre et de ses analyses. S'agissant, en second lieu, des interventions du requérant dans la presse et dans un programme télévisé, la

Commission réfutent qu'elles sont mentionnées dans le rapport de saisine du conseil de discipline.

– Appréciation du Tribunal

46 Il y a lieu de rappeler que l'article 87, second alinéa, du statut exige qu'un fonctionnaire soit entendu par l'AIPN avant que celle-ci n'engage la procédure prévue à l'annexe IX. L'audition prévue à ce stade de la procédure disciplinaire, à la demande de l'AIPN, doit permettre au fonctionnaire de s'expliquer sur les griefs qui lui sont adressés et à l'AIPN d'apprécier la gravité de ces griefs à la lumière des explications fournies par l'intéressé. Lorsque, à la suite de cette audition, des faits pouvant donner lieu à des sanctions plus graves que l'avertissement ou le blâme sont retenus à la charge du fonctionnaire, le conseil de discipline est saisi et l'intéressé doit alors bénéficier de toutes les garanties prévues à l'annexe IX (arrêt de la Cour du 11 juillet 1985, R./Commission, 255/83 et 256/83, Rec. p. 2473, points 20 et 21). A cet égard, l'article 1er de l'annexe IX dispose que le rapport de l'AIPN portant saisine du conseil de discipline doit indiquer clairement les faits reprochés et, s'il y a lieu, les circonstances dans lesquelles ils ont été commis.

47 Il convient dès lors de vérifier si, dans le cas d'espèce, l'AIPN n'a pas méconnu les droits de la défense, tels qu'ils sont garantis par l'article 87, second alinéa, du statut et l'article 1er de son annexe IX.

48 S'agissant de la violation alléguée de l'article 87, second alinéa, du statut, il convient de relever que, après avoir convoqué le requérant à une première audition préalable, au cours de laquelle celui-ci a déposé une déclaration écrite faisant état de l'absence d'accusations précises, l'AIPN l'a de nouveau invité, par lettre du 13 septembre 1995, à être préalablement entendu sur d'éventuels manquements aux articles 11, 12 et 17 du statut. L'AIPN lui précisait que les manquements qui lui étaient reprochés concernaient la publication de l'ouvrage dont il était l'auteur, sa parution par extraits dans le quotidien *The Times*, depuis le 4 septembre 1995, ainsi que les propos qu'il avait tenus à cette occasion dans un entretien paru dans le même journal, en l'absence d'autorisation préalable. L'AIPN l'invitait, en

conséquence, à s'expliquer sur toutes les circonstances de cette affaire à la lumière des obligations résultant des dispositions susvisées.

47 Or, il ressort du dossier que, lors de cette seconde audition préalable du 26 septembre 1995, qui, au surplus, avait été reportée à deux reprises à sa demande, le requérant a de nouveau refusé de répondre à toute question et s'est limité à déposer une nouvelle déclaration écrite, dans laquelle, en tout état de cause, il s'expliquait sur les faits qui lui étaient reprochés. Il résulte de ces éléments que le requérant a été préalablement entendu, conformément à l'article 87, second alinéa, du statut, et, en raison de son attitude, celui-ci ne saurait valablement se prévaloir de ce que, lors de ces auditions, l'AIPN ne lui aurait pas expressément fait part de son appréciation quant au contenu de l'ouvrage publié.

48 Il convient également de rejeter l'argument du requérant selon lequel le rapport de l'AIPN portant saisine du conseil de discipline ne viserait pas le contenu du livre parmi les faits reprochés, mais se limiterait à faire état de violations formelles des articles 11, 12 et 17 du statut. A cet égard, il y a lieu de constater que ledit rapport faisait apparaître, sans ambiguïté, que le contenu de l'ouvrage en cause, et notamment son caractère polémique, constituait l'un des faits reprochés au requérant. En particulier, aux points 23 et suivants du rapport, l'AIPN invoquait un manquement à l'article 12 du statut, aux motifs que «la publication du livre en elle-même porte atteinte à la dignité de la fonction de M. Connolly, puisqu'il a été chef de l'unité [II.D.3] chargée, au sein de la Commission, des questions évoquées dans son livre», et que «en outre, dans son livre, M. Connolly se livre à certaines attaques désobligeantes et non étayées envers des commissaires et d'autres membres du personnel de la Commission de manière à porter atteinte à la dignité de sa fonction et à discréditer la Commission», en violation des obligations qui lui incombent en vertu de l'article 12. Le rapport citait ensuite expressément certains des propos tenus par le requérant dans son ouvrage, et comportait, en annexe, de nombreux extraits du livre en cause.

45 Il s'ensuit que, conformément à l'article 1er de l'annexe IX, le rapport de l'AIPN exposait de manière suffisamment claire les faits reprochés au requérant pour qu'il soit en mesure d'exercer ses droits de la défense.

46 Cette interprétation est en outre confirmée par le fait que, ainsi qu'il ressort du procès-verbal de l'audition du requérant devant le conseil de discipline, celui-ci s'est, à cette occasion, expliqué à plusieurs reprises sur l'objet et le contenu de son ouvrage.

47 Par ailleurs, il y a lieu de relever que le requérant, lors de sa dernière audition par l'AIPN, le 9 janvier 1996, n'a pas prétendu que l'avis du conseil de discipline était fondé sur des griefs devant être considérés comme des faits nouveaux, ni demandé la réouverture de la procédure disciplinaire comme l'article 11 de l'annexe IX lui en reconnaissait le droit (voir, en ce sens, l'arrêt du Tribunal du 26 janvier 1995, D/Commission, T-549/93, RecFP p. II-43, point 55).

48 Quant à l'argument selon lequel le fait qu'il ait publié un article en vue de la promotion de son livre, le 6 septembre 1995, et qu'il ait participé à une émission télévisée le 26 septembre 1995 ne lui aurait pas non plus été reproché dans le rapport de saisine du conseil de discipline, il suffit de constater que, contrairement à ce qu'il allègue, l'AIPN y avait fait expressément référence au point 19 dudit rapport.

49 Au vu de l'ensemble de ces éléments, la première branche du moyen doit, par conséquent, être rejetée.

Sur le caractère irrégulier de l'audition du directeur général de la DG II par le conseil de discipline

— Arguments des parties

50 Le requérant soutient que l'audition du directeur général de la DG II par le conseil de discipline est irrégulière à plusieurs égards.

51 En premier lieu, ce témoin à charge a été cité par le conseil de discipline et non par la Commission, en violation des articles 4 et 5 de l'annexe IX, en vertu desquels ce droit n'est conféré qu'au fonctionnaire poursuivi et à la Commission. Le requérant ajoute qu'il avait protesté auprès du conseil de discipline contre cette audition, comme l'attesterait le mémoire complémentaire qu'il avait déposé. Dans sa réplique, le requérant conclut qu'en procédant de la sorte le conseil de discipline a, de facto, engagé une enquête complémentaire au sens de l'article 6 de l'annexe IX, ce qui exigeait, en tout état de cause, que cette enquête soit contradictoire.

52 En deuxième lieu, ce témoignage violerait les dispositions de l'annexe IX, ainsi que le principe du contradictoire. Tout d'abord, le requérant n'aurait pas été informé suffisamment tôt par le conseil de discipline de la convocation de ce témoin. Le préavis de deux heures, invoqué par la Commission, aurait été insuffisant pour permettre au requérant de préparer sa défense puisqu'il a été consacré à son audition.

53 Ensuite, le compte rendu de l'audition du directeur général de la DG II devant le conseil de discipline lui aurait été transmis tardivement, de sorte qu'il n'aurait pas pu exercer ses droits de la défense. L'argument selon lequel il n'aurait pas invoqué ce grief devant l'AIPN serait sans fondement, dès lors qu'il avait formellement protesté contre cette audition et que, en tout état de cause, l'AIPN n'était pas en mesure de remédier à ce vice, eu égard à l'indépendance du conseil de discipline.

55 Enfin, le compte rendu de cette audition serait incomplet sur plusieurs points et en donnerait une impression inexacte. Ainsi, la question posée au témoin, par l'un des membres du conseil de discipline, pour savoir si le livre contenait des informations confidentielles, ne serait pas retranscrite. Le fait que, selon le témoin, aucune remarque négative officielle ne lui avait été adressée à propos de ce livre ne serait pas non plus mentionné. De même, ne seraient pas consignées les protestations du requérant contre les déclarations du témoin, selon lesquelles l'ouvrage ne contenant aucune analyse économique, et étant mal perçu par les fonctionnaires de la DG II

56 La Commission fait valoir que le requérant et son conseil ont été informés de la décision du conseil de discipline d'entendre le directeur général de la DG II, environ deux heures avant l'audition de ce dernier, et que le requérant a eu la possibilité de commenter les déclarations du témoin. Quant au compte rendu de l'audition du témoin, le requérant n'aurait jamais signalé les erreurs alléguées auprès de l'AIPN. A supposer même qu'elles aient existé, de telles erreurs n'auraient pas pu influer sur l'appréciation des membres du conseil, dès lors que ces derniers avaient eux-mêmes procédé à l'audition du témoin.

Appréciation du Tribunal

57 Il y a lieu de rappeler, à titre liminaire, que les articles 4 et 5 de l'annexe IX reconnaissent au fonctionnaire incriminé et à l'institution concernée le droit de citer des témoins devant le conseil de discipline.

58 Par ailleurs, aux termes de l'article 6, premier alinéa, de l'annexe IX, le conseil de discipline peut, s'il ne se juge pas suffisamment éclairé sur les faits reprochés à l'intéressé, ou sur les circonstances dans lesquelles ces faits ont été commis, ordonner une enquête contradictoire. Or, selon la jurisprudence, le conseil de discipline dispose, en vertu de cette disposition, d'un pouvoir d'appréciation sur la nécessité de certaines mesures d'instruction complémentaires, telles que la requête de pièces ou la citation de témoins (arrêt R./Commission, précité, point 24). Il résulte, en outre, des dispositions de l'annexe IX que le conseil de discipline est un organe d'instruction qui, en cette qualité, a pour mission d'effectuer les enquêtes destinées à constater les infractions disciplinaires et à déterminer les circonstances

essentielles pour établir le degré de sanction à infliger (arrêt de la Cour du 29 janvier 1985, F./Commission, 228/83, Rec. p. 275, point 16, ci-après «arrêt F./Commission»).

58 En l'espèce, il ressort des procès-verbaux versés au dossier que le conseil de discipline a estimé nécessaire de procéder à l'audition du supérieur hiérarchique du requérant, en vue d'être éclairé sur les circonstances ayant accompagné la publication de l'ouvrage de M. Connolly. Ce témoin n'ayant pas été préalablement cité par les parties, il y a donc lieu de considérer que l'audition dudit témoin par le conseil de discipline constituait une mesure d'instruction complémentaire, à laquelle, conformément à la jurisprudence susvisée, celui-ci pouvait avoir recours dans le cadre du pouvoir d'appréciation dont il dispose en vertu de l'article 6 de l'annexe IX, afin de mener à bien la mission d'organe d'instruction qui lui est assignée par le statut. Il en résulte que, ce faisant, le conseil de discipline a engagé une enquête au sens de l'article 6 susvisé, ainsi qu'il y était habilité.

59 Il importe néanmoins d'examiner si, ainsi qu'il est allégué, l'audition de ce témoin devant le conseil de discipline a été effectuée en violation du principe du caractère contradictoire de la procédure disciplinaire, qui constitue la garantie du respect des droits de la défense, et auquel l'article 6 de l'annexe IX fait expressément référence.

60 S'agissant, tout d'abord, de l'argument tiré de l'absence d'un préavis suffisamment long pour informer le requérant de l'audition du témoin en cause, cette circonstance ne saurait, en soi, démontrer une violation du principe du contradictoire.

61 A cet égard, il y a lieu de rappeler que le respect du caractère contradictoire de la procédure, dans le cadre d'une enquête telle que celle visée à l'article 6 de l'annexe IX, exige que le fonctionnaire incriminé ou son défenseur soit mis en mesure d'assister aux auditions de témoins auxquelles il est procédé et de poser à ces derniers les questions qui lui paraissent utiles à sa défense (arrêt de la Cour du 20 juin 1985, De Compte/Parlement, 141/84, Rec. p. 1951, point 17, et D/Commission, précité, point 59).

82 Or, en l'espèce, le requérant se limite à invoquer le retard avec lequel il a été informé de l'audition du témoin sans préciser en quoi cette circonstance l'a effectivement empêché d'exercer ses droits de la défense au sens de la jurisprudence susvisée. Il ressort au contraire du dossier que, malgré la brièveté du délai allégué, le requérant et son conseil non seulement ont été mis en mesure d'assister à l'audition du témoin cité par le conseil de discipline, mais ont pu également poser les questions qu'ils estimaient utiles à la défense, de même que présenter des observations sur le témoignage recueilli. En outre, le requérant n'a pas demandé au conseil de discipline de convoquer à nouveau ce témoin afin qu'il réponde à des questions que son conseil, ou lui-même, n'auraient pas eu le temps matériel de préparer pour la première audition.

83 Par conséquent, en l'espèce, il n'est pas établi que le fait pour le requérant d'avoir été averti tardivement de l'audition du témoin en cause ait porté atteinte au caractère contradictoire de la procédure disciplinaire et à l'exercice des droits de la défense.

84 De même, l'argument tiré de ce que le compte rendu de l'audition du témoin a été communiqué tardivement au requérant, à savoir une semaine après que le conseil de discipline a émis son avis, n'est pas non plus de nature à démontrer une violation du principe du contradictoire et doit être écarté. En effet, selon la jurisprudence, la transmission tardive de comptes rendus d'auditions de témoins ne porte pas atteinte au caractère contradictoire de la procédure et aux droits de la défense lorsque, comme en l'espèce, ces comptes rendus concernent uniquement des auditions auxquelles le requérant et ses conseils ont assisté, et lorsque le fonctionnaire poursuivi n'a pas été privé de la possibilité de présenter des observations utiles pour la constatation des faits lors de la procédure disciplinaire (arrêt F./Commission, points 27 et 28).

85 S'agissant de la teneur du compte rendu, elle n'est contestée par le requérant que sur des points qui ne remettent pas en cause le contenu des déclarations du témoin, ni la réalité des faits poursuivis. Ainsi, concernant la question, prétendument omise, portant sur le point de savoir si le livre contenait des informations confidentielles, le compte rendu souligne que le témoin a déclaré n'avoir pas lu le livre, de sorte que ses déclarations à cet égard ne pouvaient servir de fondement au grief tiré d'une

violation du devoir de discrétion, grief qui n'a, en tout état de cause, pas été retenu par l'AIPN dans la décision de révocation (voir ci-dessous point 136). Est également dénué de pertinence l'argument selon lequel il ne serait pas précisé que les commentaires de tiers concernant l'ouvrage, que le témoin a déclaré avoir entendus, auraient été exprimés à titre officieux, dès lors que le compte rendu ne prétend pas que le témoin les aurait qualifiés d'officiels. Quant à la circonstance que ne seraient pas consignées les protestations du requérant à l'égard de certaines déclarations du témoin, concernant le sentiment des fonctionnaires de la DG II et l'absence d'analyse économique dans l'ouvrage, il suffit de relever que le compte rendu en cause porte sur le témoignage de M. Ravasio, et non sur l'opinion du requérant, laquelle a été exposée dans le compte rendu de son audition.

Enfin, le requérant, comme il l'admet lui-même, n'a pas fait état des omissions alléguées lorsqu'il s'est vu notifier le compte rendu contesté, lors de son audition par l'AIPN le 9 janvier 1996 en application de l'article 7, troisième alinéa, de l'annexe IX.

Dans ces conditions, l'argument tiré du caractère incomplet de ce compte rendu ne saurait non plus être accueilli.

Il résulte de ces éléments que la deuxième branche du moyen doit être rejetée.

Sur le défaut d'établissement d'un rapport devant le conseil de discipline

– Arguments des parties

Le requérant estime que les articles 3 et 6 de l'annexe IX, ainsi que les principes exprimés aux points 4.6 et 4.7 d'une note du 24 novembre 1983 du président de la Commission, ont été méconnus aux motifs qu'aucun rapport sur l'ensemble de l'affaire n'a été effectué par l'un des membres du conseil de discipline et que les fonctions de rapporteur n'ont pas été exercées. A l'argument selon lequel l'établissement d'un rapport ne serait qu'une simple faculté, le requérant oppose

que, en décidant lui-même d'entendre un témoin, le conseil de discipline a, de fait, engagé une enquête supplémentaire au sens de l'article 6 de l'annexe IX, lequel imposerait que l'enquête soit conduite par un rapporteur.

- La Commission soutient que l'annexe IX n'impose pas qu'un rapport soit formellement établi et que, en tout état de cause, il faudrait démontrer, pour justifier l'annulation de la décision de révocation, que l'établissement d'un tel rapport aurait entraîné une autre sanction. S'agissant de l'argument tiré de l'absence d'un rapporteur, elle renvoie à l'acte de nomination de ce dernier.

— Appréciation du Tribunal

- En vertu de l'article 3 de l'annexe IX, «lors de la première réunion du conseil de discipline, le président charge l'un de ses membres de faire rapport sur l'ensemble de l'affaire». L'article 6 de l'annexe susvisée dispose, par ailleurs, que l'enquête contradictoire «est conduite par le rapporteur».

- Il y a lieu de souligner, à titre liminaire, que ces dispositions constituent, à l'instar d'autres dispositions de l'annexe IX, des règles de bonne administration et non des formalités substantielles dont la méconnaissance entraînerait, à elle seule, la nullité des actes accomplis durant la procédure disciplinaire (voir, par analogie, en ce qui concerne les délais prévus à l'article 7 de l'annexe IX, les arrêts de la Cour du 4 février 1970, Van Eick/Commission, 13/69, Rec. p. 3, points 3 et 4, F./Commission, point 30, et du 19 avril 1988, M./Conseil, 175/86 et 209/86, Rec. p. 1891, point 16; voir également l'arrêt du Tribunal du 26 novembre 1991, Williams/Cour des comptes, T-146/89, Rec. p. II-1293, point 49, ci-après «arrêt Williams/Cour des comptes»). En effet, l'objet de ces dispositions est de permettre au conseil de discipline, dans le cadre de son organisation interne, de procéder à une enquête suffisamment complète présentant pour l'intéressé toutes les garanties voulues par le statut.

71 En l'espèce, il ressort du procès-verbal de la première séance du conseil de discipline que, conformément à l'article 3 de l'annexe IX, le président a désigné l'un de ses membres comme rapporteur, afin qu'il soit fait rapport sur l'ensemble de l'affaire. Si les procès-verbaux versés au dossier font, certes, apparaître que celui-ci n'a pas été le seul des membres du conseil de discipline à interroger le requérant et le témoin lors des auditions, il ne saurait pour autant en être déduit que les fonctions de rapporteur n'ont pas été exercées.

72 S'agissant, par ailleurs, du grief selon lequel il n'aurait pas été fait rapport sur l'ensemble de l'affaire, il convient de souligner que l'article 3 de l'annexe IX se limite à prévoir la mission du rapporteur sans prescrire de formalités particulières pour l'exécution de celle-ci, comme la production d'un rapport écrit ou encore la communication aux parties d'un tel rapport. Par conséquent, il n'est pas exclu qu'un rapport puisse être présenté oralement par le rapporteur aux autres membres du conseil de discipline. En l'espèce, il n'est pas établi par le requérant qu'un tel rapport n'a pas été présenté. En outre, le requérant ne fournit pas le moindre élément de nature à démontrer que le conseil de discipline n'a pas procédé à une enquête suffisamment complète, présentant pour lui toutes les garanties voulues par le statut (voir l'arrêt F./Commission, point 30, et l'arrêt du Tribunal du 28 juin 1996, Y/Cour de justice, T-500/93, Rec. FP p. II-977, point 52), et, partant, qu'il n'a pas pu statuer en pleine connaissance de cause. Dans ces conditions, l'argumentation du requérant doit être rejetée.

73 Quant aux extraits cités par le requérant de la note du 24 novembre 1983, adressée aux membres de la Commission par le président de cette institution et par le membre en charge des questions de personnel, il convient de relever qu'ils concernent les «possibilités d'amélioration» du fonctionnement de la procédure disciplinaire alors envisagées au sein de la Commission [point 4, sous b)] et qu'il s'agit de simples propositions, adressées aux seuls membres de la Commission, et non de règles de droit que le requérant serait fondé à invoquer. Il y a lieu de constater, en outre, que les extraits cités ne comportent aucun élément permettant de considérer que les règles de la procédure devant le conseil de discipline auraient, en l'espèce, été méconnues.

90 En conséquence, la troisième branche du moyen doit être rejetée.

Sur la participation irrégulière du président du conseil de discipline à la procédure

– Arguments des parties

91 Le requérant fait valoir, tout d'abord, que l'avis du conseil de discipline a été adopté avec la participation active de son président et, partant, en violation de l'article 8 de l'annexe IX. En outre, le président du conseil aurait fait preuve de partialité à l'occasion de l'audition du requérant, puisqu'il aurait qualifié son comportement de «malhonnête et déloyal», et aurait essayé de nier l'importance d'éléments produits à sa décharge.

92 La Commission répond qu'il n'a pas été nécessaire, en l'espèce, d'avoir recours au vote du président du conseil de discipline, dès lors que l'avis a été adopté à la majorité des membres du conseil. Il ne serait d'ailleurs même pas allégué que le président du conseil de discipline a participé au vote.

– Appréciation du Tribunal

93 En vertu de l'article 4 de l'annexe II du statut, «le ou les conseils de discipline sont composés d'un président et de quatre autres membres».

94 Aux termes de l'article 8, premier alinéa, de l'annexe IX, «le président du conseil de discipline ne participe pas aux décisions du conseil, sauf lorsqu'il s'agit de questions de procédure ou en cas de partage égal de voix».

81 Selon la jurisprudence, cette disposition a pour but de permettre au système paritaire, qui inspire la constitution des conseils de discipline, de fonctionner dans toute la mesure où les conseils sont capables, sur cette base, de former en leur sein une majorité. Elle doit donc être interprétée en ce sens que le président du conseil de discipline n'est appelé à participer, par son vote, qu'en cas de partage égal des voix et, pour le surplus, dans les décisions de procédure. Le président jouit toutefois, en vertu de sa qualité même, de tous les pouvoirs nécessaires en vue d'assurer le fonctionnement normal du conseil de discipline. En conséquence, lorsque le président du conseil de discipline n'a pas eu l'occasion d'intervenir, par son vote, dans la décision sur l'avis motivé, mais s'est limité à accomplir les divers actes relatifs à la procédure disciplinaire relevant de l'exercice normal de ses prérogatives, il ne saurait lui être reproché d'avoir pris une part active aux délibérations, en violation de l'article 8 susvisé (arrêts de la Cour du 30 mai 1973, De Greef/Commission, 46/72, Rec. p. 543, points 35 à 41, et Dreyfus/Commission, 49/72, Rec. p. 565, points 24 à 30).

82 En l'espèce, il ressort du texte même de l'avis du conseil de discipline que le président du conseil de discipline n'a pas eu à participer au vote sur l'avis motivé et que ce dernier a été adopté à la majorité des quatre autres membres. Il ressort également des procès verbaux versés au dossier que, à l'ouverture du délibéré, le président du conseil de discipline s'est limité à inviter les membres de celui-ci à apprécier si les faits reprochés étaient établis et à déterminer le degré de sanction à infliger, ce qui relève de l'exercice normal de ses prérogatives. Dès lors, le requérant ne saurait valablement invoquer une violation de l'article 8 de l'annexe IX, au motif que le président du conseil de discipline aurait pris une part active aux délibérations.

83 En tout état de cause, il y a lieu de souligner que la présence du président aux délibérations du conseil de discipline s'avère nécessaire afin, notamment, de lui permettre, le cas échéant, de participer au vote en pleine connaissance de cause en cas de partage des voix ou lors de l'adoption de décisions de procédure.

44 Quant à la prétendue partialité du président du conseil de discipline à l'égard du requérant durant les auditions, elle n'est corroborée par aucun élément de preuve. Par conséquent, dans la mesure où, en outre, il n'est ni allégué ni démontré que le conseil de discipline aurait manqué au devoir qui est le sien, en sa qualité d'organe d'instruction, de statuer de manière indépendante et impartiale (voir, à cet égard, arrêt F./Commission, point 16, et arrêt du Tribunal du 19 mars 1998, Tzoanos/Commission, T-74/96, RecFP p. II-343, point 140), l'argumentation du requérant doit être rejetée.

45 Partant, la quatrième branche du moyen ne saurait être accueillie.

46 Il résulte de l'ensemble de ces éléments que le premier moyen doit être rejeté.

Sur le deuxième moyen, tiré d'un défaut de motivation et de la violation, par le conseil de discipline, de l'article 7 de l'annexe IX, des droits de la défense, ainsi que du principe de bonne administration

Arguments des parties

47 Le requérant estime que, sous couvert d'une motivation formelle, l'avis du conseil de discipline et la décision de révocation sont, en réalité, entachés d'un défaut de motivation, dans la mesure où les moyens qu'il avait soulevés à l'appui de sa défense sont restés sans réponse.

48 Selon le requérant, ni le conseil de discipline ni l'AIPN n'auraient répondu à ses arguments concernant l'inapplicabilité aux fonctionnaires en congé de convenance personnelle de l'article 17, second alinéa, du statut et l'interprétation erronée, par l'AIPN, de l'article 12 du statut. Il n'aurait pas non plus été répondu à son argument concernant le caractère irrégulier de certaines déclarations faites par les responsables de la Commission, qui préjugeaient de l'issue de la procédure.

89 En outre, l'avis du conseil de discipline et la décision de révocation se limiteraient, sans motivation, à constater l'existence d'une contrariété entre son ouvrage et la politique de la Commission, alors que le requérant avait signalé l'imprécision du rapport de saisine du conseil à ce sujet, ainsi que la nécessité d'une audition préalable par l'AIPN avant tout examen des griefs de fond. Dans sa réplique, le requérant conteste la citation, extraite de l'avis du conseil de discipline, selon laquelle il aurait fait part de sa décision de rendre public le danger que représentait la politique de la Commission.

90 En tout état de cause, le requérant estime que le conseil de discipline n'a pas pu procéder à un examen sérieux de tous ces arguments, qui étaient développés dans des mémoires qu'il avait déposés lors de son audition, le 5 décembre 1995, puisque l'avis a été adopté le même jour. Le procès-verbal de la réunion du conseil de discipline attesterait d'ailleurs de l'absence de débat sur le dossier de la défense. En conséquence, le conseil de discipline aurait méconnu l'article 7 de l'annexe IX et violé les droits de la défense ainsi que le principe de bonne administration.

91 La Commission considère que le conseil de discipline et l'AIPN ont satisfait à l'obligation de motivation en exposant les éléments qu'ils estimaient pertinents et en répondant aux arguments essentiels soulevés pendant la procédure.

Appréciation du Tribunal

92 En vertu de l'article 7 de l'annexe IX, le conseil de discipline doit, au vu des pièces produites devant lui et compte tenu, le cas échéant, des déclarations écrites ou verbales de l'intéressé et des témoins, ainsi que des résultats de l'enquête à laquelle il a pu être procédé, émettre un avis motivé sur la sanction que lui paraissent devoir entraîner les faits reprochés.

53 Par ailleurs, il résulte d'une jurisprudence constante que la motivation d'une décision faisant grief doit permettre au juge communautaire d'exercer son contrôle sur sa légalité et de fournir à l'intéressé les indications nécessaires pour savoir si la décision est bien fondée (arrêts de la Cour du 20 février 1997, Daffix/Commission, C-166/95 P, Rec. p. I-983, point 23, et du 20 novembre 1997, Commission/V., C-188/96 P, Rec. p. I-6561, point 26; arrêt du Tribunal du 16 juillet 1998, Y/Parlement, T-144/96, Rec. FP p. II-1153, point 21). La question de savoir si la motivation de l'acte en cause satisfait aux exigences du statut doit être appréciée au regard non seulement de son libellé, mais également de son contexte ainsi que de l'ensemble des règles juridiques régissant la matière concernée (arrêt Y/Parlement, précité, point 22). Il y a lieu de souligner, à cet égard, que si le conseil de discipline et l'AIPN sont tenus de mentionner les éléments de fait et de droit dont dépend la justification légale de leurs décisions et les considérations qui les ont amenés à les prendre, il n'est pas pour autant exigé qu'ils discutent tous les points de fait et de droit qui ont été soulevés par l'intéressé au cours de la procédure (voir, par analogie, arrêt de la Cour du 17 janvier 1984, VBVB et VBBB/Commission, 43/82 et 63/82, Rec. p. 19, point 22).

54 En l'espèce, s'agissant de l'application de l'article 17, paragraphe 2, du statut, le conseil de discipline et l'AIPN l'ont motivée en considérant que «tout fonctionnaire [y] reste soumis», après qu'il a été explicitement relevé, dans l'avis du conseil de discipline, que le requérant la contestait au motif qu'il était en congé de convenance personnelle. L'application de l'article 12 du statut est également motivée à suffisance de droit. En effet, l'avis du conseil de discipline et la décision de révocation rappellent les fonctions du requérant, soulignent la teneur des propos contenus dans son ouvrage, ainsi que la manière dont ce dernier s'était assuré de sa publication, et en concluent que l'ensemble du comportement du requérant a nui à la dignité de sa fonction. L'avis et la décision de révocation mettent donc clairement en rapport le comportement du requérant avec le contenu de l'interdiction de l'article 12 du statut et exposent les raisons essentielles pour lesquelles le conseil de discipline et l'AIPN ont estimé que les dispositions de cet article avaient été violées. La question de savoir si une telle appréciation est adéquate relève de l'examen au fond, et non de celui du caractère suffisant ou non de la motivation.

« S'agissant du grief tiré de ce qu'il n'aurait pas été répondu à l'argument selon lequel certaines déclarations de membres de la Commission mettaient en cause l'impartialité de la procédure engagée contre lui, il ressort du dossier que, par cet argument, le requérant s'était limité à faire valoir, devant le conseil de discipline, que «cette situation appel[ait] donc une vigilance et une indépendance toute particulière [de celui-ci]» (annexe A.1 à la requête, p. 17). Or, le requérant n'allègue pas que, en l'espèce, le conseil de discipline a manqué au devoir qui est le sien, en sa qualité d'organe d'instruction, de statuer de manière indépendante et impartiale. Par conséquent, ce grief est dépourvu de pertinence.

« Au surplus, il importe de relever que l'argument en cause n'évoquant pas d'élément de fait ou de droit dont dépendait la justification de la sanction recommandée, de sorte que la décision de révocation ne saurait être entachée d'un défaut de motivation sur ce point. En effet, les déclarations citées par le requérant envisageaient uniquement la possibilité que des sanctions soient adoptées contre lui au terme de la procédure disciplinaire et ne pouvaient pas altérer la régularité de cette procédure dans laquelle, en tout état de cause, l'administration est la partie qui prend l'initiative. A cet égard, il y a lieu de souligner que, d'une part, le conseil de discipline connaît la position de l'administration par le biais de documents bien plus exhaustifs que ces déclarations à la presse, et que, d'autre part, la constatation d'un éventuel manquement du fonctionnaire poursuivi à ses obligations, et l'adoption en conséquence d'une sanction disciplinaire, appartiennent à l'administration elle-même, après une procédure contradictoire au cours de laquelle l'intéressé peut faire valoir son point de vue (voir l'ordonnance Connolly/Commission, précitée, point 38).

« Doit également être rejeté l'argument du requérant selon lequel l'avis du conseil de discipline et la décision de révocation seraient insuffisamment motivés dans la mesure où ils considèrent que le requérant «ne pouvait ignorer que la publication de son ouvrage refléterait une opinion personnelle, discordante de la ligne de conduite adoptée par la Commission en tant qu'institution de l'Union européenne responsable de la poursuite d'un objectif majeur et d'un choix politique irréversible inscrit dans le traité de l'Union qui est l'Union économique et monétaire». En effet, il convient de relever que le litige concernait un conflit d'opinion évident et connu entre le requérant et la Commission quant à la politique monétaire de l'Union (ordonnance Connolly/Commission, précitée, point 36), dont l'ouvrage en cause, ainsi qu'il

ressort du dossier, constitue l'expression manifeste, le requérant y écrivant, notamment, que «[sa] thèse centrale est que le MTC [le mécanisme des taux de change] et l'UEM ne sont pas seulement inefficaces, mais aussi antidémocratiques, un danger, non seulement pour [la] richesse [de l'Union], mais aussi pour les quatre libertés et, finalement, pour la paix» (p. 12 du livre) [«My central thesis is that ERM and EMU are not only inefficient but also undemocratic: a danger not only to our wealth but to our four freedoms and, ultimately, our peace»].

« Il convient d'ajouter que l'avis et la décision de révocation constituent l'aboutissement de la procédure disciplinaire, dont les détails étaient suffisamment connus de l'intéressé (arrêt Daffix/Commission, précité, point 34). Or, ainsi qu'il ressort de l'avis du conseil de discipline, le requérant avait lui-même exposé, lors de son audition le 5 décembre 1995, que, pendant plusieurs années, il avait fait état, dans des documents rédigés dans le cadre de ses fonctions de chef de l'unité II.D.3, «des contradictions qu'il avait détectées dans les orientations de la Commission en matière économique et monétaire», et que, «ses analyses et propositions s'étant heurtées à l'opposition de ses supérieurs, il avait décidé, étant donné l'importance vitale du sujet en question et le danger que la politique poursuivie par la Commission comportait pour le futur de l'Union, de les rendre publiques». Bien que, dans sa réplique, le requérant ait contesté ces considérations de l'avis du conseil de discipline, il y a lieu néanmoins de constater qu'elles sont clairement confirmées par le procès-verbal de son audition, dont il ne conteste pas le contenu (voir, précisément, p. 4 à 7 du procès verbal d'audition).

« Au regard de ces éléments, la motivation de l'avis du conseil de discipline et de la décision de révocation ne sauraient, par conséquent, être considérées comme insuffisantes sur ce point.

« Quant à la thèse du requérant selon laquelle le conseil de discipline n'aurait pas été en mesure de procéder à un examen sérieux de tous ses arguments, elle ne saurait non plus être accueillie. D'une part, il ressort clairement du procès-verbal de l'audition du requérant que celui-ci a exposé l'ensemble des arguments développés dans ses mémoires déposés auprès du conseil de discipline, de sorte que ce dernier a pu prendre connaissance de tous les éléments invoqués à l'appui de sa défense.

D'autre part, il résulte de ce qui précède que, conformément à l'article 7 de l'annexe IX, l'avis du conseil de discipline indique de manière suffisamment précise les faits retenus à la charge du requérant et les considérations l'ayant amené à recommander la sanction de la révocation, tout en répondant aux arguments essentiels soulevés pendant la procédure.

101 Enfin, compte tenu des éléments exposés ci-dessus, une violation du principe de bonne administration et des droits de la défense ne saurait être alléguée au motif que le conseil de discipline a délibéré le jour même de l'audition du requérant, une telle circonstance étant de nature à démontrer que cet organe a, au contraire, agi de manière diligente. Il convient, en outre, de constater que l'avis du conseil de discipline a été définitivement adopté deux jours après cette audition.

102 Il découle de l'ensemble de ces considérations que le moyen doit être rejeté.

Sur le troisième moyen, tiré de la violation de l'article 11 du statut

Arguments des parties

103 Le requérant estime que l'avis du conseil de discipline et la décision de révocation sont fondés sur une interprétation erronée de l'article 11 du statut. Cette disposition aurait pour objet non pas d'interdire aux fonctionnaires de percevoir des droits d'auteur du fait de la publication de leurs ouvrages, mais de garantir leur indépendance en leur défendant d'accepter des instructions de personnes extérieures à leur institution. Or, en percevant des droits d'auteur, le requérant ne se serait mis sous l'autorité d'aucune personne extérieure à la Commission. L'interprétation donnée, en l'espèce, de l'article 11 du statut serait d'autant plus erronée qu'elle conduirait à interdire toutes les rémunérations de quelque source extérieure que ce soit, en ce compris les revenus de valeurs mobilières, et serait, dès lors, contraire à l'article 1er du protocole additionnel n° 1 de la convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales (ci-après «CEDH»), relatif au droit de propriété. En outre, une telle interprétation serait en contradiction avec la pratique de la Commission, qui serait d'admettre la perception de droits

d'auteur, par les fonctionnaires, pour des services rendus lors de congés de convenance personnelle.

104 Dans sa réplique, le requérant soutient que la Commission elle-même reconnaît l'absence de gravité de l'infraction alléguée en admettant que ce fait n'aurait jamais, à lui seul, entraîné la sanction de la révocation.

105 La Commission soutient que, dans la mesure où la perception de droits d'auteur n'aurait certes pas entraîné, à elle seule, la révocation du requérant, le fait d'avoir accepté cette rémunération d'une source extérieure à l'institution n'en est pas moins contraire à l'article 11, second alinéa, du statut. Contrairement à la thèse du requérant, il ne s'agirait pas d'un revenu assimilable à celui provenant de valeurs mobilières, mais d'une rémunération extérieure.

Appréciation du Tribunal

106 L'article 11 du statut dispose:

«Le fonctionnaire doit s'acquitter de ses fonctions et régler sa conduite en ayant uniquement en vue les intérêts des Communautés, sans solliciter ni accepter d'instructions d'aucun gouvernement, autorité, organisation ou personne extérieure à son institution.

Le fonctionnaire ne peut accepter d'aucun gouvernement ni d'aucune source extérieure à l'institution à laquelle il appartient, sans autorisation de l'[A]PN, une distinction honorifique, une décoration, une faveur, un don, une rémunération, de quelque nature qu'ils soient, sauf pour services rendus soit avant sa nomination, soit au cours d'un congé spécial pour service militaire ou national, et au titre de tels services.»

107 En l'espèce, tant le conseil de discipline que l'AIPN ont, dans l'avis et la décision de révocation, retenu une violation de l'article 11 du statut à la charge du requérant. La décision de révocation relève, en particulier, que «M. Connolly reconnaît avoir perçu les droits d'auteur qui lui ont été payés par ses éditeurs en contrepartie de la publication de son œuvre».

108 A cet égard, il ressort des déclarations du requérant au conseil de discipline, ainsi que de l'attestation de son éditeur qu'il avait alors produite, que des «royalties» sur les ventes de son ouvrage lui ont effectivement été versées par ce dernier. Dès lors, ne saurait être accueilli l'argument du requérant selon lequel l'article 11 du statut ne serait pas violé, au motif que la perception de ces rémunérations n'impliquait pas qu'il fût sous l'influence d'une personne extérieure à son institution d'appartenance. En effet, une telle argumentation méconnaît les conditions objectives de la prohibition prévue par l'article 11, second alinéa, du statut, à savoir l'acceptation d'une rémunération, de quelque nature qu'elle soit, de la part d'une personne extérieure à l'institution, sans autorisation de l'AIPN. Or, force est de constater que ces conditions étaient réunies en l'espèce.

109 Le requérant ne peut valablement soutenir que cette interprétation de l'article 11, second alinéa, du statut conduit à une violation du droit de propriété tel qu'il est consacré par l'article 1er du protocole additionnel n° 1 de la CEDH.

110 Tout d'abord, il convient de relever qu'il n'y a eu, en l'espèce, aucune atteinte au droit de propriété, la Commission n'ayant pas privé le requérant des sommes qu'il a perçues en rémunération de son ouvrage.

111 Il y a lieu de souligner, en outre, que, selon la jurisprudence, l'exercice de droits fondamentaux tels que le droit de propriété peut être soumis à des restrictions, à condition que celles-ci répondent à des objectifs d'intérêt général poursuivis par la Communauté et ne constituent pas une intervention démesurée et intolérable portant atteinte à la substance même des droits garantis (voir l'arrêt de la Cour du 11 juillet 1989, Schräder HS Kraftfutter, 265/87, Rec. p. 2237, point 15, et la jurisprudence

citée). Or, les prescriptions de l'article 11 du statut, dont il résulte que le fonctionnaire doit régler sa conduite en ayant uniquement en vue les intérêts des Communautés, répondent au souci légitime de garantir non seulement l'indépendance, mais aussi la loyauté du fonctionnaire à l'égard de son institution (voir, à cet égard, l'arrêt du Tribunal du 15 mai 1997, N/Commission, T-273/94, RecFP p. II-289, points 128 et 129, ci-après «arrêt N/Commission»), objectif dont la poursuite justifie l'inconvénient mineur d'obtenir une autorisation de l'AIPN pour la réception de sommes provenant de sources extérieures à l'institution d'appartenance.

112 L'argumentation du requérant selon laquelle le manquement n'était pas suffisamment grave pour entraîner, à lui seul, sa révocation est dénuée de pertinence dans le cadre du présent moyen, en ce qu'elle n'est pas non plus de nature à infirmer la constatation d'un manquement à l'obligation en cause. La question de savoir si la sanction imposée était disproportionnée relève du sixième moyen et doit être examinée dans le cadre de celui-ci au regard de l'ensemble des faits reprochés.

113 Quant à l'existence prétendue d'une pratique de la Commission consistant à admettre la perception de droits d'auteur, pour des services rendus par des fonctionnaires lors de congés de convenance personnelle, force est de constater qu'elle n'est nullement démontrée. Cette argumentation n'est, de surcroît, pas pertinente dès lors qu'il n'est pas allégué que la pratique en question aurait visé la publication d'ouvrages n'ayant pas reçu l'autorisation préalable visée à l'article 17 du statut. Le requérant ne soutient donc pas qu'il existait des assurances précises ayant éventuellement pu créer, dans son chef, des espérances fondées de ne pas avoir à solliciter l'autorisation prévue à l'article 11 du statut.

114 Au vu de l'ensemble de ces éléments, le moyen doit être rejeté.

Sur le quatrième moyen, tiré de la violation de l'article 12 du statut

Arguments des parties

115 Le requérant fait valoir que le grief concernant une violation de l'article 12 du statut est illicite au motif qu'il est contraire au principe de la liberté d'expression, consacré explicitement par l'article 10 de la CEDH. En effet, l'interprétation de l'article 12 du statut à laquelle a procédé l'AIPN conduirait à interdire au fonctionnaire toute opinion personnelle, même en dehors du cadre professionnel. La jurisprudence de la Cour européenne des droits de l'homme démontrerait d'ailleurs que la liberté d'expression d'un fonctionnaire ne peut être limitée que dans les cas visés à l'article 10, paragraphe 2, de la CEDH. Or, aucune des exceptions visées à cet article n'aurait été invoquée par l'AIPN pour justifier la sanction infligée.

116 Par ailleurs, ce grief manquerait en fait. L'ouvrage en cause constituerait, tout d'abord, un travail d'analyse économique, l'analyse n'excluant toutefois pas la polémique. Ensuite, il ne serait pas établi que l'analyse contenue dans son ouvrage est contraire aux intérêts de la Communauté, d'autant plus que le requérant ne s'est pas opposé aux objectifs du traité. Comme l'attesteraient, au contraire, les notes internes qu'il avait élaborées, il se serait toujours conformé au devoir d'assistance et de conseil qui était le sien, en vertu de l'article 21 du statut, en signalant à ses supérieurs le caractère dangereux des moyens choisis pour parvenir à l'Union économique et monétaire.

117 Le requérant estime que la Commission dénature la portée de l'obligation de loyauté. En effet, celle-ci impliquerait de la part du fonctionnaire une certaine loyauté à l'égard des traités, mais pas un lien de confiance personnel dans l'institution qui l'emploie. En outre, le grief tiré d'une violation du devoir de loyauté viserait, selon la jurisprudence, l'article 21 du statut (arrêt Williams/Cour des comptes 1), et non l'article 12. Aucune violation de l'article 21 du statut, n'ayant été formulée dans le rapport de l'AIPN portant saisine du conseil de discipline, il en résulterait une extension injustifiée de la procédure disciplinaire.

18 Quant aux références de la Commission aux observations faites dans son livre à l'égard de certaines personnes, le requérant rétorque que ni l'avis du conseil de discipline ni la décision de révocation n'ont finalement retenu le grief, formulé dans le rapport de l'AIPN, tiré de l'existence, dans son livre, d'attaques personnelles désobligeantes non étayées. Ces «légèretés de plume» étant intervenues dans un contexte d'analyse économique, elles devraient, de toute façon, être distinguées des injures et des diffamations qui faisaient l'objet de l'arrêt Williams/Cour des comptes I, dans lequel la sanction infligée était en outre, plus modérée qu'en l'espèce.

19 La Commission fait valoir que le grief retenu à l'encontre du requérant, au titre de l'article 12 du statut, vise aussi plus largement le manquement à l'obligation de loyauté incombant aux fonctionnaires à l'égard de l'institution qui les emploie, obligation dont l'article 12 du statut constituerait, à l'instar des articles 11 et 17, une manifestation particulière (arrêt de la Cour du 14 décembre 1966, Alfieri/Parlement, 3/66, Rec. p. 633, arrêts du Tribunal Williams/Cour des comptes I, point 72, et du 7 mars 1996, Williams/Cour des comptes, T-146/94, RecFP p. II-329, points 98 et 99, ci-après «arrêt Williams/Cour des comptes II»).

20 Dans ce contexte, l'argumentation du requérant méconnaîtrait le fait que la liberté d'expression doit être conciliée avec les limites imposées par la relation de travail et le statut de fonctionnaire. A supposer même que la CEDH soit directement applicable, la jurisprudence de la Commission et de la Cour européenne des droits de l'homme confirmerait d'ailleurs que la révocation d'un fonctionnaire s'étant exprimé publiquement, de façon incompatible avec sa fonction, n'est pas contraire à l'article 10 de la CEDH (arrêts du 28 août 1986, Kosiek/Allemagne, série A n° 105, et du 26 septembre 1995, Vogt/Allemagne, série A n° 323).

21 S'agissant de la nature même de l'ouvrage, la Commission estime qu'il s'agit d'un récit à vocation polémique, et non d'un traité d'économie. Elle renvoie, à titre d'exemple, à plusieurs extraits du livre (annexe 3 au mémoire en défense) et souligne que le requérant lui-même a qualifié son livre de «polémique» dans un article paru dans le quotidien britannique *The Times*, le 6 septembre 1995. Le livre comporterait, notamment, des observations péjoratives à l'égard de certains

responsables de l'époque, comme l'attesteraient certains passages dans lesquels, par exemple, le chancelier allemand H. Kohl est qualifié de «Bismarck in a cardigan» (p. 337 du livre), le Premier ministre britannique J. Major de «clueless amateur» (p. 126 et 282), et le président de la Commission J. Delors, de meneur (p. 71) et «Euroracist» (p. 294), ce dernier étant en outre assimilé à un économiste nazi («Nazi professor») (p. 231). Seraient également formulées des appréciations non étayées sur, notamment, le prétendu «rôle ambigu» de la Cour de justice des Communautés européennes (p. 208) ou le fait que le personnel de la Commission serait toujours le défenseur des intérêts français (p. 4). Enfin, l'illustration choisie pour la couverture du livre serait difficilement compatible avec l'allégation selon laquelle il s'agirait d'un ouvrage d'analyse économique.

122 Outre le caractère insultant de l'ouvrage, la gravité du manquement du requérant à ses obligations statutaires résulterait du fait que, par ce livre, il se serait opposé, de manière publique, à la politique qu'il avait la responsabilité de promouvoir. L'argument selon lequel le fait d'avoir des opinions personnelles non conformes serait interdit au sein de la Commission serait également dénué de fondement. Comme l'attesteraient les notes produites par le requérant lui-même, les opinions de ce dernier étaient déjà connues auparavant, sans que cela ait jamais donné lieu à une procédure disciplinaire. Seul le fait d'avoir porté ces idées sur la place publique aurait été sanctionné.

Appréciation du Tribunal

123 Aux termes de l'article 12, premier alinéa, du statut, «le fonctionnaire doit s'abstenir de tout acte et, en particulier, de toute expression publique d'opinions qui puisse porter atteinte à la dignité de sa fonction».

124 Selon une jurisprudence constante, cette disposition vise, tout d'abord, à garantir que les fonctionnaires communautaires présentent, dans leur comportement, une image de dignité conforme à la conduite particulièrement correcte et respectable que l'on est en droit d'attendre des membres d'une fonction publique internationale (arrêts du Tribunal Williams/Cour des comptes II, point 65, N/Commission, point 127, et du 17 février 1998, E/CES, T-183/96, RecFP p. II-159, point 39.

ci-après «arrêt E/CES»). Il en résulte, notamment, que des injures exprimées publiquement par un fonctionnaire, et portant atteinte à l'honneur des personnes auxquelles elles se réfèrent, constituent en soi une atteinte à la dignité de la fonction au sens de l'article 12, premier alinéa, du statut (ordonnance de la Cour du 21 janvier 1997, Williams/Cour des comptes, C 156/96 P, Rec. p. I-239, point 21; arrêts Williams/Cour des comptes I, point 76 et 80, et Williams/Cour des comptes II, point 66).

105 En l'espèce, il ressort du dossier et des extraits du livre cités par la Commission que l'ouvrage litigieux contient de nombreuses affirmations agressives, dénigrantes, et souvent injurieuses, portant atteinte à l'honneur des personnes et des institutions auxquelles elles se réfèrent, et qui ont connu une publicité importante, notamment par voie de presse. Contrairement à ce que prétend le requérant, les propos cités par la Commission, et visés dans le rapport de l'AIPN portant saisine du conseil de discipline, ne sauraient être qualifiés de simples «légèretés de plume», mais doivent être considérés comme étant constitutifs, en soi, d'une atteinte à la dignité de la fonction.

106 L'argument selon lequel ni le conseil de discipline ni l'AIPN n'auraient finalement retenu ce dernier grief pour justifier sa révocation est dénué de fondement. Tous deux ont, en effet, expressément considéré, dans l'avis et la décision de révocation, que «l'ensemble du comportement de M. Connolly a porté atteinte à la dignité de sa fonction». Le fait que des extraits du livre ne soit pas cités expressis verbis dans la décision de révocation comme ils l'étaient dans le rapport de l'AIPN portant saisine du conseil de discipline ne saurait, dès lors, être interprété comme impliquant l'abandon du grief tiré d'une violation de l'article 12, premier alinéa, du statut. Il en est d'autant plus ainsi que la décision de révocation constitue l'aboutissement d'une procédure disciplinaire dont les détails étaient suffisamment connus de l'intéressé et au cours de laquelle, ainsi qu'il ressort des procès-verbaux versés au dossier, celui-ci a eu l'occasion de s'expliquer sur la teneur des propos contenus dans son livre.

127 Il y a lieu, ensuite, de souligner que l'article 12, premier alinéa, du statut constitue, au même titre que les articles 11 et 21, l'une des expressions spécifiques de l'obligation de loyauté qui s'impose à tout fonctionnaire (voir l'arrêt N/Commission, point 129, confirmé sur pourvoi par l'ordonnance de la Cour du 16 juillet 1998, N/Commission, C-252/97 P, Rec. p. I-4874). Contrairement à ce que fait valoir le requérant, il ne saurait être déduit de l'arrêt Williams/Cour des comptes I que cette obligation découle du seul article 21 du statut, le Tribunal ayant souligné, dans cet arrêt, que l'obligation de loyauté constitue un devoir fondamental, qui incombe à tout fonctionnaire vis-à-vis de l'institution dont il relève et de ses supérieurs, «dont l'article 21 du statut est une manifestation particulière». Par conséquent, doit être rejeté l'argument selon lequel l'AIPN ne pouvait valablement retenir, à l'encontre du requérant, une violation du devoir de loyauté, au motif que le rapport portant saisine de l'AIPN ne lui reprochait pas une violation de l'article 21 du statut.

128 De même, doit être rejetée la thèse selon laquelle le devoir de loyauté n'impliquerait pas la préservation d'un lien de confiance personnel entre le fonctionnaire et son institution, mais seulement une loyauté à l'égard des traités. En effet, l'obligation de loyauté impose non seulement que le fonctionnaire concerné s'abstienne de conduites attentatoires à la dignité de la fonction et au respect dû à l'institution et à ses autorités (voir, par exemple, l'arrêt Williams/Cour des comptes I, point 72, et l'arrêt du Tribunal du 18 juin 1996, Vela Palacios/CES, T-293/94, Rec. FP p. II-893, point 43), mais également qu'il fasse preuve, d'autant plus s'il a un grade élevé, d'un comportement au-dessus de tout soupçon, afin que les liens de confiance existant entre cette institution et lui-même soient toujours préservés (arrêt N/Commission, point 129). Or, en l'espèce, il convient de rappeler que l'ouvrage litigieux, outre le fait qu'il comportait des propos portant en soi atteinte à la dignité de la fonction, exprimait publiquement, ainsi que l'AIPN l'a constaté, une opposition fondamentale du requérant à la politique de la Commission qu'il avait pour fonction de mettre en œuvre, à savoir la réalisation de l'Union économique et monétaire, objectif, par ailleurs, assigné par le traité.

129 Le requérant ne saurait utilement invoquer, dans ce contexte, une violation du principe de la liberté d'expression. Il ressort en effet de la jurisprudence en la matière que, si la liberté d'expression constitue un droit fondamental dont jouissent également les fonctionnaires communautaires (arrêt de la Cour du 13 décembre 1989, Oyowe et Traore/Commission, C-100/88, Rec. p. 4285, point 16), il n'en

demeure pas moins que l'article 12 du statut, tel qu'interprété ci-dessus, ne constitue pas une entrave à la liberté d'expression des fonctionnaires, mais impose des limites raisonnables à l'exercice de ce droit dans l'intérêt du service (arrêt E/CES, point 41).

150 Il y a lieu de souligner, enfin, que cette interprétation de l'article 12, premier alinéa, du statut ne saurait être mise en cause au motif que, en l'espèce, la publication de l'ouvrage litigieux est intervenue lors d'une période de congé de convenance personnelle. A cet égard, il résulte de l'article 35 du statut que le congé de convenance personnelle constitue l'une des positions dans lesquelles peut être placé un fonctionnaire, de sorte que, pendant cette période, l'intéressé demeure soumis aux obligations découlant du statut, sauf dispositions contraires expresses. L'article 12 du statut visant tous les fonctionnaires, sans distinguer selon leur position, une telle circonstance ne pouvait, dès lors, exonérer le requérant des obligations que lui imposent cet article. Il en est d'autant plus ainsi que le respect dû par le fonctionnaire à la dignité de sa fonction ne se limite pas au moment particulier où il exerce telle ou telle tâche spécifique, mais s'impose à lui en toute circonstance (arrêt Williams/Cour des comptes II, point 68). Il en va de même de l'obligation de loyauté, laquelle, selon la jurisprudence, ne s'impose pas seulement dans la réalisation de tâches spécifiques, mais s'étend aussi à toute la sphère des relations existant entre le fonctionnaire et l'institution (arrêts Williams/Cour des comptes I, point 72, et E/CES, point 47).

151 Au vu de l'ensemble de ces éléments, l'AIPN a pu légitimement considérer que le requérant avait, de par son comportement, nui à la dignité de sa fonction et rompu de façon irréparable la confiance que la Commission est en droit d'exiger de ses fonctionnaires.

152 Il s'ensuit que le moyen doit être rejeté.

Sur le cinquième moyen, tiré de la violation de l'article 17 du statut

Sur la violation de l'article 17, premier alinéa, du statut

– Arguments des parties

99 Le requérant soutient que le conseil de discipline et l'AIPN ont retenu, à tort, qu'il avait violé le devoir de discrétion, prévu à l'article 17, premier alinéa, du statut, dans la mesure où, ainsi qu'il l'avait démontré lors de la procédure, les informations que le rapport de l'AIPN lui reprochait d'avoir publiées dans son livre provenaient de sources publiques.

100 En réponse à l'argument de la Commission selon lequel ce grief n'a pas été retenu dans la décision de révocation, le requérant en déduit, dans sa réplique, qu'il y a lieu de constater l'abandon de celui-ci par l'AIPN et, de fait, une aggravation de la sanction recommandée par le conseil, puisque le nombre d'incriminations était ainsi réduit. Dans la mesure où l'AIPN est tenue de motiver les raisons spécifiques pour lesquelles elle s'est écartée de l'avis du conseil de discipline, il en résulterait que la décision de révocation est entachée d'un défaut de motivation sur ce point.

101 La Commission soutient que le grief tiré d'une violation de l'article 17, premier alinéa, du statut n'a pas été retenu dans la décision de révocation et en déduit qu'il n'y a donc pas lieu de se prononcer à cet égard. En tout état de cause, l'AIPN ayant infligé au requérant la sanction recommandée par le conseil de discipline, et non pas une sanction plus grave, sa décision ne saurait être entachée d'un défaut de motivation sur ce point.

– Appréciation du Tribunal

102 Le requérant ayant pris acte, tant dans sa réplique que lors de l'audience, que l'AIPN n'avait pas retenu contre lui un manquement au devoir de discrétion dans la décision de révocation, le grief tiré d'une violation de l'article 17, premier alinéa, du statut est devenu sans objet (voir, en ce sens, l'arrêt HOGES, point 37).

68 S'agissant du grief tiré d'un défaut de motivation de la décision de révocation, pour autant qu'elle s'écarterait de l'avis du conseil de discipline en aggravant la sanction infligée, il n'a été soulevé qu'au stade de la réplique et, conformément à l'article 48, paragraphe 2, du règlement de procédure, il doit donc être rejeté comme irrecevable en tant que moyen nouveau soulevé en cours d'instance. En tout état de cause, ce grief ne pourrait être accueilli en l'espèce. D'une part, il est constant que l'AIPN a infligé au requérant la sanction recommandée par le conseil de discipline, à savoir la révocation sans perte des droits à pension, de sorte qu'aucun surcroît de motivation n'était nécessaire. D'autre part, il ressort du deuxième moyen que l'AIPN a suffisamment exposé, dans la décision de révocation, les raisons pour lesquelles elle estimait que le comportement du requérant, de par sa gravité, rendait impossible le maintien d'une quelconque relation de travail avec la Commission.

69 En conséquence, la première branche du moyen doit être rejetée.

Sur la violation de l'article 17, second alinéa, du statut

– Arguments des parties

70 Le requérant soutient, en premier lieu, que l'interprétation de l'article 17, second alinéa, du statut, sur laquelle sont fondés l'avis du conseil de discipline et la décision de révocation, est contraire au principe de la liberté d'expression, consacré par l'article 10 de la CEDH, dans la mesure où elle conduit à interdire, par principe, toute publication. Or, des entraves à la liberté d'expression ne seraient autorisées que dans les hypothèses exceptionnelles énumérées à l'article 10, paragraphe 2, de la CEDH, dont la Commission aurait néanmoins admis, dans la décision de rejet de la réclamation, précitée, qu'elles n'étaient pas applicables en l'espèce. Dès lors, l'interprétation selon laquelle un fonctionnaire devrait obtenir une autorisation préalable pour toute publication quelle qu'elle soit, en dehors même des cas visés à l'article 10, paragraphe 2, de la CEDH, constituerait une entrave injustifiée à la liberté d'expression.

140 Selon le requérant, cette analyse n'est pas démentie par le fait que l'article 17, second alinéa, du statut institue un régime d'autorisation préalable, dans la mesure où il est ainsi permis à l'institution concernée d'exercer une censure sans limites. Par ailleurs, l'argument de la Commission, selon lequel le cas d'espèce ne relèverait pas de l'article 10 de la CEDH dès lors que l'AIPN est intervenue en qualité d'employeur, et non en tant qu'autorité publique à l'égard de tiers, serait erroné, au motif que, selon la jurisprudence de la Cour européenne des droits de l'homme, les fonctionnaires peuvent se prévaloir de la CEDH en leur qualité de fonctionnaire (arrêt Vogt/Allemagne, précité).

141 En second lieu, le requérant soutient que l'article 17, second alinéa, du statut n'est pas applicable aux fonctionnaires en congé de convenance personnelle. En effet, dans la mesure où seul le premier alinéa de l'article 17 du statut précise qu'il s'impose au fonctionnaire après la cessation de ses fonctions, il en résulterait a contrario que le second alinéa du même article ne s'applique qu'aux fonctionnaires en activité. Cette interprétation serait confirmée par le fait que l'article 37 du statut, relatif à la position du fonctionnaire en détachement, dispose expressément que celui-ci reste soumis aux obligations qui lui incombent en raison de son appartenance à son institution d'origine, alors que l'article 40 du statut, relatif à la position du fonctionnaire en congé de convenance personnelle, ne contient aucune disposition similaire.

142 Le requérant soutient que, en tout état de cause, il était fondé à croire en cette interprétation de l'article 17, second alinéa, du statut, compte tenu de la pratique suivie par la Commission, à tout le moins au sein de la DG II. A cet égard, il ressortirait de l'audition de l'ancien directeur général de la DG II, déposée auprès du conseil de discipline, qu'une autorisation préalable de publication n'était jamais nécessaire pour les fonctionnaires en congé de convenance personnelle. L'argument de la Commission, selon lequel il serait alors inutile de demander aux fonctionnaires de préciser les activités qu'ils envisagent d'exercer pendant un congé de convenance personnelle, serait sans pertinence, dès lors qu'il est seulement demandé d'indiquer les motifs personnels du congé. Quant au fait, mentionné dans la décision de révocation, qu'il s'était déjà vu refuser des autorisations de publications, le requérant oppose que des autorisations lui avaient aussi été accordées.

143 La Commission réfute, en premier lieu, que, dans la mesure où la révocation d'un fonctionnaire pour manquement à son devoir de loyauté échappe au domaine d'application de la CEDH ou, en tout état de cause, n'est pas contraire à son article 10, l'obligation de demander une autorisation préalable de publication est d'autant plus justifiée qu'il s'agit d'une mesure préventive, permettant ainsi au fonctionnaire d'éviter des sanctions. En outre, l'article 17, second alinéa, du statut instaurerait un droit de publier, puisqu'un refus doit être motivé par la mise en jeu des intérêts des Communautés, ce qui serait, notamment, le cas lorsque l'opinion exprimée est incompatible avec les fonctions de l'intéressé.

144 En second lieu, la Commission fait valoir qu'un fonctionnaire en congé de convenance personnelle reste soumis à l'obligation prévue à l'article 17, paragraphe 2, du statut, dès lors que, en vertu de l'article 35 du statut, il demeure fonctionnaire pendant cette période de congé.

145 Quant à l'existence alléguée d'une pratique antérieure au sein de la Commission, elle serait démentie par le fait qu'il est toujours préalablement demandé aux fonctionnaires sollicitant un congé de convenance personnelle d'indiquer les activités qu'ils comptent avoir pendant cette période. A supposer même qu'une telle pratique ait existé au sein de la DG II, le requérant ne pouvait avoir aucune confiance légitime dans son maintien: d'une part, cela aurait supposé une promesse spécifique à son intention; d'autre part, en admettant même que le précédent supérieur hiérarchique du requérant ait formulé une telle promesse, elle serait inopposable à la Commission puisqu'elle serait illégale et émanerait d'une personne n'ayant pas la qualité d'AIPN.

Appréciation du Tribunal

146 L'article 17, second alinéa, du statut, dispose:

«Le fonctionnaire ne doit ni publier ni faire publier, seul ou en collaboration, un texte quelconque dont l'objet se rattache à l'activité des Communautés sans l'autorisation de l'[AIPN]. Cette autorisation ne peut être refusée que si la publication envisagée est de nature à mettre en jeu les intérêts des Communautés.»

142 En l'espèce, il est constant que le requérant a procédé à la publication de son ouvrage sans demander l'autorisation préalable prévue par la disposition précitée. Toutefois, le requérant, sans soulever expressément une exception d'illégalité visant à mettre en cause la validité de l'article 17, second alinéa, du statut dans son ensemble, considère que la Commission a procédé à une interprétation de cette disposition contraire au principe de la liberté d'expression.

143 A cet égard, il convient de rappeler que le droit à la liberté d'expression, consacré par l'article 10 de la CEDH, constitue, ainsi qu'il a déjà été souligné, un droit fondamental dont le juge communautaire assure le respect et dont jouissent, en particulier, les fonctionnaires communautaires (arrêts Oyowe et Traore/Commission, précité, point 16, et E/CES, point 41). Néanmoins, il résulte également d'une jurisprudence constante que les droits fondamentaux n'apparaissent pas comme des prérogatives absolues, mais peuvent comporter des restrictions, à condition que celles-ci répondent effectivement à des objectifs d'intérêt général poursuivis par la Communauté et ne constituent pas, au regard du but poursuivi, une intervention démesurée et intolérable qui porterait atteinte à la substance même des droits ainsi garantis (arrêts de la Cour Schräder HS Kraftfutter, précité, point 15, et du 5 octobre 1994, X/Commission, C-404/92 P, Rec. p. I-4737, point 18, arrêts du Tribunal du 13 juillet 1995, K/Commission, T-176/94, RecFP p. II-621, point 33, et N/Commission, point 73).

144 Examiné à la lumière de ces principes, et à l'instar de ce qui a été jugé à propos de l'article 12 du statut (voir, ci-dessus, point 129, et arrêt E/CES, point 41), l'article 17, second alinéa, tel qu'il a été interprété dans la décision de révocation, ne saurait être considéré comme imposant une restriction injustifiée à la liberté d'expression des fonctionnaires.

145 En effet, il convient, en premier lieu, de souligner que l'exigence d'une autorisation préalable de publication répond à l'objectif légitime qu'un texte ayant trait à l'activité des Communautés ne puisse pas porter atteinte à leurs intérêts et, notamment, comme en l'espèce, à la réputation et à l'image de l'une des institutions.

153 En second lieu, l'article 17, second alinéa, du statut ne constitue pas une mesure disproportionnée à l'objectif d'intérêt général que ledit article vise à sauvegarder.

154 A cet égard, il convient, tout d'abord, de relever que, contrairement à ce que soutient le requérant, il ne saurait être déduit de l'article 17, second alinéa, du statut que le régime d'autorisation préalable qu'il prévoit permet à l'institution concernée d'exercer, par ce biais, une censure sans limites. D'une part, en vertu de cette disposition, l'autorisation préalable de publication n'est exigée que lorsque le texte que le fonctionnaire intéressé envisage de publier, ou de faire publier, se rattache à l'activité des Communautés. D'autre part, il ressort de cette même disposition qu'il n'est instauré aucune prohibition absolue de publication, mesure qui, en soi, porterait atteinte à la substance même du droit à la liberté d'expression. Force est, au contraire, de constater que l'article 17, second alinéa, dernière phrase, du statut établit clairement le principe d'octroi de l'autorisation de publication en disposant expressément qu'une telle autorisation ne peut être refusée que si la publication en cause est de nature à mettre en jeu les intérêts des Communautés. Une telle décision étant, par ailleurs, susceptible de recours conformément aux articles 90 et 91 du statut, il en résulte qu'un fonctionnaire, estimant qu'un refus d'autorisation lui aurait été opposé en violation des dispositions du statut, a la possibilité de recourir aux voies de droit qui lui sont ouvertes en vue de soumettre au contrôle du juge communautaire l'appréciation de l'institution concernée.

155 Il importe également de souligner que la formalité exigée par l'article 17, second alinéa, du statut constitue une mesure préventive, permettant, d'une part, de ne pas mettre en péril les intérêts des Communautés et, d'autre part, ainsi que le fait valoir la Commission à juste titre, d'éviter, postérieurement à la publication d'un texte mettant en cause les intérêts des Communautés, l'adoption, par l'institution concernée, de sanctions disciplinaires à l'encontre du fonctionnaire ayant exercé son droit d'expression de manière incompatible avec ses fonctions.

156 En l'espèce, il y a lieu de constater que, dans la décision de révocation, l'AIPN a retenu, à l'encontre du requérant, un manquement à cette disposition aux motifs, d'une part, que l'intéressé n'avait pas demandé d'autorisation de publication pour son ouvrage, d'autre part, qu'il ne pouvait ignorer qu'une telle autorisation lui serait

refusée pour les mêmes raisons que celles ayant dicté le refus d'autorisations antérieures de publier certains articles ayant un contenu similaire et, enfin, que, par sa conduite, le requérant avait gravement lésé les intérêts des Communautés et porté préjudice à l'image et à la réputation de l'institution.

155 Dès lors, et à la lumière de l'ensemble des considérations qui précèdent, il ne peut être déduit de la décision de révocation que le manquement à l'article 17, second alinéa, du statut, reproché au requérant, aurait également été retenu en l'absence de toute atteinte à l'intérêt des Communautés, de sorte que la portée donnée à cette disposition par l'AIPN n'apparaît pas comme excédant l'objectif poursuivi et, partant, comme contraire au principe de la liberté d'expression.

156 Dans ces conditions, le grief tiré d'une violation du droit à la libre expression doit être rejeté.

157 L'argument selon lequel l'article 17, second alinéa, du statut ne serait pas applicable aux fonctionnaires en congé de convenance personnelle est également dénué de fondement. En effet, ainsi qu'il a été souligné ci-dessus (voir point 130), il résulte de l'article 35 du statut qu'un fonctionnaire en congé de convenance personnelle conserve la qualité de fonctionnaire pendant cette période et qu'il demeure donc soumis aux obligations qui découlent du statut sauf dispositions expresses contraires. Or, l'article 17, second alinéa, du statut vise tout fonctionnaire, sans distinguer selon la position de l'intéressé. Par conséquent, le fait que le requérant était en congé de convenance personnelle lors de la publication de son ouvrage ne l'exonérait pas de l'obligation que lui imposait l'article 17, second alinéa, du statut de solliciter préalablement une autorisation de publication auprès de l'AIPN.

158 Cette interprétation n'est pas contredite par le fait que, à l'inverse du second alinéa, de l'article 17, du statut, le premier alinéa du même article dispose expressément qu'un fonctionnaire demeure soumis au devoir de discrétion après la cessation de ses fonctions. En effet, un fonctionnaire en position de congé de convenance personnelle ne saurait être assimilé à celui ayant définitivement cessé ses fonctions.

visé à l'article 47 du statut, et qui, partant, ne relève pas de l'une des positions du fonctionnaire, énumérées à l'article 35 du statut.

109 Est également sans pertinence l'argument a contrario tiré de ce que, en vertu de l'article 37, second alinéa, du statut, le fonctionnaire en détachement «reste soumis aux obligations qui lui incombent en raison de son appartenance à son institution d'origine». En effet, le détachement peut impliquer une mise à la disposition d'une autre institution que l'institution d'origine (ou d'une personne exerçant un mandat au sein d'une autre institution). Cette disposition vise donc seulement à déterminer si le fonctionnaire concerné demeure également soumis à ses obligations statutaires vis-à-vis de son institution d'origine. Aucun argument ne peut, dès lors, en être déduit pour ce qui est des obligations du fonctionnaire en position de congé de convenance personnelle, pour lequel la question de l'appartenance à une autre institution communautaire ne se pose pas.

110 Il résulte de l'ensemble de ces éléments que c'est à juste titre que le conseil de discipline et l'AIPN ont considéré que le requérant avait violé l'article 17, second alinéa, du statut.

111 Enfin, la prétendue existence d'une pratique générale de la Commission, en vertu de laquelle une autorisation préalable de publication n'était pas exigée des fonctionnaires en congé de convenance personnelle, n'est nullement démontrée par la déclaration qu'invoque le requérant. Par ladite déclaration, l'ancien directeur général de la DG II se limite, en effet, à attester que M. Connolly s'était déjà vu accorder, en 1985, un congé de convenance personnelle d'une année afin de travailler au sein d'une institution financière privée et que, pendant cette période, il n'avait pas estimé devoir approuver les textes rédigés par le requérant pour le compte de cette institution, ou même émettre des observations à leur égard. Il s'ensuit que l'argument n'est pas fondé.

112 Par suite, le moyen doit être rejeté.

Sur le sixième moyen, tiré d'une erreur manifeste d'appréciation et de la violation du principe de proportionnalité

Arguments des parties

163 Le requérant estime que la décision de révocation est entachée d'une erreur manifeste d'appréciation des faits et viole le principe de proportionnalité, en ce qu'elle omet de tenir compte de plusieurs circonstances atténuantes, à savoir, d'une part, ses bons états de service, et, d'autre part, sa bonne foi quant à la liberté de publier pendant une période de congé de convenance personnelle. Il soutient, en outre, que les fonctionnaires affectés à la DG II savaient que son congé serait l'occasion de préparer un ouvrage et que certains d'entre eux lui avaient même recommandé de le rédiger. Enfin, la sanction serait d'autant plus disproportionnée que seules des infractions formelles aux articles 11, 12 et 17, du statut lui étaient initialement reprochées.

164 La Commission répond que le fait de ne pas avoir fait l'objet de procédures disciplinaires auparavant est inopérant. Par ailleurs, il serait malvenu pour le requérant d'invoquer sa bonne foi, dès lors que, dans sa demande de congé, celui-ci avait indiqué d'autres motifs que celui de la préparation d'un livre.

Appréciation du Tribunal

165 Selon une jurisprudence constante, dès lors que la réalité des faits retenus à la charge du fonctionnaire est établie, le choix de la sanction adéquate appartient à l'AIPN, et le juge communautaire ne saurait substituer son appréciation à celle de cette autorité, sauf en cas d'erreur manifeste ou de détournement de pouvoir (arrêts De Greef/Commission, précité, point 45, F./Commission, point 34, Williams/Cour des comptes I, point 83, et D./Commission, précité, point 96). Il convient de rappeler également que la détermination de la sanction à infliger est fondée sur une évaluation globale par l'AIPN de tous les faits concrets et circonstances propres à chaque cas individuel, les articles 86 et 89 du statut ne prévoyant pas de rapports fixes entre les sanctions disciplinaires indiquées et les différentes sortes de manquements et ne précisant pas dans quelle mesure l'existence de circonstances aggravantes ou atténuantes intervient dans le choix de la sanction (arrêt de la Cour

du 5 février 1987, F./Commission, 403/85, Rec. p. 645, point 26; arrêts Williams/Cour des comptes I, point 83, et Y/Parlement, précité, point 34).

66 En l'espèce, il convient de constater, tout d'abord, que la réalité des faits reprochés au requérant est établie.

67 Il y a lieu de relever, ensuite, que la sanction infligée ne saurait être considérée comme étant disproportionnée ou comme résultant d'une erreur manifeste d'appréciation. Même s'il n'est pas contesté que le requérant avait de bons états de service, l'AIPN pouvait néanmoins légitimement considérer que, eu égard à la gravité des faits retenus, au grade et aux responsabilités du requérant, une telle circonstance n'était pas susceptible d'atténuer la sanction à infliger.

68 Par ailleurs, l'argument du requérant, selon lequel il aurait dû être tenu compte de sa bonne foi quant à la portée des devoirs du fonctionnaire en congé de convenance personnelle, ne peut être accueilli. Il résulte, en effet, de la jurisprudence que les fonctionnaires sont censés connaître le statut (arrêts du Tribunal du 18 décembre 1997, Daffix/Commission, T-12/94, RecFP p. I-1197, point 116, et du 7 juillet 1998, Telchini e a./Commission, T-116/96, T-212/96 et T-215/96, RecFP p. II-947, point 59), de sorte que leur prétendue ignorance des obligations leur incombant à ce titre ne saurait être constitutive de bonne foi. L'argument est d'autant moins fondé en l'espèce qu'il est admis par le requérant que ses collègues connaissaient son intention de préparer l'ouvrage litigieux pendant son congé de convenance personnelle, alors que, dans la demande qu'il avait adressée à l'AIPN en application de l'article 40 du statut, il avait indiqué d'autres motifs que la préparation de cet ouvrage. Étant donné que de telles déclarations sont contraires aux liens de loyauté et de confiance qui doivent régir les relations entre administration et fonctionnaires, et inconciliables avec l'intégrité exigée de tout fonctionnaire (voir, en ce sens, arrêt M./Conseil, précité, point 21), l'AIPN pouvait, dès lors, considérer à juste titre que l'argument du requérant, concernant sa prétendue bonne foi, n'était pas fondé.

169 En conséquence, le moyen doit être rejeté.

Sur le septième moyen, tiré d'un détournement de pouvoir

170 Le requérant fait valoir qu'un ensemble d'indices démontre l'existence d'un détournement de pouvoir. Il invoque, à cet égard, les déclarations de certains membres de la Commission, qui démontreraient que le choix de la sanction avait déjà été décidé avant l'ouverture de la procédure disciplinaire; le fait que la Commission n'ait pas pris soin de l'avertir des problèmes posés par la publication de son ouvrage, alors qu'elle en avait connaissance par un article de presse du 10 juillet 1995; l'initiative qu'elle aurait prise, par une note du 28 juillet 1995, de modifier les modalités de calcul de la réduction des traitements en cas de suspension, les irrégularités de procédure dénoncées dans le présent recours et, enfin, l'absence de prise en considération de sa bonne foi quant au fait qu'il n'avait pas averti ses supérieurs de ses intentions.

171 Il y a lieu de rappeler que, conformément à la jurisprudence, le détournement de pouvoir consiste, pour une autorité administrative, à user de ses pouvoirs dans un but autre que celui en vue duquel ils lui ont été conférés. Dès lors, une décision n'est entachée de détournement de pouvoir que si elle apparaît, sur la base d'indices objectifs, pertinents et concordants, avoir été prise pour atteindre des fins autres que celles excipées (arrêt Williams/Cour des comptes I, points 87 et 88).

172 Sur les déclarations faites par certains membres de la Commission avant l'ouverture de la procédure disciplinaire, il suffit de rappeler que, ainsi qu'il a été souligné au point 96 ci-dessus, ces déclarations ne reflétaient qu'une appréciation provisoire de la part des membres de la Commission concernés et qu'elles ne pouvaient pas, dans les circonstances de l'espèce, altérer la régularité de la procédure disciplinaire.

173 De même, l'argument du requérant selon lequel la Commission aurait dû l'avertir des risques qu'il encourait en publiant son ouvrage ne peut davantage être accueilli. Ainsi que le fait valoir la Commission à juste titre, celle-ci ne saurait être tenue

pour responsable des initiatives que le requérant avait, en outre, pris soin de lui dissimuler lors de sa demande de congé de convenance personnelle. Par ailleurs, pour les raisons exposées dans le cadre des premier et sixième moyens, il y a lieu également de rejeter les arguments tirés de l'existence d'irrégularités dans le déroulement de la procédure disciplinaire et de la bonne foi du requérant.

111 Quant à l'argument tiré d'une modification, par la Commission, des modalités générales de calcul de la réduction des traitements en cas de suspension, il suffit de relever qu'elle ne concerne pas spécifiquement la révocation du requérant, et qu'elle ne peut donc démontrer le détournement de pouvoir allégué.

112 Dès lors, il n'est pas établi que, en infligeant la sanction prononcée, l'AIPN a poursuivi un but autre que celui de sauvegarder l'ordre interne de la fonction publique communautaire. Le septième moyen doit donc être rejeté.

113 Il découle de tout ce qui précède que les conclusions en annulation doivent être rejetées.

Sur les conclusions en indemnité

114 Le requérant soutient que les irrégularités dénoncées dans le cadre de son recours en annulation lui ont causé un préjudice matériel et moral.

115 A cet égard, il y a lieu de relever que, selon une jurisprudence constante, des conclusions tendant à la réparation du préjudice matériel ou moral doivent être rejetées dans la mesure où elles présentent un lien étroit avec les conclusions en annulation qui ont, elles-mêmes, été rejetées soit comme irrecevables, soit comme non fondées (arrêt N/Commission, point 159, et la jurisprudence citée).

179 En l'espèce, il existe un lien étroit entre les conclusions en annulation et les conclusions en indemnité, l'objet de ces dernières étant d'obtenir «réparation des irrégularités dénoncées dans le cadre du recours en annulation». Partant, dans la mesure où l'examen des moyens présentés au soutien des conclusions en annulation n'a révélé aucune illégalité commise par la Commission, et donc aucune faute de nature à engager sa responsabilité, les conclusions en indemnité doivent être rejetées.

180 Le recours doit, en conséquence, être rejeté dans son ensemble.

Sur les dépens

181 Aux termes de l'article 87, paragraphe 2, du règlement de procédure, toute partie qui succombe est condamnée aux dépens, s'il en est conclu en ce sens. Toutefois, selon l'article 88 du même règlement, dans les litiges entre les Communautés et leurs agents, les frais exposés par les institutions restent à la charge de celles-ci. Le requérant ayant succombé en ses moyens et la Commission ayant conclu à ce que le Tribunal statue sur les dépens comme de droit, chacune des parties supportera ses propres dépens.

182 En outre, aux termes de l'article 87, paragraphe 5, troisième alinéa, du règlement de procédure, en cas de désistement, et à défaut de conclusions sur les dépens, chaque partie supporte ses propres dépens.

Par ces motifs,

LE TRIBUNAL (première chambre)

déclare et arrête:

1) Les affaires T-34/96 et T-163/96 sont jointes aux fins de l'arrêt. L'affaire T-34/96 est radiée du registre du Tribunal.

2) Le recours dans l'affaire T-163/96 est rejeté.

3) Chacune des parties supportera ses propres dépens.

Vesterdorf Pirrung Vilaras

Ainsi prononcé en audience publique à Luxembourg, le 19 mai 1999.

Le greffier
H. Jung

Le président
B. Vesterdorf

JUDGMENT OF THE COURT (Sixth Chamber)

8 July 1999 *

In Case C-235/92 P,

Montecatini SpA (formerly Montedison SpA, then Montepolimeri SpA, then Montedipe SpA), whose registered office is in Milan, Italy, represented by G. Aghina and G. Celona, of the Milan Bar, and P.A.M. Ferrari, of the Rome Bar, with an address for service in Luxembourg at the Chambers of G. Margue, 20 Rue Philippe II,

appellant,

supported by

DSM NV, whose registered office is in Heerlen, Netherlands, represented by L.G.F. Cath, of The Hague Bar, with an address for service in Luxembourg at the Chambers of L. Dupong, 14a Rue des Bains,

intervener in the appeal,

APPEAL against the judgment of the Court of First Instance of the European Communities (First Chamber) of 10 March 1992 in Case T-14/89 *Montedipe* v *Commission* [1992] ECR II-1155, seeking to have that judgment set aside,

* Language of the case: Italian.

the other party to the proceedings being:

Commission of the European Communities, represented by G. Marenco, Principal Legal Adviser, acting as Agent, with an address for service in Luxembourg at the office of C. Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant at first instance,

THE COURT (Sixth Chamber),

composed of: P.J.G. Kapteyn, President of the Chamber, G. Hirsch, G.F. Mancini (Rapporteur), J.L. Murray and H. Ragnemalm, Judges,

Advocate General: G. Cosmas,

Registrars: H. von Holstein, Deputy Registrar, and D. Louterman-Hubeau, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 12 March 1997,

after hearing the Opinion of the Advocate General at the sitting on 15 July 1997,

gives the following

Judgment

1 By application lodged at the Registry of the Court of Justice on 22 May 1992, Montecatini SpA (formerly Montedison SpA, then Montepolimeri SpA, then Montedipe SpA) ('Monte') brought an appeal under Article 49 of the EC Statute of the Court of Justice against the judgment of the Court of First Instance of 10 March 1992 in Case T-14/89 *Montedipe v Commission* [1992] ECR II-1155 ('the contested judgment').

Facts and procedure before the Court of First Instance

2 The facts giving rise to this appeal, as set out in the contested judgment, are as follows.

3 Several undertakings active in the European petrochemical industry brought an action before the Court of First Instance for the annulment of Commission Decision 86/398/EEC of 23 April 1986 relating to a proceeding under Article 85 of the EEC Treaty (IV/31.149 — Polypropylene) (OJ 1986 L 230, p. 1, 'the Polypropylene Decision').

4 According to the Commission's findings, which were confirmed on this point by the Court of First Instance, before 1977 the market for polypropylene was supplied by 10 producers, four of which (Monte, Hoechst AG, Imperial Chemical Industries plc ('ICI') and Shell International Chemical Company Ltd ('Shell') ('the big four')) together accounted for 64% of the market. Following the expiry of the

controlling patents held by Monte, new producers appeared on the market in 1977, bringing about a substantial increase in real production capacity which was not, however, matched by a corresponding increase in demand. This led to rates of utilisation of production capacity of between 60% in 1977 and 90% in 1983. Each of the EEC producers operating at that time supplied the product in most, if not all, Member States.

3 Montc was one of the producers supplying the market in 1977. It was the main producer of polypropylene and consequently one of the big four. It had a market share on the west European market of between 14.2 and 15%. In 1983, when it took over the business of Enichem Anic SpA, its share was 18% of the west European market in polypropylene.

4 Following simultaneous investigations at the premises of several undertakings in the sector, the Commission addressed requests for information to a number of polypropylene producers under Article 11 of Council Regulation No 17 of 6 February 1962, the first regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87). It appears from paragraph 6 of the contested judgment that the evidence obtained led the Commission to form the view that between 1977 and 1983 the producers concerned had, in contravention of Article 85 of the EC Treaty (now Article 81 EC), regularly set target prices by way of a series of price initiatives and developed a system of annual volume control to share out the available market between them according to agreed percentage or tonnage targets. This led the Commission to commence the procedure provided for by Article 3(1) of Regulation No 17 and to send a written statement of objections to several undertakings, including Monte.

5 At the end of that procedure, the Commission adopted the Polypropylene Decision, in which it found that Monte had infringed Article 85(1) of the Treaty by participating, with other undertakings, and in Monte's case from about mid-

1977 until at least November 1983, in an agreement and concerted practice originating in mid-1977 by which the producers supplying polypropylene in the territory of the EEC:

— contacted each other and met regularly (from the beginning of 1981, twice each month) in a series of secret meetings so as to discuss and determine their commercial policies;

— set 'target' (or minimum) prices from time to time for the sale of the product in each Member State of the EEC;

— agreed various measures designed to facilitate the implementation of such target prices, including (principally) temporary restrictions on output, the exchange of detailed information on their deliveries, the holding of local meetings and from late 1982 a system of 'account management' designed to implement price rises to individual customers;

introduced simultaneous price increases implementing the said targets;

— shared the market by allocating to each producer an annual sales target or 'quota' (1979, 1980 and for at least part of 1983) or in default of a definitive agreement covering the whole year by requiring producers to limit their sales in each month by reference to some previous period (1981, 1982) (Article 1 of the Polypropylene Decision).

8 The Commission then ordered the various undertakings concerned to bring that infringement to an end forthwith and to refrain thenceforth from any agreement or concerted practice which might have the same or similar object or effect. The Commission also ordered them to terminate any exchange of information of the kind normally covered by business secrecy and to ensure that any scheme for the exchange of general information (such as Fides) was so conducted as to exclude any information from which the behaviour of specific producers could be identified (Article 2 of the Polypropylene Decision).

9 Montc was fined ECU 11 000 000, or ITL 16 187 490 000 (Article 3 of the Polypropylene Decision).

10 On 6 August 1986, Montc lodged an action for annulment of that decision before the Court of Justice. The written procedure took place entirely before the Court of Justice. By order of 15 November 1989, it referred the case to the Court of First Instance, pursuant to Council Decision 88/591/ECSC, EEC, Euratom of 24 October 1988 establishing a Court of First Instance of the European Communities (OJ 1988 L 319, p. 1).

11 Before the Court of First Instance, Montc sought annulment of the Polypropylene Decision in so far as it was addressed to it, in the alternative its annulment in so far as it imposed a fine on it, and in the further alternative its annulment in so far as it imposed on the applicant a fine of ECU 11 000 000 and a reduction of the fine to a nominal or in any event fair amount, or one which at least took account of the rules on limitation periods; it also sought in any event an order that the Commission pay all the costs, an order that the Commission reimburse it for all the costs incurred during the administrative procedure, and an order that the Commission pay compensation for all the harm associated with the implementation of the Polypropylene Decision or the establishment of a bank guarantee for its implementation, including interest and an allowance for inflation on the sums paid in implementation or for the establishment of the guarantee.

12 The Commission contended that the application should be dismissed and the applicant ordered to pay the costs.

13 By a letter lodged at the Registry of the Court of First Instance on 6 March 1992, Monte asked the Court of First Instance to reopen the oral procedure and order measures of inquiry, as a result of the statements made by the Commission at the press conference held on 28 February 1992, after delivery of the judgment of the Court of First Instance in Joined Cases T-79/89, T-84/89 to T-86/89, T-89/89, T-91/89, T-92/89, T-94/89, T-96/89, T-98/89, T-102/89 and T-104/89 *BASF and Others v Commission* [1992] ECR II-315 ("the *PVC* judgment of the Court of First Instance").

The contested judgment

Proof of the infringement — Findings of fact

The floor-price agreement

14 At paragraphs 68 and 69 of the contested judgment, the Court of First Instance found that the text of the note made by a Hercules employee to which the Commission had referred to establish the existence of a floor-price agreement was clear and unambiguous, and that Monte had put forward nothing to weaken its evidential value.

15 According to paragraph 70, the fact that the agreed floor prices could not be achieved did not tell against Monte's participation in the floor-price agreement, since even if that fact were assumed to be established, it would at most tend to

show that the floor prices were not implemented, not that they were not agreed. At paragraph 71, the Court of First Instance considered that floor prices were no different in nature from the price targets subsequently fixed by the polypropylene producers.

15 The Court of First Instance concluded, at paragraph 72, that the Commission had established to the requisite legal standard that in mid 1977 a common purpose had emerged among several producers, including Montc, concerning the fixing of floor prices.

The system of regular meetings

17 At paragraph 82, the Court of First Instance noted that Montc did not deny its participation in the periodic meetings of polypropylene producers and that it had therefore to be held that it participated in all the meetings which the Polypropylene Decision alleged had been held. At paragraph 83, the Court of First Instance considered that the Commission was fully entitled to take the view, based on the information which was provided by ICI in its reply to the request for information and was borne out by numerous meeting notes, that the purpose of the meetings was, in particular, to fix target prices and sales volumes.

18 The Court of First Instance also observed, at paragraph 84, that the contents of the notes obtained from ICI were confirmed by various documents, such as a number of tables relating to the sales volumes of the various producers and price instructions broadly corresponding in their amount and date of entry into force to the target prices mentioned in those meetings notes and — in the aggregate — by the replies of the various producers to the requests for information addressed to them by the Commission. Consequently, according to paragraph 85, the Commission was able to take the view that the meeting notes found at the premises of ICI reflected fairly objectively what went on at those meetings. At paragraph 86 the Court of First Instance considered that in those circumstances it was for Montc to provide another explanation of the subject-matter of the meetings in which it participated, by putting forward specific evidence, but it observed that Montc had not put forward or offered to put forward such material before the Court.

19 According to paragraph 88 of the contested judgment, the Commission was also fully entitled to deduce from ICI's reply concerning the regularity of the 'Bosses" and 'Experts" meetings, as well as from the identical nature and purpose of the meetings, that they were part of a system of regular meetings.

20 With regard to the particular role played by the 'big four' in the system of meetings, the Court of First Instance noted, at paragraph 89, that Monte did not deny that meetings between those undertakings had taken place on the dates indicated by the Commission. According to paragraph 90, after December 1982, those meetings had taken place the day before the 'bosses" meetings and their purpose was to determine the steps which they could take together in order to bring about a rise in prices, as was shown by the summary note prepared by an ICI employee about what had transpired at a pre-meeting on 19 May 1983 which the 'big four' had attended.

21 At paragraph 91, the Court of First Instance concluded that the Commission had established to the requisite legal standard that Monte had participated regularly in the regular meetings of polypropylene producers between the end of 1977 and September 1983, that until August 1982 the meetings were chaired by members of Monte's staff, that the purpose of those meetings was, in particular, to set price and sales volume targets and that they were part of a system.

The price initiatives

22 At paragraph 128, the Court of First Instance found that the records of the regular meetings of polypropylene producers showed that the producers which participated in those meetings had agreed to the price initiatives mentioned in the Polypropylene Decision. According to paragraph 129, since it had been established to the requisite legal standard that Monte had participated in those meetings, it could not assert that it did not support the price initiatives which were decided on, planned and monitored at those meetings without providing any evidence to corroborate that assertion.

27 At paragraph 131, the Court of First Instance considered that Monte's contention that it took no account of the outcome of the meetings when determining its conduct on the market as regards prices could not be accepted as evidence capable of corroborating its assertion that it did not subscribe to the price initiatives agreed at the meetings, but would at the most tend to show that it did not put into effect the results of those meetings. At paragraph 132, the Court of First Instance pointed out that Monte could not effectively argue that its price instructions were purely internal, since, although they were indeed internal inasmuch as they were sent by headquarters to the sales offices, they were nevertheless sent with a view to their being carried out and therefore in order to produce directly or indirectly external effects, which negated their internal character.

28 With regard to the economic context of the price initiatives, the Court of First Instance considered, at paragraph 133, that this could not explain the manner in which the price instructions issued by the different producers corresponded to each other and to the price targets set at the producers' meetings. According to paragraph 134, nor could the identical nature of the constraints faced by the producers in connection with certain factors of production explain the virtual simultaneity of the price instructions issued by Monte and by the other producers.

29 Moreover, according to paragraph 135, there could be no question of any form of 'price leadership' on the part of a producer, since the Commission had proved to the requisite legal standard that this producer had participated with others in consultation on prices. At paragraph 136, the Court of First Instance added that the Commission was fully entitled to deduce from ICI's reply to the request for information that those initiatives were part of a system of fixing target prices.

30 The Court of First Instance concluded, in paragraph 137, that the Commission had established to the requisite legal standard that Monte was one of the producers amongst whom there had emerged common intentions concerning the price initiatives mentioned in the Polypropylene Decision, that those initiatives were part of a system and that the effects of those price initiatives continued until November 1983.

The measures designed to facilitate the implementation of the price initiatives

27 At paragraph 143, the Court of First Instance considered that the Polypropylene Decision was to be interpreted as asserting that at various times each of the producers had adopted at the meetings together with the other producers a set of measures designed to bring about conditions favourable to an increase in prices, in particular by artificially reducing the supply of polypropylene, and that the implementation of the various measures involved was by common agreement shared between the various producers according to their specific situation. At paragraph 144, the Court of First Instance concluded that, in participating in the meetings during which that set of measures was adopted, Monte had subscribed to it, since it had not adduced any evidence to prove the contrary.

28 As regards the question of 'account leadership', the Court of First Instance found, at paragraph 145, that it was clear from the notes of the meetings of 2 September 1982, 2 December 1982 and of spring 1983, which were all attended by Monte, that during those meetings the producers present at them had agreed to that system. According to paragraph 146, the study produced by Monte, because of its excessively limited scope, did not show that it had not played the role of 'account leader' for customers for which it had been so designated.

29 At paragraphs 147 and 148, the Court of First Instance found that the implementation, at least in part, of this system was evidenced by the note of the meeting of 3 May 1983 and by that of another meeting in spring 1983 as well as by ICI's reply to the request for information. The Court of First Instance further observed, at paragraph 149, that Monte did not specifically deny having taken part in the decision to adopt other measures designed to facilitate the implementation of the price initiatives.

30 At paragraph 150, the Court of First Instance concluded that the Commission had established to the requisite legal standard that Monte was one of the polypropylene producers amongst whom there emerged common intentions concerning the measures designed to facilitate the implementation of the price initiatives mentioned in the Polypropylene Decision.

Target tonnages and quotas

91 The Court of First Instance first pointed out, at paragraph 175, that it had already found that Monte had participated from the outset in the periodic meetings of polypropylene producers at which discussions relating to the sales volumes of the various producers were held and information exchanged on that subject. At paragraph 176, it pointed out that, along with that participation, Monte's name appeared in various tables found on the premises of polypropylene producers, whose contents clearly showed that they were drawn up for the purpose of determining sales volume targets. The Commission was therefore entitled to take the view that the data contained in those tables, which must have been drawn up on the basis of information from the producers themselves rather than Fides statistics, had, as far as Monte was concerned, been provided by it in the course of the meetings. With regard to the assertion that that information was untrue, the Court of First Instance pointed out, first, at paragraph 177, that that was undermined by the reference in one of the tables to a comparison between the figures provided by certain producers and the Fides figures. Secondly, in the view of the Court of First Instance, the fact that that information might have been untrue tended to confirm that it was intended to be used as the basis for a decision following negotiations whose purpose was to reconcile interests which were individually opposed but in overall terms convergent. At paragraph 178, the Court of First Instance held that the terms used in the tables relating to the years 1979 and 1980 justified the conclusion that the producers had arrived at a common purpose.

92 As regards the year 1979 in particular, the Court of First Instance indicated, at paragraph 179, that the note of the meeting of 26 and 27 September 1979 and the table headed 'Producers' Sales to West Europe', taken from the premises of [C], indicated that the scheme originally planned for 1979 had had to be made tighter for the last three months of the year.

93 In paragraph 180, the Court of First Instance found that, as regards the year 1980, it was clear from the table dated 26 February 1980 found at the premises of Atochem SA and from the note of the January 1981 meetings that sales volume targets were set for the whole of the year; it pointed out in that regard that although the figures from the two sources were different, that was because the producers' forecasts had had to be revised downwards. At paragraph 181, it added that according to the note of the meetings in January 1981, Monte had

provided its sales figures for 1980 so that they could be compared with the sales volume targets fixed and accepted for 1980.

» In paragraphs 182 to 187, the Court of First Instance pointed out that, for 1981, the complaint against the producers was that they took part in negotiations in order to reach a quota agreement, that they communicated their 'aspirations', that they had agreed, as a temporary measure, to restrict their monthly sales to one-twelfth of 85% of the 'target' agreed for 1980 during February and March 1981, that they had taken the previous year's quota as a theoretical entitlement for the rest of the year, that they had reported their sales each month to the meetings, and, finally, had monitored whether the sales matched the theoretical quota allocated to them. According to the Court of First Instance, the existence of those negotiations and the communication of 'aspirations' were attested by various pieces of evidence such as tables and an ICI internal note; the adoption of temporary measures during February and March 1981 was apparent from the note of the meetings of January 1981; the fact that the producers each took their previous year's quota as a theoretical entitlement for the rest of the year and monitored whether sales matched that quota by exchanging their sales figures each month was established by the combination of a table dated 21 December 1981, an undated table entitled 'Scarti per società' found at the premises of ICI, and an undated table also found there; according to the Court of First Instance, the participation of Monte in those various activities was apparent from its participation in the meetings at which those activities took place, and from the fact that its name appeared in the various documents mentioned above.

» At paragraphs 188 to 192, the Court of First Instance stated that, for 1982, the complaint against the producers was that they took part in negotiations in order to reach an agreement on quotas, that they communicated their tonnage 'aspirations', that, failing a definitive agreement, they communicated their monthly sales figures during the first half of the year, comparing them with the percentage achieved during the previous year and, during the second half of the year, attempting to restrict their monthly sales to the same percentage of the overall market achieved in the first six months of that year. According to the Court of First Instance, the existence of those negotiations and the communication of their 'aspirations' were evidenced by a document entitled 'Scheme for discussions "quota system 1982"', by an ICI note entitled 'Polypropylene 1982, Guidelines', by a table dated 17 February 1982 and by a table written in Italian which was a complex proposal; the measures adopted for the first half of the year

were established by the note of the meeting on 13 May 1982 and by Monte's statement at that meeting; the implementation of those measures was evidenced by the notes of the meetings of 9 June, 20 and 21 July and 20 August 1982; the measures adopted for the second half were proved by the note of the meeting of 6 October 1982 and the continuation of the measures was confirmed by the note of the meeting of 2 December 1982.

16 The Court of First Instance also found, at paragraph 193, that, as regards the years 1981 and 1982, the Commission was entitled to conclude from the mutual monitoring, conducted at the regular meetings, of the implementation of a system for restricting monthly sales by reference to a previous period that that system had been adopted by the participants at the meetings.

17 In respect of 1983, the Court of First Instance found, at paragraphs 194 to 200, that it was clear from the documents produced by the Commission that at the end of 1982 and the beginning of 1983 the polypropylene producers had discussed a quota system for 1983, that Monte had participated in the meetings at which the discussions took place, that on those occasions it had supplied data relating to its sales and that in Table 2 attached to the note of the meeting of 2 December 1982 the word 'acceptable' appeared beside the quota assigned to Monte's name, so that Monte had participated in the negotiations held with a view to arriving at a quota system for 1983. According to the Court of First Instance, the Commission was entitled to conclude from the combination of the note of the meeting on 1 June 1983 and the note of an internal meeting of the Shell group on 17 March 1983, which were confirmed by two other documents mentioning the figure of 11% as Shell's market share, that those negotiations had led to the introduction of such a system. Moreover, according to the Court of First Instance, the fact that Monte's sales did not always correspond to the quotas allocated to it was irrelevant, since the Commission's decision did not rely on the actual implementation by Monte of the quota system on the market in order to prove its participation in that system. The Court of First Instance added that, owing to the identical aim of the various measures for restricting sales volumes — namely to reduce the pressure exerted on prices by excess supply — the Commission was entitled to conclude that those measures were part of a quota system.

51 The Court of First Instance concluded, in paragraph 201, that the Commission had established to the requisite legal standard that Monte was one of the polypropylene producers amongst whom common purposes had emerged in relation to sales volume targets for 1979, 1980 and the first half of 1983 and to the restriction of their monthly sales by reference to a previous period for the years 1981 and 1982 which were mentioned in the Polypropylene Decision and which formed part of a quota system.

The application of Article 85(1) of the Treaty

Legal characterisation

52 The Court of First Instance observed, at paragraphs 228 and 229 of the contested judgment, that the Commission had characterised each factual element as either, principally, an agreement or, in the alternative, a concerted practice for the purposes of Article 85(1) of the Treaty. At paragraph 230, referring to Case 41/69 *ACF Chemiefarma* v *Commission* [1970] ECR 661 and Joined Cases 209/78 to 215/78 and 218/78 *Van Landewyck and Others* v *Commission* [1980] ECR 3125, it held that in order for there to be an agreement within the meaning of Article 85(1) of the Treaty it was sufficient that the undertakings in question should have expressed their joint intention to conduct themselves on the market in a specific way. The Commission was accordingly entitled to treat the common intentions existing between Monte and the other polypropylene producers, which related to floor prices in 1977, price initiatives, measures designed to facilitate the implementation of the price initiatives, sales volume targets for the years 1979 and 1980 and the first half of 1983 and measures for restricting monthly sales by reference to a previous period for 1981 and 1982, as agreements. Furthermore, the Court of First Instance indicated, in paragraph 231, that having established to the requisite legal standard that the effects of the price initiatives continued to last until November 1983, the Commission was fully entitled to take the view that the infringement continued until at least November 1983. In that connection, and referring to Case 243/83 *Binon* v *Agence et Messageries de la Presse* [1985] ECR 2015, the Court of First Instance observed that Article 85 of the Treaty was also applicable to agreements which were no longer in force but which continued to produce their effects after they had formally ceased to be in force.

40 For a definition of the concept of concerted practice, the Court of First Instance referred, at paragraph 232, to Joined Cases 40/73 to 48/73, 50/73, 54/73, 55/73, 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663. In the case before it, it found, at paragraph 233, that Montc had participated in meetings concerning the fixing of price and sales volume targets, and including the exchange of information between competitors on the subject, and that it had thus taken part in concerted action the purpose of which was to influence the conduct of the producers on the market and to disclose to each other the course of conduct which each itself contemplated adopting on the market. The Court of First Instance added, at paragraph 234, that Monte had not only pursued the aim of eliminating in advance uncertainty about the future conduct of its competitors but also, in determining the policy which it intended to follow on the market, it could not fail to take account, directly or indirectly, of the information obtained during the course of those meetings. Similarly, according to the Court of First Instance, in determining the policy which they intended to follow, its competitors were bound to take into account, directly or indirectly, the information disclosed to them by Monte about the course of conduct which it had decided upon or which it contemplated adopting on the market. The Court of First Instance concluded, in paragraph 235, that the Commission was justified, in the alternative, having regard to their purpose, in categorising the regular meetings in which Monte had participated between the end of 1977 and September 1983 as concerted practices within the meaning of Article 85(1) of the Treaty.

41 As regards the question whether there was a single infringement, described in Article 1 of the Polypropylene Decision as 'an agreement and concerted practice', having pointed out, in paragraph 236, that, in view of their identical purpose, the various concerted practices and agreements formed part of schemes of regular meetings, target-price fixing and quota fixing, the Court of First Instance stated, in paragraph 237, that those schemes were part of a series of efforts made by the undertakings in question, in pursuit of a single economic aim, namely to distort the normal movement of prices on the market in polypropylene. According to the Court of First Instance, it would thus have been artificial to split up such continuous conduct, characterised by a single purpose, by treating it as consisting of a number of separate infringements. The fact was that Monte had taken part — over a period of years — in an integrated set of schemes constituting a single infringement, which progressively manifested itself in both unlawful agreements and unlawful concerted practices.

42 The Court of First Instance therefore held, at paragraph 238, that the Commission was entitled to characterise that single infringement as 'an agreement and a concerted practice', since the infringement involved at one and the same time factual elements to be characterised as 'agreements' and factual elements to be characterised as 'concerted practices'. According to the Court of First Instance, given such a complex infringement, the dual characterisation by the Commission in Article 1 of the Polypropylene Decision was to be understood not as requiring, simultaneously and cumulatively, proof that each of those factual elements presented the constituent elements both of an agreement and of a concerted practice, but rather as referring to a complex whole comprising a number of factual elements some of which were characterised as agreements and others as concerted practices for the purposes of Article 85(1) of the Treaty, which lays down no specific category for a complex infringement of that type.

Restrictive effect on competition

43 With regard to Monte's line of argument seeking to demonstrate that its participation in the regular meetings of polypropylene producers had had no anti-competitive effect, the Court of First Instance pointed out, in paragraph 246, that in any event the purpose of those meetings was to restrict competition within the common market, in particular by fixing price and sales volume targets, so that its participation in those meetings was therefore not free of anti-competitive purpose within the meaning of Article 85(1) of the Treaty.

Effect on trade between Member States

44 The Court of First Instance pointed out, in paragraph 253, that in the light of Article 85(1) of the Treaty the Commission was not required to demonstrate that the applicant's participation in an agreement and a concerted practice had had an appreciable effect on trade between Member States, but only that the agreements and concerted practices were capable of having an effect on trade between Member States. In that connection, referring to *Van Landewyck and Others* v

Commission, the Court of First Instance held that the restrictions on competition found to exist were likely to distort trade patterns from the course which they would otherwise have followed. At paragraph 254, the Court of First Instance concluded that the Commission had established to the requisite legal standard that the infringement in which Monte had participated was apt to affect trade between Member States, and it was not necessary for the Commission to demonstrate that Monte's individual participation had affected trade between Member States.

Justifying factors

45 With regard to Monte's arguments that the Commission should have examined the agreements in relation to their economic context, and in any event, should have applied the 'rule of reason', the Court of First Instance recalled, at paragraph 264, that the Commission had proved to the requisite legal standard that the agreements and concerted practices had an anti-competitive object for the purposes of Article 85(1) of the Treaty. In the view of the Court of First Instance, the question whether they were anti-competitive in effect was therefore relevant only to assessment of the amount of the fine. At paragraph 265, the Court of First Instance pointed out that the fact that the infringement was a clear one precluded the application of a rule of reason, assuming such a rule to be applicable in Community competition law, since in that case it had to be regarded as an infringement *per se* of the competition rules.

46 At paragraph 271, the Court of First Instance observed that Monte could not assert that Article 85(3) of the Treaty should have been applied to the agreements which it had entered into and the concerted practices in which it had participated. Pursuant to Article 4(1) of Regulation No 17, Monte should have first notified the agreements and concerted practices to the Commission if it had wished to rely on Article 85(3) of the Treaty, which it did not do. According to paragraph 272, Monte could not therefore assert that it was the victim of discrimination in relation to undertakings whose agreements had been exempted under that provision.

47 Monte had stated that the measures taken by the producers had had extraordinarily beneficial effects, at the price of very heavy losses for the producers, but the Court of First Instance observed, at paragraphs 279 and 280, that, even assuming that there had been a positive market trend and that it had any relevance in the case, Monte had not in any event proved that the trend was attributable to the agreements which it had entered into and the concerted practices in which it had participated. According to the Court of First Instance, Monte's argument to the effect that the established producers could have blocked the entry onto the market of the newcomers, instead of channelling their entry, failed to take into account the fact that those newcomers were large undertakings which could afford to incur losses, even heavy losses, for several years in order to penetrate the polypropylene market.

48 At paragraphs 286 to 287, the Court of First Instance observed that the principle of burden-sharing among undertakings by common agreement, relied upon by Monte with regard to a situation of necessity, was contrary to the concept of competition which Article 85 of the Treaty was intended to uphold. Accordingly, in the view of the Court of First Instance, it was not for undertakings to put that principle into operation without referring to the competent Community authority and observing the procedures laid down for that purpose.

49 At paragraphs 295 and 296, the Court of First Instance observed that the sale of goods below cost price might constitute a form of unfair competition where it was intended to reinforce the competitive position of an undertaking to the detriment of its competitors, but not if sale below cost price resulted from the operation of supply and demand, as was the case here. Consequently, according to the Court of First Instance, participants in a cartel which sought to raise prices from a level below cost to a level at or above cost could not argue, in justification of their conduct, that the cartel sought to eliminate unfair competition.

50 At paragraph 301, the Court of First Instance considered that the analogy drawn by Monte with associations of producers or consumers of raw materials, which it claimed had stabilised markets, was entirely baseless, since the agreements in

question were public measures regulating the market which could not be compared to the agreements entered into in this case by the polypropylene producers.

51 The Court of First Instance observed, at paragraphs 310 and 311, that the obligations to which Monte said it was subject under a collective agreement preserving jobs and the declaration that it was in a critical situation enabling it to benefit from the aid paid in connection with the application of Law No 675 of 12 August 1977, which prevented it from carrying out the job cuts which it had planned, all came into existence more than three years after the conclusion of the floor-price agreement and had been consented to by Monte in order to obtain the benefits which corresponded to the commitments it had entered into. Consequently, according to paragraph 312, Monte could not assert that its obligations had placed it in a position which made its participation in agreements and concerted practices contrary to Article 85 of the Treaty inevitable. Lastly, at paragraph 313, the Court of First Instance declared the argument based on Monte's alleged blackmail by the 'Red Brigades', which had been put forward in its reply, inadmissible as a new plea in law within the meaning of Article 48(2) of the Rules of Procedure of the Court of First Instance and Article 42(2) of the Rules of Procedure of the Court of Justice.

Amount of the fine

The limitation period

52 At paragraph 330, the Court noted that under Article 1(2) of Regulation (EEC) No 2988/74 of the Council of 26 November 1974 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition (OJ 1974 L 319, p. 1), the five-year limitation period applying to the Commission's power to impose fines begins to run, in the case of continuing or repeated infringements, on the day on which the infringement ceases. It follows from paragraphs 331 and 332 that, in this case, Monte had participated without interruption in a single and

continuous infringement (in Italian, which was the language of the case, 'un'infrazione unica e continuata') from the conclusion of the floor-price agreement in mid-1977 until November 1983 and could not therefore rely on the limitation period relating to the imposition of fines.

Duration of the infringement

53 At paragraph 336, the Court of First Instance pointed out that it had already found that the Commission had properly assessed the duration of the period during which Monte had infringed Article 85(1) of the Treaty.

The gravity of the infringement

54 The Court of First Instance held, in paragraph 346, that, according to the case-law of the Court of Justice, in assessing the gravity of an infringement for the purpose of fixing the amount of the fine, the Commission had to take into consideration not only the particular circumstances of the case but also the context in which the infringement occurred and had to ensure that its action had the necessary deterrent effect, especially as regards those types of infringement which were particularly harmful to the attainment of the objectives of the Community; it was also open to the Commission to have regard to the fact that infringements of a specific type, whose unlawfulness had been established, were still relatively frequent on account of the profit that some of the undertakings concerned were able to derive from them and, consequently, it was open to the Commission to raise the level of fines so as to reinforce their deterrent effect; the fact that in the past the Commission had imposed fines of a certain level for certain types of infringement did not mean that it was estopped from raising that level within the limits indicated in Regulation No 17 if that was necessary to ensure the implementation of Community competition policy (Joined Cases 100/80 to 103/80 *Musique Diffusion Française and Others* v *Commission* [1983] ECR 1825).

56 In view of those considerations, the Court of First Instance found, at paragraph 347, that the Commission had rightly described the fixing of target prices and of sales volumes as well as the adoption of measures designed to facilitate the implementation of target prices as a particularly grave and clear infringement.

57 At paragraphs 351 to 355, the Court of First Instance noted that in order to determine the amount of the fine, the Commission had first defined the criteria for setting the general level of the fines imposed on the undertakings to which the Polypropylene Decision was addressed (point 108 of the Decision) and then defined the criteria for achieving a fair balance between the fines imposed on each of those undertakings (point 109 of the Decision). As regards that last category of criteria, which it found to be relevant and sufficient, the Court of First Instance considered that the Commission had sufficiently individualised the way in which it took account of the criteria relating to the role played by each of the undertakings in the collusive arrangements and the period of time during which they participated in the infringement in Monte's case and had not applied the criteria relating to the respective deliveries of the various polypropylene producers to the Community and their total turnover unfairly.

58 At paragraphs 361 to 363, the Court of First Instance found that the Commission had correctly established the role played by Monte and that it was entitled to take account of that role in determining the amount of the fine. Moreover, according to the Court of First Instance, the facts established showed, by their intrinsic gravity — in particular the fixing of price and sales volume targets — that Monte had not acted rashly or even through lack of care but intentionally. In that regard the Court of First Instance observed that the undertakings involved accounted for virtually the whole of the market concerned, which showed clearly that the infringement which they had committed together might have restricted competition.

59 The Court of First Instance noted, at paragraph 369, that the Commission had distinguished two types of effect: first the price instructions from the producers to their sales offices; secondly, the movements in prices charged to various customers. According to paragraph 370, the first type of effect had been proved to the requisite legal standard by the Commission from the many price instructions given by the various producers. With regard to the second type of

effect, the Court of First Instance pointed out, at paragraph 371, that it was clear from the Polypropylene Decision that the Commission had taken into account, in mitigation of the penalties, the fact that the price initiatives generally had not achieved their objective in full and that there were no measures of constraint to ensure compliance with quotas or other measures. The Court of First Instance concluded, at paragraphs 372 and 373, that the Commission had rightly taken full account of the first type of effect and that it had taken account of the limited character of the second type of effect to an extent that Monte had not shown was insufficient, that the statement of the grounds for the Commission's decision supported its conclusion and that there was nothing to indicate that the Commission had based the Polypropylene Decision on consideration of more far-reaching effects than those set out in the statement of grounds for the Decision, contrary to Monte's assertions. There could therefore be no question of any misuse of powers.

66 The Court of First Instance found, at paragraph 379, that the Commission had taken account of the fact that the undertakings had incurred substantial losses on their polypropylene operations over a considerable period, and that it thereby took account of the unfavourable economic conditions prevailing in the sector with a view to determining the general level of the fines. It added, at paragraph 380, that the maximum limit of 10% of turnover laid down in Article 15(2) of Regulation No 17 applied in all circumstances.

67 At paragraphs 385 and 386, the Court of First Instance observed that the various facts put forward by Monte as justification, which related in particular to the national political and social context or the beneficial effects of the cartel, were not such as to efface the unlawful nature of its conduct, since it could not be accepted that participation in an unlawful cartel constituted a legitimate form of self-defence. According to the Court of First Instance, the Commission could have taken account of those facts in determining the amount of the fine as mitigating circumstances, but was not obliged to do so. In that connection, in so far as the applicant appealed to the exercise by the Court of First Instance of its unlimited jurisdiction, the latter observed that the criteria set out in point 108 of the Polypropylene Decision entirely justified the general level of the fines imposed, having regard in particular to the particularly manifest nature of the infringement committed.

61 In conclusion, at paragraph 388, the Court of First Instance held that the fine imposed on Monte was appropriate having regard to the gravity and duration of the breach of the competition rules found to have been committed. According to the Court of First Instance, since the Polypropylene Decision was not unlawful or defective in any way the Commission could not incur liability.

Reopening of the oral procedure

62 In dealing with the request to reopen the oral procedure, referred to in paragraph 389, having again heard the views of the Advocate General, the Court of First Instance considered, at paragraph 390, that it was not necessary to order the reopening of the oral procedure in accordance with Article 62 of its Rules of Procedure or to order measures of inquiry as requested by Monte.

63 At paragraph 391 of the grounds of the judgment the Court of First Instance held as follows:

'It must be stated that the judgment delivered in the abovementioned cases (judgment of 27 February 1992 in Joined Cases T-79/89, T-84/89 to T-86/89, T-89/89, T-91/89, T-92/89, T-94/89, T-96/89, T-98/89, T-102/89 and T-104/89 *BASF and Others* v *Commission* [1992] ECR II-315) does not in itself justify the reopening of the oral procedure in this case. The Court observes that a measure which has been notified and published must be presumed to be valid. It is thus for a person who seeks to allege the lack of formal validity or the non existence of a measure to provide the Court with grounds enabling it to look behind the apparent validity of the measure which has been formally notified and published. In this case the applicants have not put forward any evidence to suggest that the measure notified and published had not been approved or adopted by the members of the Commission acting as a college. In particular, in contrast to the *PVC* cases (judgment in Joined Cases T-79/89, T-84/89 to T-86/89, T-89/89, T-91/89, T-92/89, T-94/89, T-96/89, T-98/89, T-102/89 and T-104/89, cited above, paragraph 32 et seq.), the applicants have not put forward any evidence that the principle of the inalterability of the adopted measure was infringed by a change to the text of the Decision after the meeting of the College of Commissioners at which it was adopted.'

66 The Court of First Instance dismissed the application and ordered Monte to pay the costs.

The application for revision and the order of the Court of First Instance

67 On 11 June 1992 Monte lodged an application for revision of the contested judgment at the Registry of the Court of First Instance, pursuant to Article 41 of the EC Statute of the Court of Justice and Article 125 of the Rules of Procedure of the Court of First Instance.

68 By order of 4 November 1992 in Case T-14/89 REV *Montecatini* v *Commission* [1992] ECR II-2409, the Court of First Instance dismissed the application for revision as inadmissible.

The appeal

69 In its appeal Monte requests the Court of Justice:

— first, to declare the appeal admissible;

— principally, to annul in full the contested judgment and to refer the case back to another Chamber of the Court of First Instance for a fresh examination of the facts, where that was omitted, and application of the proper principles of law where they were infringed;

— in the alternative, partially to annul the contested judgment with referral as above;

— in any event, order the Commission to pay the costs in relation to the proceedings before both Courts.

68 By order of the Court of Justice of 30 September 1992, DSM NV ('DSM') was given leave to intervene in support of the orders sought by Monte. DSM requests the Court to:

— annul the contested judgment;

— declare the Polypropylene Decision non-existent or annul it;

— declare the Polypropylene Decision non-existent or annul it as regards all addressees of that decision, or at least as regards DSM, irrespective of whether or not those addressees appealed against the judgment concerning them, or whether or not their appeals were rejected;

— in the alternative, refer the case back to the Court of First Instance on the issue whether the Polypropylene Decision is non-existent or should be annulled;

— in any event, order the Commission to pay the costs of the proceedings, both in relation to the proceedings before the Court of Justice and to those before

the Court of First Instance, including the costs incurred by DSM in its intervention.

88 The Commission contends that the Court should:

— dismiss the appeal in its entirety;

— uphold the dismissal by the Court of First Instance of the application;

— order Montedipe to pay the costs in relation to the proceedings before both Courts;

— reject the intervention as a whole as inadmissible;

— alternatively, reject the forms of order sought in the intervention to the effect that the Court should declare the Polypropylene Decision non-existent or annul it as regards all its addressees, or at least as regards DSM, irrespective of whether those addressees appealed against the judgment of the Court of First Instance concerning them, or whether their appeals were rejected, and reject the remainder of the intervention as unfounded;

— in the further alternative, reject the intervention as unfounded;

— in any event, order DSM to pay the costs arising out of the intervention.

70 In support of its appeal, Montedipe puts forward five pleas alleging infringement of Community law, within the meaning of the first paragraph of Article 51 of the EC Statute of the Court of Justice based, first, on the fact that the Court of First Instance failed to verify of its own motion whether the Polypropylene Decision existed; secondly, on infringement of Article 85 of the Treaty; thirdly, on the way the facts were established; fourthly, on infringement of the rules applicable to limitation periods; and, fifthly and in the alternative, on the determination of the amount of the fine.

71 At the Commission's request and with an objection on Montedipe's part, by decision of the President of the Court of Justice of 27 July 1992 proceedings were stayed until 15 September 1994 to enable the appropriate conclusions to be drawn from the judgment of 15 June 1994 in Case C-137/92 P *Commission v BASF and Others* [1994] ECR I-2555 ('the *PVC* judgment of the Court of Justice'), which was delivered on the appeal against the *PVC* judgment of the Court of First Instance.

Admissibility of the intervention

72 The Commission considers that DSM's intervention must be declared inadmissible. DSM explained that, as an intervener, it had an interest in having the contested judgment concerning Montedipe set aside. According to the Commission, annulment cannot benefit all addressees of a decision, but only those who bring an action for its annulment. That is precisely one of the distinctions between annulment and non-existence. Failure to observe that distinction would mean that time-limits for bringing an action would cease to be mandatory in actions for annulment. DSM cannot therefore seek the benefit of an annulment because it failed to appeal against the judgment of the Court of First Instance which concerned it (judgment of 17 December 1991 in Case T-8/89 *DSM v Commission* [1991] ECR II 1833). By its intervention DSM is simply seeking to circumvent a time-bar.

73 The order of 30 September 1992, cited above, granting DSM leave to intervene was made at a time when the Court of Justice had not yet decided the issue of

annulment or non-existence in its *PVC* judgment. According to the Commission, following that judgment, the allegations of procedural defects, even if well founded, could lead only to annulment of the Polypropylene Decision and not to a finding of non-existence. Accordingly, DSM has ceased to have any interest in intervention.

74 The Commission also objects in particular to the admissibility of DSM's submission that the judgment of the Court of Justice should include provisions declaring non-existence or annulling the Polypropylene Decision as regards all its addressees, or at least as regards DSM, irrespective of whether or not those addressees appealed against the judgment of the Court of First Instance concerning them or whether or not their appeals were rejected. That submission is inadmissible, since DSM is seeking to introduce an issue which concerns it alone, whereas an intervener can only take the case as he finds it. Under the fourth paragraph of Article 37 of the EC Statute of the Court of Justice, an intervener may only support the form of order sought by another party, without introducing his own. In the Commission's view, that point in DSM's submissions confirms that it is seeking to use the intervention in order to get round the expiry of the time-limit for appealing against the judgment of the Court of First Instance in *DSM v Commission* concerning it.

75 As regards the objection of inadmissibility raised against the intervention as a whole, the Court observes first of all that the order of 30 September 1992 by which it gave DSM leave to intervene in support of the form of order sought by Mostre does not preclude a fresh examination of the admissibility of its intervention (see, to that effect, Case 138/79 *Roquette Frères v Council* [1980] ECR 3333).

76 Under the second paragraph of Article 37 of the EC Statute of the Court of Justice, the right to intervene in cases before the Court is open to any person establishing an interest in the result of the case. Under the fourth paragraph of Article 37, an application to intervene is to be limited to supporting the form of order sought by one of the parties.

77 The forms of order sought by Monte in its appeal include, in particular, the annulment of the contested judgment on the ground that the Court of First Instance failed to find the Polypropylene Decision non-existent. It is clear from paragraph 49 of the *PVC* judgment of the Court of Justice that, by way of exception to the principle that acts of the Community institutions are presumed to be lawful, acts tainted by an irregularity whose gravity is so obvious that it cannot be tolerated by the Community legal order must be treated as having no legal effect, even provisional, that is to say they must be regarded as legally non-existent.

78 Contrary to the Commission's contention, DSM's interest did not die on delivery of the judgment by which the Court of Justice annulled the *PVC* judgment of the Court of First Instance and held that the defects found by the latter were not such as to warrant treating the decision challenged in the *PVC* cases as non-existent. The *PVC* judgment did not concern the non-existence of the Polypropylene Decision and therefore did not bring DSM's interest in obtaining a finding of such non-existence to an end.

79 As regards the Commission's objection to DSM's submission that this Court should declare the Polypropylene Decision non-existent or annul it as regards all its addressees, or at least as regards DSM, that claim specifically concerns DSM and is not identical to the forms of order sought by Monte. It does not therefore satisfy the conditions laid down in the fourth paragraph of Article 37 of the EC Statute of the Court so that it must be held inadmissible.

Pleas in law relied upon in support of the appeal

80 In support of its appeal, Monte, referring to paragraphs 389 to 391 of the grounds of the contested judgment, claims first that, inasmuch as it failed to verify the existence of the Polypropylene Decision, the Court of First Instance infringed the rules governing the burden of proof and failed in its obligation to undertake of its own motion the verifications necessary. Secondly, referring to paragraphs 57 to 202 and 203 to 315 of the contested judgment, Monte claims

that, when finding the facts put forward for its assessment and reviewing the application of Article 85(1) of the Treaty to those facts, the Court of First Instance infringed Article 85 of the Treaty. Thirdly, with regard again to paragraphs 57 to 202 referred to above, the appellant claims that in finding the facts put forward for its assessment the Court of First Instance infringed the principles applicable to matters of evidence and the assessment of the individual responsibility of those participating in the infringement. Fourthly, referring to paragraphs 236 and 237, and to paragraphs 328 to 337 of the contested judgment, Monte claims that the Court of First Instance infringed the rules applicable to limitation periods. Fifthly, and in the alternative, Monte claims that, in refusing to reduce the fine imposed on it, the Court of First Instance infringed the rules applicable to the determination of the amount of the fine.

Failure to find the Polypropylene Decision non-existent or to annul it for breach of essential procedural requirements

41 By its first plea, Monte claims that the Court of First Instance infringed the principles governing the burden of proof and the principle that a court should verify of its own motion whether a contested act exists and set aside any illegal act. Monte states that, following the *PVC* case before the Court of First Instance and the statements made by the Commission's spokesperson, which were reproduced in the press, it had become clear that when the Polypropylene Decision was signed and therefore adopted, some texts did not in fact exist and that there were sometimes significant differences between the texts which were ready when signature took place and the texts notified, owing to changes made by the Commission's services after the decision was adopted. Such a manner of proceeding is all the more serious where what is involved is a decision imposing a fine, as was the case here.

42 Moreover, in this case Monte has every reason to believe that the Italian version of the Polypropylene Decision was not adopted on 26 April 1986. That defect entails the non-existence of that decision and the Court of First Instance should have verified that point of its own motion, in accordance with a principle that is well-established in the legal orders of the Member States. All the most serious forms of nullity entail non-existence which takes effect *ex tunc* and no limitation period applies.

53 Monte maintains that the Commission itself recognised that the *PVC* and *Polypropylene* cases were identical when it requested that this case be stayed until the *PVC* judgment of the Court of Justice was delivered. In contending that the defects which, in accordance with the principles laid down in that judgment, entail nullity and not the non-existence of the decision should have been pleaded in the application at first instance, the Commission is forgetting that, in the *PVC* judgment, the Court of Justice annulled the Commission's decision although that defect was not the subject of a specific complaint. Even if the issue were non-existence rather than nullity, in its *PVC* judgment the Court of Justice considered that that did not affect the possibility open to the Court of annulling the contested decision.

54 Non-existence does not constitute an independent category of defect in an administrative act, but rather a particular species of defect within the category of nullity. Acts vitiated by very significant defects are only considered to be non-existent within very strict limits and in extreme cases (see the Opinion of Advocate General Trabucchi in Joined Cases 15/73 to 33/73, 52/73, 53/73, 57/73 to 109/73, 116/73, 117/73, 123/73, 132/73 and 135/73 to 137/73 *Schots-Kortner and Others* v *Council* [1974] ECR 177). In this case, there was no need to rely on a finding, of the Court's own motion, of a defect entailing nullity, because that defect was relied on in the appeal, although under the title of non-existence.

55 In the event, as in the *PVC* cases, there is serious evidence to suggest that the text of the decision in Italian was drawn up after the Decision was adopted and that the decision was altered before it was notified to Monte. The Court of First Instance should therefore have asked the Commission to produce the original text of its Decision, as the Court of Justice should do now.

56 DSM states that new developments have taken place in other cases before the Court of First Instance. They confirm that it is incumbent on the Commission to prove that it has followed its own essential procedural requirements and that, to clarify the issue, the Court of First Instance must, of its own motion or at the request of a party, order measures of inquiry in order to examine the relevant documentary evidence. In the *'Soda-Ash'* cases (Case T-30/91 *Solvay* v *Commission* [1995] ECR II-1775 and Case T-36/91 *ICI* v *Commission* [1995] ECR II-1847), the Commission contended that the Supplement to Reply lodged

by ICI in those cases after the *PVC* judgment of the Court of First Instance contained no evidence that the Commission had infringed its Rules of Procedure, and that the request for measures of inquiry lodged by ICI amounted to a new plea in law. The Court of First Instance nevertheless put questions to the Commission and ICI as to the conclusions to be drawn from the *PVC* judgment of the Court of Justice and also asked the Commission, by reference to paragraph 32 of the *PVC* judgment of the Court of Justice, whether it was able to produce extracts from the minutes and the authenticated texts of the contested decisions. Following other developments in the procedure, the Commission finally admitted that the documents produced as authenticated were only authenticated after the Court of First Instance had ordered their production.

v According to DSM, in the "*Low-density polyethylene* ("*LdPE*")" cases (Joined Cases T-80/89, T-81/89, T-83/89, T-87/89, T-88/89, T-90/89, T-93/89, T-95/89, T-97/89, T-99/89, T-100/89, T-101/89, T-103/89, T-105/89, T-107/89 and T-112/89 *BASF and Others* v *Commission* [1995] ECR II-729), the Court of First Instance also ordered the Commission to produce a certified copy of the original version of the contested decision. The Commission admitted that authentication had not taken place at the meeting at which the College of Commissioners adopted that decision. DSM observes that the procedure for authenticating acts of the Commission must therefore have been introduced after March 1992. It follows that the same defect of lack of authentication must affect the Polypropylene Decision.

vi DSM adds that the Court of First Instance adopted a similar approach to that taken in the *Polypropylene* cases in Case T-34/92 *Fiatagri and New Holland Ford* v *Commission* [1994] ECR II-905, at paragraphs 24 to 27, and Case T-35/92 *John Deere* v *Commission* [1994] ECR II-957, at paragraphs 28 to 31, when it rejected the applicants' pleas on the ground that they had failed to produce the slightest evidence which might rebut the presumption of validity of the decision that they were contesting. In Case T-43/92 *Dunlop Slazenger International* v *Commission* [1994] ECR II-441, the applicant's argument was rejected on the ground that the decision had been adopted and notified in accordance with the Commission's Rules of Procedure. In none of those cases did the Court of First Instance reject the applicants' plea of irregularity in the adoption of the challenged act on the ground that the Commission's Rules of Procedure had not been complied with.

49 The only exceptions are to be found in the orders in Case T-4/89 *BASF* v *Commission* [1992] ECR II-1591 and Case T-8/89 Rev *DSM* v *Commission* [1992] ECR II-2399; however, even in those cases the applicants did not rely on the *PVC* judgment of the Court of First Instance as a new fact, but on other facts. In Case C-195/91 P *Bayer* v *Commission* [1994] ECR I-5619, the Court rejected the plea that the Commission had infringed its own Rules of Procedure, because it had not been properly raised before the Court of First Instance. In the Polypropylene proceedings, however, the same plea had been raised before the Court of First Instance and was rejected on the ground that there was not sufficient evidence.

50 DSM considers that the Commission's defence in this case is based on procedural arguments that are irrelevant, given the context of the contested judgment, which in essence turns on the burden of proof. According to DSM, if, in the *Polypropylene* cases, the Commission has not itself produced evidence as to the regularity of the procedures followed, that is because it is not in a position to show that it complied with its own Rules of Procedure.

51 The Commission maintains that, following the *PVC* judgment of the Court of Justice, Monte's criticism has been overtaken by events. Even if were to be accepted that non-existence should be found of the Court's own motion, it is clear from that judgment that Monte could have relied on the alleged procedural defects only for the purpose of seeking the annulment of the Polypropylene Decision. Grounds for annulment must be relied on in the originating application, and that was not done.

52 The Commission points out that, even if it were to be considered that a claim for a declaration of non-existence includes a claim of nullity, Monte's criticism in the appeal, to the effect that the Court of First Instance should have acted of its own motion, relates to the case of non-existence, not to that of nullity. It adds that the proceedings in the Polypropylene cases did not bring factual evidence to light analogous to that which came to light in the *PVC* cases.

54 As regards DSM's arguments, the Commission states that these are fundamentally flawed, since they fail to take account of the differences between the *PVC* cases and this case, and are based on a misconstruction of the *PVC* judgment of the Court of Justice.

55 Moreover, the Commission maintains its view that the applicants in the *Soda-Ash* cases had not produced sufficient evidence to justify the order by the Court of First Instance that the Commission produce documents. At all events, in those cases and the *LdPE* cases, also cited by DSM, the Court of First Instance reached its decision in the light of the particular circumstances of the case before it. In the Polypropylene proceedings, supposed deficiencies in the Polypropylene Decision could have been pointed out in 1986, but no one did so.

56 If, in its judgments in *Fiatagri and New Holland Ford v Commission* and *John Deere v Commission*, cited above, the Court of First Instance rejected the applicants' allegations, which were raised timeously, on the ground that there was no evidence to support them, the same solution should *a fortiori* be reached in this case, where the arguments relating to procedural irregularities in the Polypropylene Decision were produced late and without evidence.

57 With regard, first, to the conditions capable of rendering an act non-existent, it is clear in particular from paragraphs 48 to 50 of the *PVC* judgment of the Court of Justice that acts of the Community institutions are in principle presumed to be lawful and accordingly produce legal effects, even if they are tainted by irregularities, until such time as they are annulled or withdrawn.

58 However, by way of exception to that principle, acts tainted by an irregularity whose gravity is so obvious that it cannot be tolerated by the Community legal order must be treated as having no legal effect, even provisional, that is to say they must be regarded as legally non-existent. The purpose of this exception is to maintain a balance between two fundamental, but sometimes conflicting,

requirements with which a legal order must comply, namely stability of legal relations and respect for legality.

95 From the gravity of the consequences attaching to a finding that an act of a Community institution is non-existent it is self-evident that, for reasons of legal certainty, such a finding is reserved for quite extreme situations.

96 As was the case in the *PVC* actions, whether considered in isolation or even together, the irregularities alleged by Monte, which relate to the procedure for the adoption of the Polypropylene Decision, do not appear to be of such obvious gravity that the decision must be treated as legally non-existent.

97 The Court of First Instance did not therefore infringe Community law as regards the conditions capable of rendering an act non-existent.

98 Secondly, with regard to the refusal by the Court of First Instance to find defects relating to the adoption and notification of the Polypropylene Decision such as to lead to its annulment, it need merely be held that this plea was raised for the first time in the request that the oral procedure be reopened and measures of inquiry be taken. Consequently, the question whether the Court of First Instance was obliged to examine it overlaps with the question whether that Court should have acceded to the request.

99 In that connection, and as regards the request for measures of inquiry, the case-law of the Court (see, in particular, Case 77/70 *Prelle* v *Commission* [1971] ECR 561, paragraph 7, and Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 53) makes it clear that, if made after the oral procedure is closed, such a request

can be admitted only if it relates to facts which may have a decisive influence and which the party concerned could not put forward before the close of the oral procedure.

[51] The same applies with regard to the request that the oral procedure be reopened. It is true that, under Article 62 of its Rules of Procedure, the Court of First Instance has discretion in this area. However, the Court of First Instance is not obliged to accede to such a request unless the party concerned relies on facts which may have a decisive influence on the outcome of the case and which it could not put forward before the close of the oral procedure.

[52] In this case, the request to the Court of First Instance for the oral procedure to be reopened and measures of inquiry ordered was based on statements made at a press conference which took place after the *PVC* judgment of the Court of First Instance was delivered.

[53] First, indications of a general nature relating to an alleged practice of the Commission that emerged from a judgment delivered in other cases or from statements made on the occasion of other proceedings could not, as such, be regarded as decisive for the purposes of the determination of the case then before the Court of First Instance.

[54] Secondly, even when submitting its application, Monte was in a position to provide the Court of First Instance with at least minimum evidence of the expediency of measures of organisation of procedure or inquiry for the purposes of the proceedings in order to prove that the Polypropylene Decision had been adopted in breach of the language rules applicable or altered after its adoption by the College of Members of the Commission, or that the originals were lacking, as certain applicants in the *PVC* cases did (see, to that effect, Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraphs 93 and 94).

107 Furthermore, the Court of First Instance was not obliged to order that the oral procedure be reopened on the ground of an alleged duty to raise of its own motion issues concerning the regularity of the procedure by which the Polypropylene Decision was adopted. Any such obligation to raise matters of public policy could exist only on the basis of the factual evidence adduced before the Court.

108 The Court of First Instance did not therefore commit any error of law in refusing to reopen the oral procedure and to order measures of organisation of procedure and of inquiry.

109 Thirdly and finally, inasmuch as the appellant asks the Court of Justice to order measures of inquiry or offers evidence in order to establish the conditions under which the Commission adopted the Polypropylene Decision, suffice it to point out that such measures cannot be considered in an appeal, which is limited to points of law.

110 On the one hand, measures of inquiry would necessarily lead the Court to decide questions of fact and would change the subject-matter of the proceedings commenced before the Court of First Instance, in breach of Article 113(2) of the Rules of Procedure of the Court of Justice.

111 On the other hand, the appeal relates only to the contested judgment and it is only if that judgment were set aside that the Court of Justice could, in accordance with the first paragraph of Article 54 of the EC Statute of the Court of Justice, deliver judgment itself in the case. As long as the contested judgment is not set aside, the Court is not therefore required to examine possible defects in the Polypropylene Decision.

112 It follows from the foregoing that the first plea in law must be dismissed.

Infringement of Article 85 of the Treaty

113 By its second plea in law, Monte claims that the Court of First Instance infringed Article 85 of the Treaty both in relation to the letter of that provision and in the interpretation given to it by the Commission and the Court of Justice.

Distortions of competition

114 By the first limb of this plea, Monte alleges that the Court of First Instance failed to taken into account distortions of competition caused by factors beyond the control of the undertakings, in particular by the economic context. Monte had claimed, in its application to the Court of First Instance, that towards the end of the 1970s the market was characterised by a situation of overcapacity which was aggravated by a tripling of the price of oil by the Organisation of Petroleum-Exporting Countries ('OPEC'), which the Commission had never attempted to challenge. The serious distortions in the polypropylene market were due not to the producers' meetings but to the prices imposed by OPEC and were therefore caused by factors which had nothing to do with the undertakings. Monte refers, in this connection, to the judgment in *Suiker Unie and Others* v *Commission*, cited above, and to the Opinion of Advocate General Mayras in that case.

115 Contrary to the Commission's assertions, the principle laid down in *Suiker Unie and Others* v *Commission*, cited above, has not been superseded by subsequent case-law, in particular *Van Landewyck and Others* v *Commission*, cited above, or Joined Cases 240/82 to 242/82, 261/82, 262/82, 268/82 and 269/82 *Stichting Sigarettenindustrie and Others* v *Commission* [1985] ECR 3831.

116 With regard to its obligation to consider the economic context, the Court of First Instance confined itself, when taking the economic context into consideration, to the fact, referred to in paragraph 257 of the contested judgment, that all the polypropylene producers were operating at a loss, neglecting the reasons for, and

the significance and duration of that negative period, which was due to the abovementioned factors. Moreover, the Court of First Instance failed completely to consider the existence of the formal instructions given by the Italian Government for Italian undertakings to maintain contact with each other and with multinationals nor did it consider the superior contractual power of the polypropylene users or the legal and moral obligation incumbent on the undertakings concerned to reduce losses.

110 Given that set of circumstances, each one of which could justify a completely different interpretation of Monte's conduct, the Court of First Instance confined itself to indicating, in paragraph 264, that the Commission had proved to the requisite legal standard that the agreements and concerted practices found had an anti-competitive object. However, Monte contends that no agreement or concerted practice was ever found to have existed, since the Commission could establish only the existence of meetings. It was therefore by disregarding all the factual circumstances that the Court of First Instance was able to uphold the appraisal made of the supposed facts by the Commission. In so doing, it infringed the principle reaffirmed by the Court of Justice in Case C-53/92 P *Hilti* v *Commission* [1994] ECR I-667 according to which, where the Commission's reasoning is based on a supposition, it is sufficient for the applicant who is contesting the infringement to prove circumstances which cast the facts established by the Commission in a different light and which thus allow another explanation of the facts to be substituted for the one adopted by the Commission.

111 In reply, the Commission states that no text or general principle authorises undertakings to infringe Article 85 of the Treaty as a reaction to the anti-competitive activity of a third party. According to *Suiker Unie and Others* v *Commission*, cited above, the Commission had to take account of the effects of legislation in a Member State, but the activities of OPEC are not the subject of such legislation. That judgment has, moreover, been overtaken on that point by *Van Landewyck and Others* v *Commission* and *Stichting Sigarettenindustrie and Others* v *Commission* cited above, in which the Court of Justice examined whether, in practice, national legislation excluded any possibility of competition. The increase in the price of petrol did not in itself exclude competition between polypropylene producers, which was, however, reduced by the agreements found by the Commission and the Court of First Instance. In any event, the suggestions made by the Italian administration and the difficulty, in practice, of achieving the price targets sought by the agreement cannot excuse the infringement of Article 85 of the Treaty.

119 It should first be borne in mind that, pursuant to Article 168A of the EC Treaty (now Article 225 EC) and the first paragraph of Article 51 of the EC Statute of the Court of Justice, an appeal may rely only on grounds relating to the infringement of rules of law, to the exclusion of any appraisal of the facts. The appraisal by the Court of First Instance of the evidence put before it does not constitute, save where the clear sense of that evidence has been distorted, a point of law which is subject, as such, to review by the Court of Justice (see, *inter alia*, *Hilti* v *Commission*, cited above, paragraphs 10 and 42).

120 It follows that, inasmuch as it relates to the appraisal by the Court of First Instance of the evidence adduced, this complaint cannot be examined in an appeal.

121 Secondly, in so far as Monte complains that the Court of First Instance did not take account of the economic context in assessing the effects of the infringement, it should be noted that, having considered that the Commission had proved to the requisite legal standard that the agreements and concerted practices held to have existed had an anti-competitive object, the Court of First Instance was properly entitled to decide that it was not necessary to examine whether those agreements and practices had had an effect on the conditions of competition.

122 It is settled case-law that, for the purposes of applying Article 85(1) of the Treaty, there is no need to take account of the concrete effects of an agreement once it appears that it has as its object the prevention, restriction or distortion of competition (Joined Cases 56/64 and 58/64 *Consten and Grundig* v *Commission* [1966] ECR 299, at p. 342; see also, to the same effect, Case C-277/87 *Sandoz Prodotti Farmaceutici* v *Commission* [1990] ECR I-45; Case C-219/95 P *Ferriere Nord* v *Commission* [1997] ECR I-4411, paragraphs 14 and 15).

123 Similarly, a concerted practice falls under Article 85(1) of the Treaty, even in the absence of anti-competitive effects on the market.

124 First, it follows from the actual text of that provision that, as in the case of agreements between undertakings and decisions by associations of undertakings, concerted practices are prohibited, regardless of their effect, when they have an anti-competitive object.

125 Next, although the very concept of a concerted practice presupposes conduct by the participating undertakings on the market, it does not necessarily mean that that conduct should produce the specific effect of restricting, preventing or distorting competition.

126 Lastly, that interpretation is not incompatible with the restrictive nature of the prohibition laid down in Article 85(1) of the Treaty (see Case 24/67 *Parke Davis v Centrafarm* [1968] ECR 55, p. 71) since, far from extending its scope, it corresponds to the literal meaning of the terms used in that provision.

127 Thirdly, inasmuch as Montc's criticism is intended to show that, as a result of circumstances beyond the control of the undertakings involved, the agreements and concerted practices which were the subject of the Polypropylene Decision could not have had an anti-competitive object, it must be pointed out that, even if well founded, Montc's claims are not such as to prove that the economic context excluded any possibility of effective competition (see, to that effect, the judgments cited above, *Van Landewyck and Others v Commission*, paragraph 153, and *Stichting Sigarettenindustrie and Others v Commission*, paragraphs 24 to 29).

128 Fourthly, in so far as Monte complains that the Court of First Instance overlooked the suggestions made to Monte by the Italian Government, it is sufficient to point out, without ascertaining whether irresistible pressure exerted by the authorities of a Member State can exclude an undertaking's liability for infringement of Community competition law, that Monte has not even claimed that it suffered such pressure and was therefore constrained to take part in a restrictive arrangement with the other polypropylene producers. That argument is

accordingly not such as to exclude Monte's responsibility for the infringements of Article 85(1) of the Treaty found to have existed.

129 It follows that the first limb of this plea in law must be dismissed.

The rule of reason

130 By the second limb of this plea, Monte claims that, at paragraph 265 of the contested judgment, the Court of First Instance wrongly disregarded the application of the principle of the rule of reason, on the sole ground that the infringement was manifest. Academic writers and the European Parliament have criticised the Commission's attitude, which consists in considering protection of competition in purely formal terms, without looking at the spirit underlying the Community provisions. In that connection the Court of Justice has always maintained that competition cannot be enforced without account being taken of the economic and legislative context and the effects of the alleged infringements.

131 According to Monte, the Commission maintains that the principle of the rule of reason is particular to the legal order of the United States of America and that this principle is confined to a court's obligation to carry out an analysis in order to assess whether the possible advantages accruing for competition are not greater than the possible harm caused to it. In Monte's view, first, it is hard to understand why, in order to apply the law in a rational rather than unreasonable way, recourse must be had to a principle of North American law. Secondly, the *ratio legis* of the rule to be applied must first be sought and then it must be ascertained whether or not the conduct is contrary to that rule. For that purpose it is essential to assess the context in which the conduct was adopted. In this case, to assume that the meetings had anti-competitive aims, far from constituting a finding of fact, would be lacking in all common sense and credibility. It is not even possible to weigh up the harm caused to and advantages accruing for competition, because

a price proposal closer to the cost of production could not be regarded as an act adversely affecting competition where the buyer was able to reject the proposal and threaten to choose another supplier.

138 The Commission points out that, in response to Monte's argument that, in interpreting Article 85 of the Treaty, the rule of reason should be applied, the Court of First Instance held that the Commission had proved to the requisite legal standard that the agreement had an anti-competitive object for the purposes of that provision. The Court of First Instance rightly added that, assuming the principle to be applicable in Community competition law, the Commission did not have to analyse the effect on competition because there was no doubt that an agreement to fix prices, to limit production and to share out markets constitutes an infringement *per se*. In other words, by reason of the highly damaging nature of such an infringement as regards competition, there is no need to inquire whether there are positive circumstances counterbalancing the negative effects. In any event, the Commission states that in Europe, as in the United States of America, horizontal agreements on prices are prohibited, even when undertakings are operating at a loss. In such a situation restrictive agreements slow down the necessary restructuring of supply which would otherwise be achieved by eliminating marginal undertakings and consolidating the most viable undertakings.

139 On this point, it need merely be stated that, even if the rule of reason did have a place in the context of Article 85(1) of the Treaty, in no event may it exclude application of that provision in the case of a restrictive arrangement involving producers accounting for almost all the Community market and concerning price targets, production limits and sharing out of the market. The Court of First Instance did not therefore commit an error of law when it considered that the clear nature of the infringement in any event precluded the application of the rule of reason.

140 The second limb of this plea must therefore also be dismissed.

The presumption that the meetings between producers were unlawful

151 By the third limb of this plea, Monte claims that the Court of First Instance wrongly considered, at paragraphs 82 and 91 of the contested judgment, that it is *per se* unlawful for an undertaking to take part in meetings with members of the same secret in disregard of the right of assembly, freedom to hold opinions, freedom of discussion and of association, it thus created an arbitrary presumption that the meetings between producers, which had, however, never been kept secret, were unlawful.

152 According to the Commission, this complaint results from a misreading by Monte of the contested judgment at odds with what the judgment actually said. The complaint is therefore inadmissible, or at least manifestly unfounded. It is clear that the Court of First Instance relates the infringement of the competition rules not to mere participation in meetings but also to their purpose, which was to fix price and sales volume targets.

153 On that point, it should be borne in mind that freedom of expression, of peaceful assembly and of association, enshrined *inter alia* in Articles 10 and 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 ('the ECHR'), constitute fundamental rights which, as the Court of Justice has consistently held and as is reaffirmed in the preamble to the Single European Act and in Article F(2) of the Treaty on European Union (now, after amendment, Article 6(2) EU), are protected in the Community legal order (see, to that effect, *Bosman*, cited above, paragraph 79).

154 However, it follows expressly from paragraph 91 of the contested judgment, to which Monte refers, that the regular meetings of polypropylene producers were not held to be contrary to Article 85(1) of the Treaty *per se*, but only inasmuch as their purpose was anti-competitive. Moreover, that purpose had been established by the Court of First Instance on the basis of the evidence referred to in paragraphs 83 to 90 of the contested judgment, not on the basis of a presumption.

139 It follows that the third limb of this plea can not be upheld either.

The arbitrary presumption of a causal link

140 By the fourth limb of this plea Montedison claims that, in paragraphs 132 to 134 of the contested judgment, the Court of First Instance arbitrarily presumed that there was a causal link between two successive events. For the Commission's line of argument to make sense, the meetings would have had to have led to conduct on the part of the undertakings different from what their conduct would probably have been in the absence of the meetings. In this case, there was no alternative to the undertakings' conduct, since all the producers had suffered heavy and substantial financial losses which they necessarily had to reduce. The conduct complained of thus corresponded to a compelling economic, legal and ethical requirement on the part of the undertakings. If shipwrecked mariners all swim towards the nearest land in sight that is not the result of an agreement but the expression of a natural survival instinct. The competition rules are aimed at preserving the freedom of undertakings to make choices with regard to external constraints, not in relation to necessities which derive from the very raison d'être of the undertaking, including that of making a profit.

141 The Commission states that Montedison's view is that the meetings had a purpose other than that of creating reciprocal commitments. That plea is inadmissible, since it seeks to cast doubt on the findings of fact. In any event it is unfounded, because the Court of First Instance held, like the Commission, that the aim of the meetings was to fix prices and market shares, founding its conclusion on documentary evidence.

142 The Court would observe that, inasmuch as this complaint seeks to cast doubt on the assessment of the Court of First Instance, in paragraph 133 of the contested judgment, according to which the economic context could not explain the manner in which the price instructions issued by the different producers corresponded to each other and to the price targets set at the producers'

meetings, it relates to the assessment of the evidence adduced before the Court of First Instance and cannot be examined by the Court in an appeal.

149 In so far as Monte is criticising the contested judgment on the ground that it did not take into account a situation of necessity which compelled the undertakings who were the addressees of the Polypropylene Decision to adopt the conduct complained of, it must be stated that, although a situation of necessity might allow conduct which would otherwise infringe Article 85(1) of the Treaty to be considered justified, such a situation can never result from the mere requirement to avoid financial loss.

150 Therefore the fourth limb of this plea cannot be upheld either.

Motives capable of justifying the conduct

151 By the fifth limb of this plea Monte states, with regard to paragraphs 232 and 233 of the contested judgment, that the Court of First Instance infringed the principle according to which, in case of doubt between two possible motives underlying certain conduct, the one capable of justifying the conduct should be adopted. If simultaneous conduct may be justified by something other than concerted action, the court can no longer presume that it is caused by an anti-competitive agreement rather than having another cause. Monte refers here to Case 395/87 *Tournier* [1989] ECR 2521. In the present case, it was normal for initiatives by the undertakings to take place with some degree of simultaneity, since that is the practice on the market for the semi-finished product in question, intended for industrial users. The customers involved had to schedule the deliveries required and make their purchasing choices well in advance. In markets of that type it serves a practical purpose for prices to be announced by the undertakings at preestablished intervals for a preestablished length of time. Monte observes that the fact that, after a price alteration was announced, all the other producers indicated their own prices in the days that followed reflects the demands of the

users and is the practice in the sector. Moreover, it is current practice for one or several large undertakings to act as 'price-leaders' and precede the others in fixing prices. That eliminates all suspicion of concerted action. As regards the size of the attempted increases, the latter were made more or less homogenous by the need to abide by market realities.

148 According to the Commission, despite the reference to paragraphs 232 and 233, the alleged infringement cannot relate to any part of the judgment, since neither the Commission nor the Court of First Instance ever had doubts as to how to interpret Montes's conduct. This plea in law is therefore inadmissible, since it is completely unrelated to the contested judgment. The Commission refers here to the judgment of the Court of Justice in Case C-354/92 P *Eppe* v *Commission* [1993] ECR I-7027, and to the orders of the Court of Justice in Case C-244/92 P *Kupka-Floridi* v *Economic and Social Committee* [1993] ECR I-2041 and Case C 338/93 P *De Hoe* v *Commission* [1994] ECR I-819, from which it follows that, in accordance with Article 51 of the EC Statute of the Court of Justice and Article 112(1)(c) of the Rules of Procedure of the Court of Justice, an appeal must present legal arguments specifically challenging a particular aspect of the contested judgment. An appeal which simply repeats the arguments already submitted to the Court of First Instance and contains no legal argument in support of the forms of order sought in the appeal does not satisfy that requirement. It amounts to asking simply that the application be reconsidered, which falls outside the jurisdiction of the Court of Justice, and should be dismissed as inadmissible within the meaning of Article 119 of the Rules of Procedure of the Court of Justice. A mere reference to the pleas in law and arguments already submitted to the Court of First Instance, or the mere assertion that the latter could have reached a different decision fall into the same category.

149 In that regard, it must be pointed out, first, that the case-law relied on by Montes concerns a situation in which, given parallel conduct by several undertakings on the market, it must be ascertained whether that phenomenon is the effect of those undertakings concerting together or whether there can be another explanation. It is not therefore relevant in this case, since the Commission proved to the requisite legal standard, according to the findings of the Court of First Instance, that there was concerted action with an anti-competitive purpose.

150 Secondly, the Court of First Instance rightly considered, at paragraph 135 of the contested judgment, that there can be no question of any form of 'price

leadership' on the part of a producer where that producer has participated with others in consultation on prices.

165 It follows from the foregoing that the fifth limb of this plea must also be dismissed.

The assertion that undertakings forced to operate at a loss must act fairly towards one another

166 By the sixth limb of this plea, Monte criticises the dismissal by the Court of First Instance of the argument that the undertakings were bound to act fairly in attempting to reduce their losses and had to avoid predatory pricing. The argument in paragraph 295 of the contested judgment to the effect that the sale of goods below cost price may constitute a form of unfair competition where it is intended to reinforce the competitive position of an undertaking to the detriment of its competitors and not when it results from the operation of supply and demand, does not apply to the case in point. What the undertakings accused each other of doing was selling more than necessary below cost price in order to win customers and force competitors to leave the market. The attempts to increase prices was aimed at reducing losses and avoiding the highly unlawful solution of predatory pricing. Monte never asserted that there was an agreement, not even an agreement no longer to compete unfairly with each other. On the contrary, it has always maintained that conduct determined by the economic context was not and could not be the result of concerted action, since it was the only conduct that was legally and economically imperative.

167 According to the Commission, Monte maintained before the Court of First Instance that an agreement between undertakings no longer to charge prices lower than cost price is not contrary to Article 85 of the Treaty, since it is aimed at excluding a form of unfair competition. That argument was, it is true, formulated in an ambiguous way, but it cannot be disputed that it was put forward and that the Court of First Instance addressed it in paragraph 295 of its judgment. In its appeal, Monte confines itself to complaining that the Court of

First Instance focused on some aspects of the agreement rather than others, and states that the undertakings were selling below cost price at a level that was lower than necessary, so that they agreed amongst each other to sell at a level that was not so low, but nevertheless still below cost price. That argument is inadmissible, because it seeks, first, to have the facts reexamined and, secondly, to change the subject-matter of the proceedings before the Court of First Instance, in breach of Article 113(2) of the Rules of Procedure of the Court of Justice. Before the Court of First Instance Monte did not speak of sales at a level even lower than was necessary. That plea is in any case unfounded, because the Court of First Instance rightly held that the only sales at a price level lower than cost price that can be described as unfair competition are those made by an undertaking occupying a dominant position in order to eliminate any remaining competition on the market.

152 The Court need merely observe here that this complaint, inasmuch as it concerns the fact that the undertakings concerned were selling at a level that was even lower than that resulting from the operation of supply and demand, must be dismissed as inadmissible on the grounds that it is seeking to challenge the assessments of the facts by the Court of First Instance and that it constitutes a new plea in law which changes the subject-matter of the proceedings before the Court of First Instance, in breach of Article 113(2) of the Rules of Procedure of the Court of Justice.

Discriminatory application of Article 85 of the Treaty to the exclusive benefit of users

153 By the seventh limb of this plea, Monte, referring to paragraphs 132 and 237 of the contested judgment, argues that the Court of First Instance applied Article 85 of the Treaty in a discriminatory manner, exclusively for the benefit of users, whilst the freedom of producers was limited by the fact that they were caught between oil suppliers, who were abusing their dominant position, and customers who had superior contractual power. On that point, it denies that the fact of announcing a slight increase in prices to someone who, having the feel of the market, already knows that he can refuse to accept that increase constitutes a serious distortion of competition. That amounts to a protection of competition

intended solely to safeguard the interests of the user industries to the detriment of others. Such a reading of Article 85 of the Treaty is incompatible with Article 2 of the EC Treaty (now, after amendment, Article 2 EC), which states that the Community is to have as its task to promote a harmonious and balanced development of economic activities, continuous and balanced expansion and increased stability. It is in fact contrary to any *ratio legis* to consider the situation that existed after the increases in the price of oil as the normal balance of supply and demand, when the repercussions of the increases affected only the suppliers of polypropylene. It is, furthermore, contrary to Article 2 of the Treaty to prevent one economic sector from reacting against the predominant power of another sector.

154 The Commission observes, on the substance, that, whilst the generic formulation of this complaint is not sufficient to render it inadmissible, Article 85 of the Treaty applies to undertakings which conclude agreements which restrict competition and that this application in such cases, where those agreements relate to sales, will benefit buyers. The Commission therefore fails to see wherein any discrimination might reside. In any event, the Court of First Instance rightly held that the existence of 'a buyer's market' provided no exemption from the obligation to comply with Article 85 of the Treaty.

155 On that point, it need merely be noted, first, as the Commission rightly pointed out, that a Commission decision relating to anti-competitive arrangements between sellers may be of benefit to buyers without the decision producing any form of discrimination. Secondly, application of Article 85(1) of the Treaty to such arrangements is not precluded solely because buyers are in a favourable situation on the market.

156 Accordingly, the seventh limb of this plea cannot be upheld.

Failure to take the economic reality into consideration

157 By the eighth limb of this plea, Monte maintains, by reference to paragraphs 143, 199 and 200 of the contested judgment, that the Court of First Instance did not take the economic reality into consideration when it upheld the charge of 'artificial reduction of supply and the introduction of a quota system'. It states that the undertakings were operating at a loss, with only 60% of their capacity utilised, and could sell more only by increasing their losses. Producers had to accept the conditions imposed by buyers. The existence of a quota system, in the present case, is not only an unproved infringement but also an infringement that was incapable of being achieved, because limiting its sales quota was only open to an undertaking free to choose its production level. That situation cannot occur when an increase in quota would mean increasing losses by subsequently reducing the price, whilst a reduction in quota would not mean increasing the price but only increasing the losses deriving from low utilisation of plant.

158 The Commission indicates that Monte is essentially maintaining the same objections as those it set out in the fourth limb of this plea. First, those allegations are inadmissible because they seek to cast doubt on the findings of fact. Secondly, they are unfounded, since Monte's participation in the agreement is based on documentary evidence.

159 The Court finds that this limb of the second plea essentially covers the same complaints as those examined under the first and fourth limbs. It must therefore be dismissed because the grounds are the same.

New infringement elements: common intentions and anti-competitive purpose

160 By the ninth limb of this plea, Monte refers to paragraphs 150, 201, 230 and 264 of the contested judgment and maintains that, in upholding the Commission's argument, the Court of First Instance introduced new elements into the infringement, in particular 'common intentions' and 'scopo anticoncorrenziale' (anti-competitive purpose). The former element is irrelevant when not arising from an agreement or undertakings concerting together. With regard to 'anti-competitive purpose', Monte considers that such a possibility leads to penalising conduct which is *per se* lawful and which had no prohibited effect but which might perhaps have had 'anti-competitive' objectives. That is equivalent to penalising mere intentions. Having not found any anti-competitive object or effect, the Court of First Instance introduced a third condition enabling Article 85 of the Treaty to be applied, namely anti-competitive purpose.

161 According to the Commission, by 'common intentions', the Court of First Instance intended to refer to the fundamental element enabling the existence of an agreement within the meaning of Article 85 of the Treaty to be established. As regards 'anti-competitive purpose', the Italian text of the contested judgment uses an alternative term ('scopo') to designate the object of preventing, restricting or distorting competition. 'Scopo' is thus the equivalent of 'object'. That plea is consequently unfounded.

162 With regard, first to 'common intentions', the Court observes that it is clear from the contested judgment that this expression was used to describe conduct which may be characterised in law as an agreement for the purposes of Article 85(1) of the Treaty. According to the settled case-law of the Court of Justice, cited in paragraph 230 of the contested judgment, such an agreement results from the intention of the undertakings concerned to conduct themselves on the market in a specific way (see, in particular, the judgments cited above, *ACF Chemiefarma v Commission*, paragraph 112, and *Van Landewyck and Others v Commission*, paragraph 86). Accordingly, far from creating new forms of infringement, the Court of First Instance properly used the term 'common intentions' to designate conduct that may be characterised as an agreement.

163 Secondly, as regards the term 'scopo anticoncorrenziale', this was used, at paragraph 264 of the contested judgment, as a synonym for 'anti-competitive object', which appears to correspond to the concept of object in Article 85(1) of the Treaty, according to a comparison of the various language versions of that provision, in particular the Danish version ('formål'), German ('bezwecken'), Finnish ('tarkoituksena'), Irish ('gcuspóir'), Dutch ('strekken'), Portuguese ('objectivo') and Swedish ('syfte').

164 That plea in law must therefore be dismissed.

The fact that data divulged by the trade press were wrongly regarded as being secret

165 By the 10th limb of this plea, Monte complains that the Court of First Instance, in paragraphs 175 to 177 of the contested judgment, wrongly regarded data such as production figures, which are commonly divulged by the trade press, as being secret. Access to those 'secrets' was open to anyone. The Commission ought to have proved that the data were collected in an informal way well before they were divulged by the press and to have explained that knowledge of the data had the effect of causing distortions of competition, which it failed to do.

166 The Commission contends that this plea is inadmissible on several grounds. Neither the data to which Monte alludes nor the part of the contested judgment which it criticises can be ascertained, since the reference to paragraphs 175 to 177 is not sufficient for that purpose. Moreover, this plea seeks to raise questions of fact which would not seem to have been raised before the Court of First Instance. Monte is therefore seeking to change the subject-matter of the proceedings, in breach of Article 113(2) of the Rules of Procedure of the Court of Justice.

167 Since this complaint concerns the assessment of the facts by the Court of First Instance, it must be dismissed as inadmissible

Effect on trade

168 Under the 11th limb of this plea, Monte observes, by reference to paragraphs 253 and 254 of the contested judgment, that trade was not affected at all, since an undertaking could do nothing other than continue to sell at a loss for six years if it wished to remain on the market. If Monte had ceased its activities, patterns of trade would have been altered, but to no purpose.

169 According to the Commission, this limb of the plea does not comprise any argument which can be regarded as finding fault with the reasoning of the Court of First Instance. It amounts to asserting that the Court of First Instance should have reached a different decision. The plea is therefore inadmissible, in accordance with *Eppe* v *Commission*, *Krupka-Floridi* v *Economic and Social Committee* and *De Hoe* v *Commission*, cited above.

170 The Court finds that this complaint is based on a misunderstanding of the concept of effect on trade between Member States. According to settled case-law, that condition is satisfied where it is possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or of fact that the agreement in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States (see to this effect *inter alia* Case 99/79 *Lancôme* v *Etos* [1980] ECR 2511, paragraph 23.

171 It follows that the Court of First Instance did not commit any error of law, so that this last complaint must also be rejected. The second plea in law must therefore be dismissed in its entirety.

Infringements of Community law in the finding of facts

177 By its third plea in law, referring to paragraphs 82, 86, 89, 129, 144, 146 and 149 of the contested judgment, Monte claims that, in finding the facts, the Court of First Instance reversed the burden of proof, infringed the principles of the presumption of innocence and the personal nature of fault, attributed to Monte non-existent confessions and admissions, asserted without proof that the producers had subscribed to a common plan, and erroneously rejected Monte's argument that 'Red Brigade' terrorism was one of the factors that gave rise to Monte's conduct.

178 The Court of First Instance wrongly held that Monte had not denied taking part in the regular producers' meetings and that it had therefore to be considered to have participated in all the meetings. The Court of First Instance was also wrong in going on to hold that it was for Monte to produce another explanation of what was discussed at the meetings in which it had taken part. It thus reversed the burden of proof and introduced a presumption of guilt, since participation in a meeting meant, as far as the Court of First Instance was concerned, adherence to all the initiatives which were supposed to have been adopted at the meetings. It was therefore for the party charged with the infringement to produce proof of its innocence. On this point Monte also observes that, in accordance with a principle common to all civilised legal orders, a court may not use a purported admission by taking from it only aspects that are favourable to the charge. It was unlawful for the Court of First Instance to seize on the acknowledgment of the existence of those meetings, lending them a tenor that Monte has always denied. Monte has, on the other hand, shown that the alleged 'account leadership' system did not operate, as far as it was concerned, for a large number of its supposedly preferential customers, and the Commission was not able to show that it had been applied to other customers. Monte points out that it also adduced evidence that the movement in its prices was independent in relation both to its list prices and to the alleged target prices or the prices indicated in the trade press. It adds that the Court of First Instance criticised it for not producing notes of the meetings taken by its employees, without having any evidence that such notes existed.

179 According to the Commission, once Monte's participation in the meetings was proved and there were notes of the meetings found on ICI's premises, it was for

Montedison to produce another explanation of the tenor of those meetings. That is an application of elementary rules governing the burden of proof. As for notes taken by Montedison's employees, the Commission states that the Court of First Instance did not assert that they existed, but made reference to them as an example of material on which Montedison could have relied in order to justify its participation in the meetings. The Commission also states that Montedison seems to wish to assert that it did not participate in any restrictive arrangements, even lawful arrangements, but such participation is clear from the documentary evidence. With regard to the system of 'account leadership', the Court of First Instance correctly held, on the basis of the documentary evidence available, that Montedison had taken part in the system. According to the Commission, Montedison is overlooking the fact that the conclusion of the Court of First Instance relates to the existence of an agreement, not to its implementation, and that that finding was founded on a certain amount of evidence. Even if the agreement may have failed in practice, this did not in any event disprove its existence. This plea is therefore unfounded.

115 The Court observes first of all that the presumption of innocence resulting in particular from Article 6(2) of the ECHR is one of the fundamental rights which, according to the Court's settled case-law, cited above in paragraph 157, reaffirmed in the preamble to the Single European Act and in Article F(2) of the Treaty on European Union, are protected in the Community legal order.

116 It must also be accepted that, given the nature of the infringements in question and the nature and degree of severity of the ensuing penalties, the principle of the presumption of innocence applies to the procedures relating to infringements of the competition rules applicable to undertakings that may result in the imposition of fines or periodic penalty payments (see, to that effect, in particular the judgments of the European Court of Human Rights of 21 February 1984, *Öztürk*, Series A No 73, and of 25 August 1987 *Lutz*, Series A No 123-A).

117 On the question whether Montedison's complaints are well founded, it must be pointed out, first, that Montedison did not deny, before the Court of First Instance, having taken part in the meetings referred to in the Polypropylene Decision, but maintained that those meetings were not of the kind and scope described in that decision.

178 In those circumstances, the Court of First Instance was entitled to consider that Monte did not dispute the fact that it had taken part in the meetings in question, without thereby distorting Monte's statements.

179 Secondly, it must be borne in mind that, where there is a dispute as to the existence of an infringement of the competition rules, it is incumbent on the Commission to prove the infringements found by it and to adduce evidence capable of demonstrating to the requisite legal standard the existence of the circumstances constituting an infringement (*Baustahlgewebe* v *Commission*, cited above, paragraph 58).

180 Contrary to Monte's allegations, the Court of First Instance did not rely on presumptions for the purpose of establishing the anti-competitive character of the meetings in question, but on the evidence mentioned in paragraphs 83 to 85 of the contested judgment. Its assessment of that evidence cannot be questioned in an appeal.

181 Since, according to the findings of the Court of First Instance, the Commission had been able to establish that Monte had taken part in meetings between undertakings of a manifestly anti-competitive nature, the Court of First Instance was entitled to consider that it was for Monte to provide another explanation of the tenor of those meetings. It follows that the Court of First Instance did not unduly reverse the burden of proof and did not set aside the presumption of innocence.

182 In that connection, as the Commission rightly pointed out, the reference to notes taken by Monte's employees at meetings, in paragraph 86 of the contested judgment, must be understood as simply an example of the evidence that Monte could have adduced to support its arguments as to the nature and tenor of the meetings, so that the Court of First Instance did not apply any presumption as to the existence of such notes.

185 Thirdly, inasmuch as Monte seeks to challenge the findings in paragraphs 145 to 148 of the contested judgment concerning its participation in the 'account leadership' system and the implementation, at least in part of that system, its complaint relates to the assessment by the Court of First Instance of evidence adduced before it and cannot therefore be examined in an appeal.

186 Fourthly, the Court of First Instance rightly considered that the argument that the 'Red Brigades' were allegedly blackmailing Monte had to be held inadmissible, pursuant to Article 42(2) of the Rules of Procedure of the Court of Justice, as a new plea put forward for the first time in the reply. The Court of First Instance found that the plea was based on a fact which had not come to light in the course of the procedure, but in 1981, well before the proceedings had begun.

The limitation period

187 According to Monte, which refers to paragraphs 236, 237 and 336 of the contested judgment, the Court of First Instance infringed Article 1(1) of Regulation No 2988/74 on limitation periods and misapplied the rules on the burden of proof as regards the question whether the conduct in question was continuous for the purposes of limitation. As Judge Vesterdorf, who was designated Advocate General before the Court of First Instance, acknowledged, there was no proof of the continuous nature of the conduct between 1977 and 1983. That meant, therefore, that prosecution of any infringement was time-barred for a period of five years preceding the letter of formal notice. That limitation period cannot be interrupted by decisions addressed to other undertakings, since Monte's complicity in any of their infringements has not been proved. Such complicity cannot consist in merely participating in meetings.

188 In its reply, Monte added that, pursuant to that regulation, the Court of First Instance, in dismissing the objection of limitation, should have based its reasoning on the continuous nature of the infringement and on Monte's continuous participation. From the contested judgment it would appear, however,

that the only factor common to all the allegedly unlawful conduct found by the Court of First Instance was pursuit of a single economic purpose, that of distorting the normal movement of prices on the market in polypropylene, which in turn constitutes continuous conduct. Consequently, the only unifying factor in the conduct was, for the Court of First Instance, the aim to 'distort the normal movement of prices'. Monte observes that a market with the characteristics already described cannot be described as 'normal', so that the efforts to reduce losses could not constitute the only unifying intention underlying the conduct of the undertakings. Furthermore, the Court of First Instance did not point to any fact that would enable Monte's conduct to be considered continuous or repeated. Lastly, the Court of First Instance ought to have specified the number of meetings in which Monte had participated. In the absence of such details, the application of the limitation rules in respect of multiple, continuous or repeated infringements has not been properly explained.

11 The Commission considers this plea to be inadmissible on several counts. First, it is impossible to understand Monte's reasoning and its criticism of the contested judgment. While the Court of First Instance described the facts as a single infringement and emphasised the link between the conduct of the various undertakings, the plea put forward appears to allege reversal of the burden of proof on the question whether the conduct was continuous, reference is then made to the Opinion of the Advocate General, and lastly to the fact that decisions addressed to other undertakings may not interrupt a limitation period. The Commission points out, in this connection, that argument by way of reference is not admissible. Secondly, in so far as the plea relates to the characterisation of the facts as a single infringement, this is a question of fact which the Court of Justice may not review in an appeal.

12 According to the Commission, Monte argued for the first time in its reply that, in dismissing the objection as to limitation, the Court of First Instance accepted the concept of 'continuous conduct'. The Commission leaves it to the Court to decide on the admissibility of those arguments.

13 The Court observes, first, that, contrary to Monte's assertions, the Court of First Instance considered, in paragraph 202 of the contested judgment, that the Commission had proved to the requisite legal standard that all the findings of fact

which it made in the contested decision against Monte were correct. Nothing in the contested judgment indicates that the various aspects of conduct ascribed to Monte were interrupted at any time.

190 It is not for the Court of Justice, when hearing an appeal, to review whether that factual assessment was correct.

191 The Court of First Instance then found, at paragraphs 230, 231 and 235 of the contested judgment, that Monte had taken part in activities characterised as agreements and concerted practices covering the period between 1977 and September 1983 the effects of which continued to last, in the case of the agreements, until November 1983. At paragraphs 236 and 237, it considered that those agreements and concerted practices, in view of their identical purpose, formed part of schemes involving regular meetings, target-price fixing and quota fixing which, in turn, were part of a series of efforts made by the undertakings in question in pursuit of a single economic aim, namely to distort the normal movement of prices. It considered that it would be artificial to split up such continuous conduct, characterised by a single purpose, by treating it as consisting of a number of separate infringements, when it was in fact a single infringement, which progressively manifested itself in both agreements and concerted practices.

192 Monte's only criticism in this regard is to the effect that the economic purpose common to all the efforts of the undertakings involved, which the Court of First Instance described as 'distorting the normal movement of prices', was irrelevant in the case of the polypropylene market, which could not be considered normal.

193 That point cannot be accepted, since the term 'normal movement of prices' must be understood as meaning the movement of prices in the absence of the anti-competitive conduct ascribed to the undertakings. The fact that the polypropylene market was at the time in a situation of imbalance which could not be described as normal is therefore irrelevant.

134 Lastly, at paragraph 331, the Court of First Instance considered that Monte had taken part in a single and continuous infringement (in Italian, which was the language of the case, 'un'infrazione unica e continuata') from the conclusion of the floor-price agreement in mid-1977 until November 1983.

135 In that connection, it need merely be held that, although the concept of a continuous infringement has different meanings in the legal orders of the Member States, in any event it comprises a pattern of unlawful conduct implementing a single infringement, united by a common subjective element.

136 The Court of First Instance was therefore right in holding that the activities which formed part of schemes and pursued a single purpose constituted a continuous infringement of the provisions of Article 85(1) of the Treaty, so that the five-year limitation period provided for in Article 1 of Regulation No 2988/74 could not begin to run until the day on which the infringement ceased, which, according to the findings of the Court of First Instance, was in November 1983.

137 In those circumstances, it is not necessary to examine the objections relating to interruption of the limitation period since it must be concluded that the Court of First Instance did not commit any error of law in holding that Monte could not argue that penalisation of its infringement was time-barred.

138 The fourth plea in law must therefore also be dismissed.

Determination of the amount of the fine

199 By its fifth plea in law, put forward in the alternative, Monte claims, having regard to paragraphs 70, 374, 379 and 385 of the contested judgment, that the Court of First Instance did not give reasons for holding that in calculating the amount of the fine the Commission had taken into account the facts put forward as justification, that it unfairly treated an unnotified agreement or practice as highly unlawful conduct, and that it did not give reasons for refusing substantially to reduce the fine. An infringement which has had no effect on the market is certainly less serious than an infringement which has had such an effect. Besides its deterrent effect, a fine also serves the purpose of restoring a situation of balanced competition, by imposing on the undertaking responsible for the infringement a financial sacrifice which stands in proportion to the gain from its unlawful conduct. According to Monte, it follows that, where the finding of an infringement is not corroborated by proof that the alleged agreements were actually implemented nor by information showing what the undertakings responsible gained from them, the fine must be calculated with particular care, since, in such a case, its function is purely deterrent. The Court of First Instance wrongly omitted to take this into consideration in its assessment as to whether the fine was proportionate.

200 Monte further observes that it is difficult to understand how the Court of First Instance could have assessed whether the fine was appropriate without resolving the question, which logically should be examined first, as to how serious the infringement of Article 81 EC was. As for the assessment of the restrictive effects of any agreement, the Commission should have taken into account the particular situation of the market, which was a buyers' market. It was also bound to assess the specific part played by each undertaking in those effects when it examined the possibility of imposing a fine and calculating its amount. Since Article 15(2) of Regulation No 17 is a penal provision, it cannot be applied without a strict assessment of the individual responsibility of the person charged.

201 In accepting the Commission's argument that it was not necessary to examine whether or not the presumed agreements were eligible for exemption under Article 81(3) EC, the Court of First Instance neglected to consider that that examination was in any event necessary, at least in order to establish the level of

the fine. An agreement that is, in substance, eligible for exemption cannot be penalised in the same way as another that is not. The Court of First Instance should have addressed that defect in the reasoning of the Polypropylene Decision.

302 Nor does the Court of First Instance appear to have considered in its entirety the plea in law concerning the intentional nature of the infringement. In that connection, Monte states that the subjective element of the infringement is an indispensable condition for imposing a fine, not merely an aggravating circumstance as the Commission considers it to be. The Court of First Instance did not examine that aspect of the plea concerning the intentional nature of the infringement. Having concluded that Monte had acted intentionally, the Court of First Instance should also have examined whether that circumstance constituted an aggravating factor such as to entail an increased penalty. According to Monte, a finding as to the intentional nature of the infringement is an important element in the evaluation of the degree of gravity of the infringement and thus in the determination of the amount of fine to be imposed. Consequently, the failure by the Court of First Instance to take this element into consideration constitutes a defect in the reasoning of the judgment.

303 The Commission points out first of all that the paragraphs to which Monte refers are not quite relevant, since none of its arguments concerns paragraphs 365 to 374, in which the Court of First Instance addresses very carefully the question of effects. Paragraph 386 is also very important, since that paragraph, as well as paragraph 385 (the only paragraph cited by Monte), shows that the Court of First Instance accepted the list of circumstances taken into consideration by the Commission, including the mitigating factor that the price initiatives did not generally achieve their objective in full, as well as the level of the fine imposed in view of those circumstances.

304 Next, at paragraph 254, the Court of First Instance considered that, in assessing evidence of damage to trade between Member States, it was necessary to take into consideration the effects of the agreement, not the effects of each individual undertaking's participation in the agreement. In that connection, the Commission observes that this is a matter of determining whether one of the conditions for the existence of an infringement exists. That reasoning by the Court of First Instance does not, however, show in any way that the individual responsibility of the

undertaking was not correctly taken into consideration in the determination of the amount of the fine.

205 Lastly, with regard to the arguments that no account was taken of the possibility of obtaining an exemption decision for the agreement under Article 81(3) EC, and the failure to assess whether the intentional nature of the infringement could constitute an aggravating circumstance, the Commission submits that these were not raised before the Court of First Instance and are accordingly inadmissible pursuant to Article 113(2) of the Rules of Procedure of the Court of Justice. In any case, the Court of First Instance underscored several times the particular seriousness of the infringement, so that the question of any possible exemption was never in point.

206 The Court would point out first of all that, as is made expressly clear in paragraphs 369, 371 and 372 of the contested judgment, the Court of First Instance held that the Commission had rightly taken account of the limited nature of the effects produced by the infringement on the movement in the prices charged to various customers. Monte's complaint in this connection is therefore unfounded.

207 Second, it is true that, where an infringement has been committed by several undertakings, the relative gravity of the participation of each of them must be examined (see, to that effect, *Stahlwerke Ruhrort and Others* v *Commission*, cited above, paragraph 622). However, the Court of First Instance found, at paragraph 361 of the contested judgment, that the Commission had correctly established the role played by Monte in the infringement and that it was entitled to take account of that role in determining the amount of the fine to be imposed on it. The Court of First Instance cannot therefore be held to have committed an error of law in that respect.

208 Third, the objection that the Court of First Instance did not consider whether the agreement could be exempted under Article 81(3) EC is inadmissible because it is

a new plea which changes the subject-matter of the proceedings before the Court of First Instance, in breach of Article 113(2) of the Rules of Procedure of the Court of Justice.

209 Fourth and last, it is clear from paragraph 362 of the contested judgment that, according to the Court of First Instance, the facts established showed, by their intrinsic gravity, that Monte did not act rashly or even through lack of care but intentionally. It is therefore clear that, when addressing the fine imposed on Monte, the Court of First Instance took into account the intentional element of the infringement as an aggravating circumstance, so that Monte's criticism is unfounded.

210 It follows that the fifth plea in law must also be dismissed.

211 Since none of the pleas in law put forward by Monte has been upheld, the appeal must be dismissed in its entirety.

Costs

212 According to Article 69(2) of the Rules of Procedure, applicable to the appeal procedure by virtue of Article 118 thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for. Since Monte's pleas have failed, it must be ordered to pay the costs. DSM must bear its own costs.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. **Dismisses the appeal;**

2. **Orders Montecatini SpA to pay the costs;**

3. **Orders DSM NV to pay its own costs.**

Kapteyn Hirsch Mancini

Murray Ragnemalm

Delivered in open court in Luxembourg on 8 July 1999.

R. Grass

Registrar

P.J.G. Kapteyn

President of the Sixth Chamber

ARRÊT DU TRIBUNAL (quatrième chambre)
14 juillet 2000 *

«Fonctionnaires – Autorisation de publication – Article 17, second alinéa, du statut – Intérêts des Communautés – Erreur manifeste d'appréciation»

Dans l'affaire T-82/99,

Michael Cwik, fonctionnaire de la Commission des Communautés européennes, demeurant à Tervuren (Belgique), représenté par Me N. Lhoëst, avocat au barreau de Bruxelles, ayant élu domicile à Luxembourg auprès de la fiduciaire Becker et Cahen, 3, rue des Foyers,

partie requérante,

contre

Commission des Communautés européennes, représentée par M. J. Currall, conseiller juridique, en qualité d'agent, ayant élu domicile à Luxembourg auprès de M. C. Gómez de la Cruz, membre du service juridique, Centre Wagner, Kirchberg,

partie défenderesse,

ayant pour objet une demande d'annulation de la décision de la Commission du 10 juillet 1998 refusant au requérant l'autorisation de publier le texte de la conférence qu'il a donnée le 30 octobre 1997,

* Langue de procédure: le français.

LE TRIBUNAL DE PREMIÈRE INSTANCE
DES COMMUNAUTÉS EUROPÉENNES (quatrième chambre),

composé de Mme V. Tiili, président, MM. R. M. Moura Ramos et P. Mengozzi, juges,

greffier: M. G. Herzig, administrateur,

vu la procédure écrite et à la suite de la procédure orale du 8 mars 2000,

rend le présent

Arrêt

Cadre juridique

1 L'article 17, second alinéa, du statut des fonctionnaires des Communautés européennes (ci-après le «statut») prévoit:

«Le fonctionnaire ne doit ni publier ni faire publier, seul ou en collaboration, un texte quelconque dont l'objet se rattache à l'activité des Communautés sans l'autorisation de l'autorité investie du pouvoir de nomination. Cette autorisation ne peut être refusée que si la publication envisagée est de nature à mettre en jeu les intérêts des Communautés.»

2 En outre, l'article 25, deuxième alinéa, du statut dispose:

«Toute décision individuelle prise en application du présent statut doit être communiquée par écrit, sans délai, au fonctionnaire intéressé. Toute décision faisant grief doit être motivée.»

Faits à l'origine du litige

3 Le requérant, économiste de formation, est entré au service de la Commission en 1970. Lors de l'introduction du recours, il était affecté à l'unité 5 «Information, publications et documentation économique», directement rattachée au directeur général adjoint chargé des directions B, C et E. de la direction générale «Affaires économiques et financières» (DG II). Sa fonction consistait à accueillir des groupes de visiteurs et à donner des conférences sur l'euro, sur l'Union économique et monétaire et sur l'ensemble des activités et programmes relevant de cette direction générale.

4 Par lettre du 12 mars 1997, le requérant a été invité par le gouvernement de la province de Cordoue (Espagne) à donner une conférence dans le cadre du 5e Congrès international de culture économique.

5 Le 20 octobre 1997, le requérant a introduit une demande auprès de son supérieur hiérarchique, M. G. Ravasio, afin d'obtenir l'autorisation de donner cette conférence le 30 octobre suivant. La demande indiquait que ladite conférence aurait comme titre «The need for economic fine-tuning at the local and regional level in the Monetary Union of the European Union» («La nécessité d'une modulation des politiques économiques aux niveaux local et régional au sein de l'Union monétaire de l'Union européenne»). Il a joint à sa demande un résumé et un plan détaillé de son intervention avec une annexe.

6 Le 26 octobre 1997, M. Ravasio a donné son autorisation en précisant cependant:

«Ceci n'est pas très économique. Présentation plus classique SVP. Attention aux risques 'fine-tuning'.»

7 Le 27 octobre 1997, le requérant a obtenu un ordre de mission sans frais pour se rendre à Cordoue du 29 octobre au 2 novembre 1997 et, le 30 octobre 1997, il a donné sa conférence.

8 En février 1998, les organisateurs du congrès lui ont demandé de leur communiquer le texte de son intervention en vue de le publier avec ceux des autres intervenants.

9 Le requérant a alors rédigé ledit texte et a demandé à M. Ravasio, en sa qualité d'autorité investie du pouvoir de nomination (ci-après l'«AIPN»), l'autorisation de le publier, conformément à l'article 17, second alinéa, du statut.

10 M. Ravasio a recueilli l'avis de M. Östberg, économiste détaché auprès de la DG II par la Banque centrale de Suède, sur l'opportunité de cette publication.

11 M. Östberg a émis un avis très critique sur le texte en cause, mais avant de le transmettre à M. Ravasio, il a soumis cet avis à ses supérieurs hiérarchiques M. Krüger, chef de l'unité 3 «Union monétaire: relations de change et politiques monétaires internes», de la direction D «Affaires monétaires», de la DG II, et M. H. Carré, directeur de cette direction. Le premier a paraphé l'avis sans ajouter aucun commentaire et le second a écrit que «la publication du texte incriminé serait inopportune». De son côté, M. Ravasio a consulté aussi M. Schulz, chef de l'unité «Ressources budgétaires; information et documentation économique; relations avec le Parlement européen, le Comité économique et social et le Comité des régions», directement rattachée au directeur général de la DG II, qui a paraphé le texte litigieux sans aucun commentaire.

12 Au vu des ces éléments, M. Ravasio a indiqué au requérant le 20 avril 1998 que «la publication [était] inopportune».

13 Le 5 juin 1998, le requérant a soumis pour approbation à M. Ravasio une nouvelle version du texte, modifié sur la base des critiques exprimées par M. Östberg. M. Ravasio a demandé à M. Schmidt, directeur de la direction B «Service économique», de la DG II, chargée notamment de l'évaluation de l'impact économique des politiques

communautaires, de lui faire connaître son avis sur le contenu du texte remanié. M. Schmidt a formulé certaines critiques et a conclu:

«DG II has so far had a very prudent, almost negative, position towards the usefulness of discretionary fiscal policy. This article seems to advocate its full use referring to fine-tuning.» («La DG II a jusqu'à présent adopté une position très prudente, presque négative, à l'égard de l'utilité d'une politique fiscale discrétionnaire. Cet article semble défendre la mise en œuvre d'une telle politique en se référant aux politiques économiques territorialement différenciées [au sein de l'Union monétaire].»)

14 De sa propre initiative, le requérant a communiqué la seconde version du texte à M. Östberg en lui demandant s'il maintenait les objections qu'il avait exprimées à l'égard de la première version, mais celui-ci a refusé de l'examiner au motif qu'il ne pouvait pas donner son opinion sans avoir reçu d'instructions spécifiques de la part de M. Ravasio.

15 Par lettre du 10 juillet 1998, M. Ravasio a informé le requérant de son refus d'autoriser la publication du texte litigieux, au motif «qu'il présent[ait] un point de vue qui n'est pas celui des services de la Commission, même si cette dernière n'a pas adopté une politique officielle à ce sujet». Il ajoutait:

«Je reconnais l'importance d'avoir des débats internes qui reflètent les différentes options des politiques économiques. Néanmoins, lorsque nous sortons à l'extérieur il serait souhaitable de présenter un point de vue commun [...]

Je crains que les intérêts de la Communauté pourraient être mis en jeu lorsque la Commission et ses fonctionnaires manifestent des points de vue différents. D'autre part, mes collaborateurs, qui ont lu votre article, ont des doutes sur sa qualité. Pour ces raisons, je n'autorise pas la publication.»

16 Le 25 août 1998, le requérant a introduit une réclamation au titre de l'article 90, paragraphe 2, du statut à l'encontre de cette décision.

17 Par décision du 5 janvier 1999, cette réclamation a été rejetée.

Procédure et conclusions des parties

18 Par requête enregistrée au greffe du Tribunal le 12 avril 1999, le requérant a introduit le présent recours.

19 Sur rapport du juge rapporteur, le Tribunal (quatrième chambre) a décidé d'ouvrir la procédure orale. Dans le cadre des mesures d'organisation de la procédure, la défenderesse a été invitée à répondre par écrit à certaines questions avant l'audience.

20 Les parties ont été entendues en leurs plaidoiries et en leurs réponses aux questions du Tribunal lors de l'audience qui s'est déroulée le 8 mars 2000.

21 Le requérant conclut à ce qu'il plaise au Tribunal:

- annuler la décision de la Commission du 5 janvier 1999 rejetant sa réclamation à l'égard de la décision refusant l'autorisation de publier le texte de la conférence qu'il a donnée à Cordoue le 30 octobre 1997;
- dire pour droit que sa demande tendant à obtenir l'autorisation de publier ce texte est recevable et fondée;
- condamner la défenderesse aux dépens de l'instance.

22 La défenderesse conclut à ce qu'il plaise au Tribunal:

- rejeter le recours;
- statuer comme de droit sur les dépens.

En droit

21 Bien que les conclusions du requérant visent également à l'annulation de la décision de la Commission du 5 janvier 1999 rejetant la réclamation introduite le 25 août 1998, au titre de l'article 90, paragraphe 2, du statut, contre la décision de l'AIPN du 10 juillet 1998, le présent recours a pour effet, conformément à une jurisprudence constante, de saisir le Tribunal de l'acte faisant grief contre lequel la réclamation a été présentée (voir, notamment, arrêts du Tribunal du 9 juillet 1997, Echauz Brigaldi e.a./Commission, T-156/95, RecFP p. I-A-171 et II-509, point 23, et du 15 décembre 1999, Latino/Commission, T-300/97, RecFP p. II-1263, point 30). Il en résulte que le présent recours tend à l'annulation de la décision de la Commission du 10 juillet 1998 refusant au requérant l'autorisation de publier le texte de la conférence qu'il a donnée à Cordoue le 30 octobre 1997 (ci-après la «décision attaquée»).

22 C'est également en ce sens que doit être interprété le deuxième chef des conclusions du requérant visant à ce qu'il plaise au Tribunal de dire pour droit que sa demande tendant à obtenir l'autorisation de publier ce texte est recevable et fondée. À supposer néanmoins que cette dernière demande doive être interprétée dans un sens littéral, il convient de rappeler que, dans le cadre d'un recours en annulation, des demandes tendant uniquement à ce que soient constatés des points de fait ou droit ne peuvent, par elles-mêmes, constituer des demandes valables (arrêt du Tribunal du 11 juillet 1996, Bernardi/Parlement, T-146/95, Rec. p. II-769, point 23, confirmé par ordonnance de la Cour du 6 mars 1997, Bernardi/Parlement, C-303/96 P, Rec. p. I-1239, point 45).

23 À l'appui de ses conclusions le requérant invoque trois moyens, tirés, premièrement, de la violation de l'article 17, second alinéa, du statut, de l'existence d'une erreur manifeste d'appréciation et d'un abus de pouvoir, deuxièmement, d'une violation du principe de protection de la confiance légitime et, troisièmement, de la violation du devoir de sollicitude. Il convient d'examiner le premier moyen.

Arguments des parties

24 Le requérant invoque une erreur de droit commise par la Commission dans son interprétation de l'article 17, second alinéa, du statut. S'appuyant sur l'arrêt du Tribunal du 19 mai 1999, Connolly/Commission (T-34/96 et T-163/96, RecFP p. I-A-87 et

II-463), il fait valoir que tout fonctionnaire bénéficie de la liberté d'expression dans le cadre de ses obligations statutaires et que l'article 17, second alinéa, du statut protège cette liberté. Dans la mesure où cette disposition prévoirait une exception à la liberté d'expression, les conditions permettant de refuser la publication devraient être interprétées de manière restrictive.

27 Le requérant soutient que, en refusant la publication de son texte au motif qu'une telle publication réduirait la marge de manœuvre de l'institution, la Commission a, d'une part, commis une erreur manifeste d'appréciation, en violation de l'article 17, second alinéa, du statut, et, d'autre part, abusé du pouvoir d'appréciation que lui confère cette disposition.

28 Il conteste que la publication du texte litigieux comporte un risque d'atteinte ou de limitation de la marge de manœuvre de la Commission. Il souligne que son texte exprime une thèse en vue de renforcer l'efficacité de l'Union économique et monétaire, dans le cadre d'un débat académique sur les conséquences de cette union. Selon lui, il ne critique nullement la politique de la Commission, ni ne va à l'encontre d'une position officielle de cette institution, cette dernière reconnaissant, en plus, n'avoir adopté aucune position en la matière.

29 En outre, la Commission aurait manqué d'expliquer en quoi sa marge de manœuvre serait ainsi limitée alors que le requérant s'exprime en son nom personnel, qu'il avait déjà été autorisé à développer sa thèse au cours d'une conférence et qu'il n'existe aucune divergence ou contradiction entre, d'une part, le contenu du résumé et du plan détaillé soumis à son supérieur hiérarchique en vue d'obtenir l'autorisation de donner ladite conférence et, d'autre part, celui du texte destiné à être publié.

30 Le requérant relève, notamment, que, dans le plan détaillé et dans le résumé de la conférence, il a très clairement indiqué à son supérieur hiérarchique qu'il voulait développer la thèse en faveur de politiques économiques territorialement différenciées (le «fine-tuning») aux niveaux local et régional. Cette thèse correspondrait également en tous points à celle exposée dans le texte litigieux.

31 Le requérant soutient encore que la qualité de son texte ne peut pas être mise en cause et que, dans sa décision du 5 janvier 1999, la Commission ne soulève absolument pas un manque de qualité dudit texte pour justifier le rejet de la réclamation.

32 La défenderesse s'oppose à l'interprétation par le requérant de l'article 17, second alinéa, du statut en soutenant que cette disposition doit être lue à la lumière du point 152 de l'arrêt Connolly/Commission, précité, et se fonde sur ce point pour contester qu'elle pratique la censure.

33 D'après la défenderesse, si l'article 17, second alinéa, du statut comporte une présomption en faveur de la publication, cette présomption ne joue plus lorsque la publication est de nature à mettre en jeu les intérêts de la Communauté.

34 Ainsi, ce qui serait décisif pour l'application de ladite disposition serait l'appréciation par l'AIPN de la question de savoir si les intérêts de la Communauté peuvent être mis en jeu, appréciation dans laquelle l'AIPN disposerait nécessairement d'un large pouvoir et qui serait soumise au contrôle juridictionnel seulement en cas d'erreur manifeste (comme une position irrationnelle ou la déformation d'un fait essentiel) ou de détournement de pouvoir.

35 La défenderesse fait valoir que, en l'espèce, l'intérêt à protéger est celui de ne pas réduire sa marge d'appréciation au sujet du «territorial fine-tuning» par des opinions de ses fonctionnaires risquant d'être mal interprétées ou d'être attribuées à l'institution.

36 À cet égard, la défenderesse conteste, en premier lieu, la prémisse du requérant selon laquelle la publication doit être autorisée dès lors qu'il n'est pas allégué que le texte en cause critique la politique de l'institution. En effet, le refus de l'autorisation de publication pourrait être aussi fondé sur d'autres motifs, comme la possibilité pour la Commission de garder sa neutralité sur certains sujets. Cela serait particulièrement le cas lorsqu'il s'agit d'un aspect d'une politique toujours en évolution, comme l'Union économique et monétaire, laquelle, de 1997 jusqu'à maintenant, aurait continué à faire l'objet de vives discussions.

37 En deuxième lieu, la défenderesse rappelle que l'expression «fine-tuning» a acquis la signification d'une politique fiscale volontariste et interventionniste à mettre en œuvre sur le plan local ou régional pour répondre aux besoins de différenciation spécifiquement locaux perçus par les partisans de cette politique. Celle-ci trouverait une justification particulière dans la prévention des chocs économiques sur certaines régions, étant donné que, dans le nouveau régime de la monnaie unique, un des facteurs permettant d'amortir ces chocs, à savoir la fluctuation des taux de change, est éliminé.

38 La défenderesse souligne que cette problématique va au-delà d'un simple débat d'économistes et concerne également l'organisation administrative et constitutionnelle des États. Les institutions de la Communauté, et plus particulièrement la Commission, se seraient abstenues de prendre position sur ces points, estimant qu'ils relèvent du pouvoir d'organisation interne des États membres.

39 La défenderesse considère que l'objectif principal en termes de politique fiscale est de poursuivre la consolidation fiscale, ce qui exclut que le «fine-tuning» puisse être une option importante de sa politique. En effet, elle doute de l'utilité de ce type de mesure en tant que composante majeure de la politique économique, du moins en dehors d'hypothèses exceptionnelles.

40 En troisième lieu, la défenderesse soutient qu'il y avait un risque de confusion entre les opinions exprimées par le requérant et les siennes, alors qu'elle avait voulu rester neutre sur la question abordée dans la conférence. En l'espèce, la Commission n'ayant pas encore pris une position officielle, toute expression d'opinion de la part d'un de ses fonctionnaires pourrait être comprise comme ayant un caractère officiel.

41 En effet, la note de bas de page selon laquelle le requérant prétend exprimer un point de vue personnel serait une précision habituelle et de pure forme qui n'aurait qu'une valeur très limitée. En outre, le requérant serait chargé au sein de la DG II de la communication, de sorte que donner des conférences ferait partie de sa fonction. Dans ces conditions, il serait presque inévitable que le requérant soit perçu, quelles que soient les précautions dont il s'entoure, comme un porte-parole autorisé exprimant une position officielle.

42 Cette analyse serait démontrée par l'article consacré à la conférence en cause, paru dans la presse locale, dont le titre annoncerait le rôle essentiel que le requérant attribue aux collectivités locales pour l'avenir de l'Union et qui présenterait celui-ci comme l'«économiste de la Commission européenne». Certes, dans le corps de l'article, le journaliste noterait que l'intervenant exprime une opinion «très personnelle», mais il ajouterait que cette opinion est le résultat de 30 ans de travail à la Commission.

43 En quatrième lieu, la défenderesse souligne la différence existant entre une intervention à un congrès et une publication. La première serait éphémère alors que la dernière aurait un caractère durable et serait, de ce fait, en mesure d'atteindre un public autrement plus vaste. C'est cette différence fondamentale entre les deux types d'expression qui ferait qu'il serait inconcevable que le pouvoir d'appréciation de l'AIPN soit réduit au seul motif qu'elle aurait autorisé une intervention orale sur le sujet traité par le texte à publier.

44 Elle fait valoir que le requérant n'est pas fondé à soutenir que le résumé et le plan détaillé de la conférence exposent la même thèse que le texte litigieux. Dans le résumé et le plan, le requérant se serait limité à poser des questions, alors que, dans le texte litigieux, il développerait sa thèse de manière affirmative. La défenderesse ne conteste pas qu'il y a de nombreux points communs entre le plan détaillé et le texte en cause, mais elle considère que ces ressemblances ne font pas disparaître les divergences, qui demeurent très importantes. En tout état de cause, même à supposer que le texte et le plan détaillé de la conférence soient identiques quant au fond, le fait d'avoir autorisé le requérant à donner cette conférence au vu dudit plan ne signifierait nullement que l'AIPN a commis une erreur manifeste en refusant l'autorisation de la publication du texte parce que les deux situations seraient différentes.

45 En ce qui concerne la qualité du texte, mise en cause par M. Ravasio dans la décision attaquée, la défenderesse déclare s'abstenir d'aborder cette question et confirme que la réponse à la réclamation ne se fonde pas sur un tel motif mais sur l'appréciation des intérêts de l'institution.

46 À l'audience, la défenderesse a encore souligné que les motifs de la décision attaquée doivent être analysés dans le contexte de l'époque, correspondant à une phase délicate pour la mise en place de l'Union monétaire, où celle-ci était contestée et où il était raisonnable de penser qu'il existait un risque d'assimilation entre l'opinion du requérant, comme fonctionnaire de la Commission, et celle de l'institution elle-même.

Appréciation du Tribunal

47 Dans le cadre du présent moyen, le requérant fait valoir, notamment, que, en lui refusant l'autorisation de publier le texte litigieux, l'AIPN a fait une interprétation et une application erronées de l'article 17, second alinéa, du statut.

48 Cette disposition prévoit:

«Le fonctionnaire ne doit ni publier ni faire publier, seul ou en collaboration, un texte quelconque dont l'objet se rattache à l'activité des Communautés sans l'autorisation de l'[AIPN]. Cette autorisation ne peut être refusée que si la publication envisagée est de nature à mettre en jeu les intérêts des Communautés.»

49 Si cette disposition subordonne l'exercice de la liberté d'expression des fonctionnaires communautaires, concernant la publication de textes se rattachant à l'activité des Communautés, à une autorisation de l'AIPN, elle établit néanmoins qu'une telle autorisation ne saurait être refusée que dans le cas où une telle publication serait de nature à mettre en jeu les intérêts des Communautés.

50 À cet égard, il convient de rappeler que la liberté d'expression, consacrée à l'article 10 de la convention de sauvegarde des droits de l'homme et des libertés fondamentales du 4 novembre 1950, fait partie des droits fondamentaux qui, selon une jurisprudence constante, réaffirmée par le préambule de l'Acte unique européen et par l'article F, paragraphe 2, du traité sur l'Union européenne (devenu, après modification, article 6, paragraphe 2, UE), sont protégés dans l'ordre juridique communautaire et dont jouissent, en particulier, les fonctionnaires communautaires (arrêts de la Cour du 13 décembre 1989, Oyowe et Traore/Commission, C-100/88, Rec. p. 4285, point 16,

du 8 juillet 1999, Montecatini/Commission, C-235/92 P, Rec. p. I-4539, point 137, et du Tribunal du 17 février 1998, E/CES, T-183/96, RecFP p. I-A-67 et II-159, point 41).

91 Néanmoins, il résulte également d'une jurisprudence constante que les droits fondamentaux ne constituent pas des prérogatives absolues, mais peuvent comporter des restrictions, à condition que celles-ci répondent effectivement à des objectifs d'intérêt général et ne constituent pas, au regard du but poursuivi, une intervention démesurée et intolérable dans une société démocratique, qui porterait atteinte à la substance même des droits protégés (voir arrêts de la Cour du 5 octobre 1994, X/Commission, C-404/92 P, Rec. p. I-4737, point 18, et du Tribunal du 15 mai 1997, N/Commission, T-273/94, RecFP p. I-A-97 et II-289, point 73).

92 Examiné à la lumière de ces principes, l'article 17, second alinéa, du statut exprime l'idée de la nécessité permanente d'un juste équilibre entre la garantie de l'exercice d'un droit fondamental et la protection d'un objectif légitime d'intérêt général. Cet objectif peut ainsi justifier une restriction à l'exercice d'un tel droit seulement si les circonstances concrètes l'exigent et dans la mesure du nécessaire. D'après cette disposition, d'une part, le fonctionnaire est soumis à l'obligation de demander l'autorisation pour publier un article, mais, d'autre part, cette obligation est circonscrite aux articles qui se rattachent à l'activité des Communautés, et l'autorisation ne peut être refusée que «si la publication envisagée est de nature à mettre en jeu les intérêts des Communautés».

93 En l'espèce, pour déterminer si la décision attaquée a été prise dans le respect des règles applicables, il convient, tout d'abord, de déterminer si la Commission a commis une erreur manifeste d'appréciation en refusant l'autorisation de la publication du texte litigieux au motif que celle-ci était de nature à mettre en jeu les intérêts des Communautés.

94 À cet égard, il y a lieu de relever que, pour l'essentiel, le refus d'autorisation de la publication du texte litigieux est fondé sur les motifs examinés ci-après.

55 En premier lieu, dans le texte même de la décision attaquée, il est exposé:

«[Le texte litigieux] présente un point de vue qui n'est pas celui des services de la Commission, même si cette dernière n'a pas adopté une politique officielle à ce sujet.

Je reconnais l'importance d'avoir des débats internes qui reflètent les différentes options des politiques économiques. Néanmoins, lorsque nous sortons à l'extérieur il serait souhaitable de présenter un point de vue commun [...]

Je crains que les intérêts de la Communauté pourraient être mis en jeu lorsque la Commission et ses fonctionnaires manifestent des points de vue différents.»

56 Il y a lieu de constater que, dans la décision attaquée, l'AIPN se limite à déclarer que les intérêts des Communautés pourraient être mis en jeu lorsque la Commission et ses fonctionnaires expriment publiquement des points de vue différents. Cette décision n'explique pas pourquoi, dans le cas d'espèce, ce danger existerait.

57 Or, dans une société démocratique fondée sur le respect des droits fondamentaux, l'expression publique, par un fonctionnaire, de points de vue différents de ceux de l'institution pour laquelle il travaille ne peut pas, en soi, être considérée comme étant de nature à mettre en danger les intérêts des Communautés.

58 À l'évidence, l'utilité de la liberté d'expression est justement la possibilité d'exprimer des opinions différentes de celles retenues au niveau officiel. Admettre que la liberté d'expression puisse être limitée au seul motif que l'opinion en cause diffère de la position retenue par les institutions reviendrait à priver ce droit fondamental de son objet.

59 De la même manière, l'article 17, second alinéa, du statut serait privé d'effet, puisque, tel qu'il résulte de son libellé, cette disposition établit clairement le principe d'octroi de l'autorisation de publication en disposant expressément qu'une telle autorisation ne peut être refusée que si la publication en cause est de nature à mettre en jeu les intérêts des Communautés.

60 Par conséquent, la différence d'opinion entre le requérant et la Commission, dans la mesure où il n'est pas démontré que le fait de la rendre publique serait de nature à mettre en jeu, dans les circonstances de l'espèce, les intérêts des Communautés, ne peut pas justifier une restriction à l'exercice de la liberté d'expression.

61 En second lieu, conformément aux règles applicables, la motivation du refus d'autorisation de publication a été complétée par la décision de rejet de la réclamation (voir, par analogie, arrêt du Tribunal du 12 février 1992, Volger/Parlement, T-52/90, Rec. p. II-121, point 36).

62 Dans cette décision, la Commission affirme:

«[...] les éventuels conflits d'intérêt entre le fonctionnaire et son institution concernant une publication ne se limitent pas à l'hypothèse d'une opposition publique à une politique de l'institution, l'intérêt de celle-ci pouvant résider dans le maintien d'un maximum de marge de manœuvre avant d'arrêter une position définitive. Il est clair que le fait que le réclamant s'exprime nettement et par écrit sur la question [de savoir si l'Union économique et monétaire nécessite ou non une modulation territoriale des politiques salariales ou fiscales (le 'fine-tuning')] revient justement à compromettre le maintien de cette marge de manœuvre; même s'il devait présenter son opinion comme étant purement personnelle, l'on ne saurait exclure que le lecteur, malgré cette réserve, rapproche l'avis du fonctionnaire travaillant dans ce secteur à celui de son institution, à défaut précisément d'une opinion de celle-ci.»

63 En outre, en ce qui concerne l'argument du requérant, présenté dans sa réclamation, selon lequel la décision attaquée serait injustifiée du fait que l'AIPN l'avait autorisé à donner la conférence dont le contenu est repris dans le texte litigieux, la Commission, dans la décision portant rejet de la réclamation, déclare:

«[...] en aucun cas, un résumé d'une page ne peut être assimilé à un article de plus de 20 pages. L'autorisation sur la base du premier ne peut certainement pas emporter autorisation du second. Et ce principe est d'autant plus vrai dans le cas de l'espèce que des divergences importantes sont à relever entre le résumé de la conférence et le texte de l'article.»

64 Il y a lieu de constater que, dans la réponse à la réclamation, l'AIPN ajoute comme motif de sa décision la réduction de la marge de manœuvre de la Commission sur le «fine-tuning» qui découlerait du danger de confusion entre l'opinion du requérant et celle de l'institution.

65 Ce raisonnement ne saurait être accueilli.

66 En effet, il résulte du dossier que, à l'époque des faits, la Commission s'était déjà exprimée publiquement et clairement sur le «fine-tuning», à travers, notamment, des documents officiels, et que, du moins en dehors d'hypothèses exceptionnelles, elle doutait de l'utilité de ce type de mesure et du recours, déjà au niveau des États membres, à des politiques budgétaires discrétionnaires. En outre, le texte litigieux a été écrit par un fonctionnaire qui n'exerce aucune responsabilité de direction et qui s'exprime à titre individuel. De plus, ce texte concerne une matière sur laquelle la Commission prétend ne pas avoir de politique officielle. Par ailleurs, sa publication étant prévue dans le recueil des interventions faites au congrès en cause, il s'adresse à un public construit par des spécialistes en la matière, qui ont vraisemblablement la possibilité d'être bien informés des positions de la Commission.

67 Dans ces circonstances, la thèse de la défenderesse, qui soutient que la publication du texte litigieux pourrait entraîner un risque significatif de confusion de la part du public entre l'opinion du requérant et celle de l'institution, pouvant réduire la marge de manœuvre de celle-ci en la matière et, ainsi, mettre en jeu les intérêts des Communautés, n'est manifestement pas fondée.

68 Par ailleurs, même s'il peut exister une différence de portée entre une conférence et la publication du texte de celle-ci, une telle différence ne suffirait pas, dans les circonstances de l'espèce, à fonder la crainte de la diminution de la marge de manœuvre de la Commission. À cet égard, il suffit de rappeler, outre les éléments déjà mentionnés (voir ci-dessus point 66), que le texte litigieux expose la même thèse que celle présentée par le requérant lors de la conférence, qui avait déjà comme titre «La nécessité d'une modulation des politiques économiques aux niveaux local et régional au sein de l'Union monétaire de l'Union européenne» («The need for local and regional economic fine-tuning in the monetary union of the European Union»). En outre, le fait qu'une telle

conférence a été autorisée par l'AIPN confirme l'absence de risque de confusion entre l'opinion du requérant et celle de la Commission. Dans ces circonstances, la défenderesse ne saurait être fondée à soutenir qu'elle avait une crainte raisonnable de voir sa marge de manœuvre réduite par la publication du texte en cause.

69 Il résulte de tout ce qui précède que la défenderesse a commis une erreur manifeste d'appréciation en refusant l'autorisation de la publication du texte litigieux au motif qu'elle était de nature à mettre en jeu les intérêts des Communautés.

70 Dans cette mesure, le premier moyen du requérant, en ce qu'il invoque l'existence d'une erreur manifeste d'appréciation, doit être accueilli.

71 Il y a donc lieu d'annuler la décision attaquée, sans qu'il soit besoin d'examiner les autres moyens et arguments avancés par le requérant.

Sur les dépens

72 Aux termes de l'article 87, paragraphe 2, du règlement de procédure, toute partie qui succombe est condamnée aux dépens s'il est conclu en ce sens. La défenderesse ayant succombé, il y a lieu de la condamner aux dépens, conformément aux conclusions du requérant.

Par ces motifs,

LE TRIBUNAL (quatrième chambre)

déclare et arrête:

1) **La décision de la Commission du 10 juillet 1998, refusant au requérant l'autorisation de publier le texte de la conférence qu'il a donnée le 30 octobre 1997, est annulée.**

2) **La Commission supportera l'ensemble des dépens.**

Tiili Moura Ramos Mengozzi

Ainsi prononcé en audience publique à Luxembourg, le 14 juillet 2000.

Le greffier
H. Jung

Le président
V. Tiili

ARRÊT DU TRIBUNAL (quatrième chambre)
14 juillet 2000 *

«Fonctionnaires – Autorisation de publication – Article 17, second alinéa, du statut – Intérêts des Communautés – Erreur manifeste d'appréciation»

Dans l'affaire T-82/99,

Michael Cwik, fonctionnaire de la Commission des Communautés européennes, demeurant à Tervuren (Belgique), représenté par Me N. Lhoëst, avocat au barreau de Bruxelles, ayant élu domicile à Luxembourg auprès de la fiduciaire Becker et Cahen, 3, rue des Foyers,

partie requérante,

contre

Commission des Communautés européennes, représentée par M. J. Currall, conseiller juridique, en qualité d'agent, ayant élu domicile à Luxembourg auprès de M. C. Gómez de la Cruz, membre du service juridique, Centre Wagner, Kirchberg,

partie défenderesse,

ayant pour objet une demande d'annulation de la décision de la Commission du 10 juillet 1998 refusant au requérant l'autorisation de publier le texte de la conférence qu'il a donnée le 30 octobre 1997,

* Langue de procédure: le français.

LE TRIBUNAL DE PREMIÈRE INSTANCE
DES COMMUNAUTÉS EUROPÉENNES (quatrième chambre),

composé de Mme V. Tiili, président, MM. R. M. Moura Ramos et P. Mengozzi, juges,

greffier: M. G. Herzig, administrateur,

vu la procédure écrite et à la suite de la procédure orale du 8 mars 2000,

rend le présent

Arrêt

Cadre juridique

1 L'article 17, second alinéa, du statut des fonctionnaires des Communautés européennes (ci-après le «statut») prévoit:

«Le fonctionnaire ne doit ni publier ni faire publier, seul ou en collaboration, un texte quelconque dont l'objet se rattache à l'activité des Communautés sans l'autorisation de l'autorité investie du pouvoir de nomination. Cette autorisation ne peut être refusée que si la publication envisagée est de nature à mettre en jeu les intérêts des Communautés.»

2 En outre, l'article 25, deuxième alinéa, du statut dispose:

«Toute décision individuelle prise en application du présent statut doit être communiquée par écrit, sans délai, au fonctionnaire intéressé. Toute décision faisant grief doit être motivée.»

Faits à l'origine du litige

3 Le requérant, économiste de formation, est entré au service de la Commission en 1970. Lors de l'introduction du recours, il était affecté à l'unité 5 «Information, publications et documentation économique», directement rattachée au directeur général adjoint chargé des directions B, C et E. de la direction générale «Affaires économiques et financières» (DG II). Sa fonction consistait à accueillir des groupes de visiteurs et à donner des conférences sur l'euro, sur l'Union économique et monétaire et sur l'ensemble des activités et programmes relevant de cette direction générale.

4 Par lettre du 12 mars 1997, le requérant a été invité par le gouvernement de la province de Cordoue (Espagne) à donner une conférence dans le cadre du 5e Congrès international de culture économique.

5 Le 20 octobre 1997, le requérant a introduit une demande auprès de son supérieur hiérarchique, M. G. Ravasio, afin d'obtenir l'autorisation de donner cette conférence le 30 octobre suivant. La demande indiquait que ladite conférence aurait comme titre «The need for economic fine-tuning at the local and regional level in the Monetary Union of the European Union» («La nécessité d'une modulation des politiques économiques aux niveaux local et régional au sein de l'Union monétaire de l'Union européenne»). Il a joint à sa demande un résumé et un plan détaillé de son intervention avec une annexe.

6 Le 26 octobre 1997, M. Ravasio a donné son autorisation en précisant cependant:

«Ceci n'est pas très économique. Présentation plus classique SVP. Attention aux risques 'fine-tuning'.»

7 Le 27 octobre 1997, le requérant a obtenu un ordre de mission sans frais pour se rendre à Cordoue du 29 octobre au 2 novembre 1997 et, le 30 octobre 1997, il a donné sa conférence.

8 En février 1998, les organisateurs du congrès lui ont demandé de leur communiquer le texte de son intervention en vue de le publier avec ceux des autres intervenants.

9 Le requérant a alors rédigé ledit texte et a demandé à M. Ravasio, en sa qualité d'autorité investie du pouvoir de nomination (ci-après l'«AIPN»), l'autorisation de le publier, conformément à l'article 17, second alinéa, du statut.

10 M. Ravasio a recueilli l'avis de M. Östberg, économiste détaché auprès de la DG II par la Banque centrale de Suède, sur l'opportunité de cette publication.

11 M. Östberg a émis un avis très critique sur le texte en cause, mais avant de le transmettre à M. Ravasio, il a soumis cet avis à ses supérieurs hiérarchiques M. Krüger, chef de l'unité 3 «Union monétaire: relations de change et politiques monétaires internes», de la direction D «Affaires monétaires», de la DG II, et M. H. Carré, directeur de cette direction. Le premier a paraphé l'avis sans ajouter aucun commentaire et le second a écrit que «la publication du texte incriminé serait inopportune». De son côté, M. Ravasio a consulté aussi M. Schulz, chef de l'unité «Ressources budgétaires; information et documentation économique; relations avec le Parlement européen, le Comité économique et social et le Comité des régions», directement rattachée au directeur général de la DG II, qui a paraphé le texte litigieux sans aucun commentaire.

12 Au vu des ces éléments, M. Ravasio a indiqué au requérant le 20 avril 1998 que «la publication [était] inopportune».

13 Le 5 juin 1998, le requérant a soumis pour approbation à M. Ravasio une nouvelle version du texte, modifié sur la base des critiques exprimées par M. Östberg. M. Ravasio a demandé à M. Schmidt, directeur de la direction B «Service économique», de la DG II, chargée notamment de l'évaluation de l'impact économique des politiques

communautaires, de lui faire connaître son avis sur le contenu du texte remanié. M. Schmidt a formulé certaines critiques et a conclu:

«DG II has so far had a very prudent, almost negative, position towards the usefulness of discretionary fiscal policy. This article seems to advocate its full use referring to fine-tuning.» («La DG II a jusqu'à présent adopté une position très prudente, presque négative, à l'égard de l'utilité d'une politique fiscale discrétionnaire. Cet article semble défendre la mise en œuvre d'une telle politique en se référant aux politiques économiques territorialement différenciées [au sein de l'Union monétaire].»)

14 De sa propre initiative, le requérant a communiqué la seconde version du texte à M. Östberg en lui demandant s'il maintenait les objections qu'il avait exprimées à l'égard de la première version, mais celui-ci a refusé de l'examiner au motif qu'il ne pouvait pas donner son opinion sans avoir reçu d'instructions spécifiques de la part de M. Ravasio.

15 Par lettre du 10 juillet 1998, M. Ravasio a informé le requérant de son refus d'autoriser la publication du texte litigieux, au motif «qu'il présent[ait] un point de vue qui n'est pas celui des services de la Commission, même si cette dernière n'a pas adopté une politique officielle à ce sujet». Il ajoutait:

«Je reconnais l'importance d'avoir des débats internes qui reflètent les différentes options des politiques économiques. Néanmoins, lorsque nous sortons à l'extérieur il serait souhaitable de présenter un point de vue commun [...]

Je crains que les intérêts de la Communauté pourraient être mis en jeu lorsque la Commission et ses fonctionnaires manifestent des points de vue différents. D'autre part, mes collaborateurs, qui ont lu votre article, ont des doutes sur sa qualité. Pour ces raisons, je n'autorise pas la publication.»

16 Le 25 août 1998, le requérant a introduit une réclamation au titre de l'article 90, paragraphe 2, du statut à l'encontre de cette décision.

17 Par décision du 5 janvier 1999, cette réclamation a été rejetée.

Procédure et conclusions des parties

18 Par requête enregistrée au greffe du Tribunal le 12 avril 1999, le requérant a introduit le présent recours.

19 Sur rapport du juge rapporteur, le Tribunal (quatrième chambre) a décidé d'ouvrir la procédure orale. Dans le cadre des mesures d'organisation de la procédure, la défenderesse a été invitée à répondre par écrit à certaines questions avant l'audience.

20 Les parties ont été entendues en leurs plaidoiries et en leurs réponses aux questions du Tribunal lors de l'audience qui s'est déroulée le 8 mars 2000.

21 Le requérant conclut à ce qu'il plaise au Tribunal:

- annuler la décision de la Commission du 5 janvier 1999 rejetant sa réclamation à l'égard de la décision refusant l'autorisation de publier le texte de la conférence qu'il a donnée à Cordoue le 30 octobre 1997;
- dire pour droit que sa demande tendant à obtenir l'autorisation de publier ce texte est recevable et fondée;
- condamner la défenderesse aux dépens de l'instance.

22 La défenderesse conclut à ce qu'il plaise au Tribunal:

- rejeter le recours;
- statuer comme de droit sur les dépens.

En droit

21 Bien que les conclusions du requérant visent également à l'annulation de la décision de la Commission du 5 janvier 1999 rejetant la réclamation introduite le 25 août 1998, au titre de l'article 90, paragraphe 2, du statut, contre la décision de l'AIPN du 10 juillet 1998, le présent recours a pour effet, conformément à une jurisprudence constante, de saisir le Tribunal de l'acte faisant grief contre lequel la réclamation a été présentée (voir, notamment, arrêts du Tribunal du 9 juillet 1997, Echauz Brigaldi e.a./Commission, T-156/95, RecFP p. I-A-171 et II-509, point 23, et du 15 décembre 1999, Latino/Commission, T-300/97, RecFP p. II-1263, point 30). Il en résulte que le présent recours tend à l'annulation de la décision de la Commission du 10 juillet 1998 refusant au requérant l'autorisation de publier le texte de la conférence qu'il a donnée à Cordoue le 30 octobre 1997 (ci-après la «décision attaquée»).

22 C'est également en ce sens que doit être interprété le deuxième chef des conclusions du requérant visant à ce qu'il plaise au Tribunal de dire pour droit que sa demande tendant à obtenir l'autorisation de publier ce texte est recevable et fondée. À supposer néanmoins que cette dernière demande doive être interprétée dans un sens littéral, il convient de rappeler que, dans le cadre d'un recours en annulation, des demandes tendant uniquement à ce que soient constatés des points de fait ou droit ne peuvent, par elles-mêmes, constituer des demandes valables (arrêt du Tribunal du 11 juillet 1996, Bernardi/Parlement, T-146/95, Rec. p. II-769, point 23, confirmé par ordonnance de la Cour du 6 mars 1997, Bernardi/Parlement, C-303/96 P, Rec. p. I-1239, point 45).

23 À l'appui de ses conclusions le requérant invoque trois moyens, tirés, premièrement, de la violation de l'article 17, second alinéa, du statut, de l'existence d'une erreur manifeste d'appréciation et d'un abus de pouvoir, deuxièmement, d'une violation du principe de protection de la confiance légitime et, troisièmement, de la violation du devoir de sollicitude. Il convient d'examiner le premier moyen.

Arguments des parties

24 Le requérant invoque une erreur de droit commise par la Commission dans son interprétation de l'article 17, second alinéa, du statut. S'appuyant sur l'arrêt du Tribunal du 19 mai 1999, Connolly/Commission (T-34/96 et T-163/96, RecFP p. I-A-87 et

II-463), il fait valoir que tout fonctionnaire bénéficie de la liberté d'expression dans le cadre de ses obligations statutaires et que l'article 17, second alinéa, du statut protège cette liberté. Dans la mesure où cette disposition prévoirait une exception à la liberté d'expression, les conditions permettant de refuser la publication devraient être interprétées de manière restrictive.

27 Le requérant soutient que, en refusant la publication de son texte au motif qu'une telle publication réduirait la marge de manœuvre de l'institution, la Commission a, d'une part, commis une erreur manifeste d'appréciation, en violation de l'article 17, second alinéa, du statut, et, d'autre part, abusé du pouvoir d'appréciation que lui confère cette disposition.

28 Il conteste que la publication du texte litigieux comporte un risque d'atteinte ou de limitation de la marge de manœuvre de la Commission. Il souligne que son texte exprime une thèse en vue de renforcer l'efficacité de l'Union économique et monétaire, dans le cadre d'un débat académique sur les conséquences de cette union. Selon lui, il ne critique nullement la politique de la Commission, ni ne va à l'encontre d'une position officielle de cette institution, cette dernière reconnaissant, en plus, n'avoir adopté aucune position en la matière.

29 En outre, la Commission aurait manqué d'expliquer en quoi sa marge de manœuvre serait ainsi limitée alors que le requérant s'exprime en son nom personnel, qu'il avait déjà été autorisé à développer sa thèse au cours d'une conférence et qu'il n'existe aucune divergence ou contradiction entre, d'une part, le contenu du résumé et du plan détaillé soumis à son supérieur hiérarchique en vue d'obtenir l'autorisation de donner ladite conférence et, d'autre part, celui du texte destiné à être publié.

30 Le requérant relève, notamment, que, dans le plan détaillé et dans le résumé de la conférence, il a très clairement indiqué à son supérieur hiérarchique qu'il voulait développer la thèse en faveur de politiques économiques territorialement différenciées (le «fine-tuning») aux niveaux local et régional. Cette thèse correspondrait également en tous points à celle exposée dans le texte litigieux.

31 Le requérant soutient encore que la qualité de son texte ne peut pas être mise en cause et que, dans sa décision du 5 janvier 1999, la Commission ne soulève absolument pas un manque de qualité dudit texte pour justifier le rejet de la réclamation.

32 La défenderesse s'oppose à l'interprétation par le requérant de l'article 17, second alinéa, du statut en soutenant que cette disposition doit être lue à la lumière du point 152 de l'arrêt Connolly/Commission, précité, et se fonde sur ce point pour contester qu'elle pratique la censure.

33 D'après la défenderesse, si l'article 17, second alinéa, du statut comporte une présomption en faveur de la publication, cette présomption ne joue plus lorsque la publication est de nature à mettre en jeu les intérêts de la Communauté.

34 Ainsi, ce qui serait décisif pour l'application de ladite disposition serait l'appréciation par l'AIPN de la question de savoir si les intérêts de la Communauté peuvent être mis en jeu, appréciation dans laquelle l'AIPN disposerait nécessairement d'un large pouvoir et qui serait soumise au contrôle juridictionnel seulement en cas d'erreur manifeste (comme une position irrationnelle ou la déformation d'un fait essentiel) ou de détournement de pouvoir.

35 La défenderesse fait valoir que, en l'espèce, l'intérêt à protéger est celui de ne pas réduire sa marge d'appréciation au sujet du «territorial fine-tuning» par des opinions de ses fonctionnaires risquant d'être mal interprétées ou d'être attribuées à l'institution.

36 À cet égard, la défenderesse conteste, en premier lieu, la prémisse du requérant selon laquelle la publication doit être autorisée dès lors qu'il n'est pas allégué que le texte en cause critique la politique de l'institution. En effet, le refus de l'autorisation de publication pourrait être aussi fondé sur d'autres motifs, comme la possibilité pour la Commission de garder sa neutralité sur certains sujets. Cela serait particulièrement le cas lorsqu'il s'agit d'un aspect d'une politique toujours en évolution, comme l'Union économique et monétaire, laquelle, de 1997 jusqu'à maintenant, aurait continué à faire l'objet de vives discussions.

37 En deuxième lieu, la défenderesse rappelle que l'expression «fine-tuning» a acquis la signification d'une politique fiscale volontariste et interventionniste à mettre en œuvre sur le plan local ou régional pour répondre aux besoins de différenciation spécifiquement locaux perçus par les partisans de cette politique. Celle-ci trouverait une justification particulière dans la prévention des chocs économiques sur certaines régions, étant donné que, dans le nouveau régime de la monnaie unique, un des facteurs permettant d'amortir ces chocs, à savoir la fluctuation des taux de change, est éliminé.

38 La défenderesse souligne que cette problématique va au-delà d'un simple débat d'économistes et concerne également l'organisation administrative et constitutionnelle des États. Les institutions de la Communauté, et plus particulièrement la Commission, se seraient abstenues de prendre position sur ces points, estimant qu'ils relèvent du pouvoir d'organisation interne des États membres.

39 La défenderesse considère que l'objectif principal en termes de politique fiscale est de poursuivre la consolidation fiscale, ce qui exclut que le «fine-tuning» puisse être une option importante de sa politique. En effet, elle doute de l'utilité de ce type de mesure en tant que composante majeure de la politique économique, du moins en dehors d'hypothèses exceptionnelles.

40 En troisième lieu, la défenderesse soutient qu'il y avait un risque de confusion entre les opinions exprimées par le requérant et les siennes, alors qu'elle avait voulu rester neutre sur la question abordée dans la conférence. En l'espèce, la Commission n'ayant pas encore pris une position officielle, toute expression d'opinion de la part d'un de ses fonctionnaires pourrait être comprise comme ayant un caractère officiel.

41 En effet, la note de bas de page selon laquelle le requérant prétend exprimer un point de vue personnel serait une précision habituelle et de pure forme qui n'aurait qu'une valeur très limitée. En outre, le requérant serait chargé au sein de la DG II de la communication, de sorte que donner des conférences ferait partie de sa fonction. Dans ces conditions, il serait presque inévitable que le requérant soit perçu, quelles que soient les précautions dont il s'entoure, comme un porte-parole autorisé exprimant une position officielle.

42 Cette analyse serait démontrée par l'article consacré à la conférence en cause, paru dans la presse locale, dont le titre annoncerait le rôle essentiel que le requérant attribue aux collectivités locales pour l'avenir de l'Union et qui présenterait celui-ci comme l'«économiste de la Commission européenne». Certes, dans le corps de l'article, le journaliste noterait que l'intervenant exprime une opinion «très personnelle», mais il ajouterait que cette opinion est le résultat de 30 ans de travail à la Commission.

43 En quatrième lieu, la défenderesse souligne la différence existant entre une intervention à un congrès et une publication. La première serait éphémère alors que la dernière aurait un caractère durable et serait, de ce fait, en mesure d'atteindre un public autrement plus vaste. C'est cette différence fondamentale entre les deux types d'expression qui ferait qu'il serait inconcevable que le pouvoir d'appréciation de l'AIPN soit réduit au seul motif qu'elle aurait autorisé une intervention orale sur le sujet traité par le texte à publier.

44 Elle fait valoir que le requérant n'est pas fondé à soutenir que le résumé et le plan détaillé de la conférence exposent la même thèse que le texte litigieux. Dans le résumé et le plan, le requérant se serait limité à poser des questions, alors que, dans le texte litigieux, il développerait sa thèse de manière affirmative. La défenderesse ne conteste pas qu'il y a de nombreux points communs entre le plan détaillé et le texte en cause, mais elle considère que ces ressemblances ne font pas disparaître les divergences, qui demeurent très importantes. En tout état de cause, même à supposer que le texte et le plan détaillé de la conférence soient identiques quant au fond, le fait d'avoir autorisé le requérant à donner cette conférence au vu dudit plan ne signifierait nullement que l'AIPN a commis une erreur manifeste en refusant l'autorisation de la publication du texte parce que les deux situations seraient différentes.

45 En ce qui concerne la qualité du texte, mise en cause par M. Ravasio dans la décision attaquée, la défenderesse déclare s'abstenir d'aborder cette question et confirme que la réponse à la réclamation ne se fonde pas sur un tel motif mais sur l'appréciation des intérêts de l'institution.

46 À l'audience, la défenderesse a encore souligné que les motifs de la décision attaquée doivent être analysés dans le contexte de l'époque, correspondant à une phase délicate pour la mise en place de l'Union monétaire, où celle-ci était contestée et où il était raisonnable de penser qu'il existait un risque d'assimilation entre l'opinion du requérant, comme fonctionnaire de la Commission, et celle de l'institution elle-même.

Appréciation du Tribunal

47 Dans le cadre du présent moyen, le requérant fait valoir, notamment, que, en lui refusant l'autorisation de publier le texte litigieux, l'AIPN a fait une interprétation et une application erronées de l'article 17, second alinéa, du statut.

48 Cette disposition prévoit:

«Le fonctionnaire ne doit ni publier ni faire publier, seul ou en collaboration, un texte quelconque dont l'objet se rattache à l'activité des Communautés sans l'autorisation de l'[AIPN]. Cette autorisation ne peut être refusée que si la publication envisagée est de nature à mettre en jeu les intérêts des Communautés.»

49 Si cette disposition subordonne l'exercice de la liberté d'expression des fonctionnaires communautaires, concernant la publication de textes se rattachant à l'activité des Communautés, à une autorisation de l'AIPN, elle établit néanmoins qu'une telle autorisation ne saurait être refusée que dans le cas où une telle publication serait de nature à mettre en jeu les intérêts des Communautés.

50 À cet égard, il convient de rappeler que la liberté d'expression, consacrée à l'article 10 de la convention de sauvegarde des droits de l'homme et des libertés fondamentales du 4 novembre 1950, fait partie des droits fondamentaux qui, selon une jurisprudence constante, réaffirmée par le préambule de l'Acte unique européen et par l'article F, paragraphe 2, du traité sur l'Union européenne (devenu, après modification, article 6, paragraphe 2, UE), sont protégés dans l'ordre juridique communautaire et dont jouissent, en particulier, les fonctionnaires communautaires (arrêts de la Cour du 13 décembre 1989, Oyowe et Traore/Commission, C-100/88, Rec. p. 4285, point 16,

du 8 juillet 1999, Montecatini/Commission, C-235/92 P, Rec. p. I-4539, point 137, et du Tribunal du 17 février 1998, E/CES, T-183/96, RecFP p. I-A-67 et II-159, point 41).

91 Néanmoins, il résulte également d'une jurisprudence constante que les droits fondamentaux ne constituent pas des prérogatives absolues, mais peuvent comporter des restrictions, à condition que celles-ci répondent effectivement à des objectifs d'intérêt général et ne constituent pas, au regard du but poursuivi, une intervention démesurée et intolérable dans une société démocratique, qui porterait atteinte à la substance même des droits protégés (voir arrêts de la Cour du 5 octobre 1994, X/Commission, C-404/92 P, Rec. p. I-4737, point 18, et du Tribunal du 15 mai 1997, N/Commission, T-273/94, RecFP p. I-A-97 et II-289, point 73).

92 Examiné à la lumière de ces principes, l'article 17, second alinéa, du statut exprime l'idée de la nécessité permanente d'un juste équilibre entre la garantie de l'exercice d'un droit fondamental et la protection d'un objectif légitime d'intérêt général. Cet objectif peut ainsi justifier une restriction à l'exercice d'un tel droit seulement si les circonstances concrètes l'exigent et dans la mesure du nécessaire. D'après cette disposition, d'une part, le fonctionnaire est soumis à l'obligation de demander l'autorisation pour publier un article, mais, d'autre part, cette obligation est circonscrite aux articles qui se rattachent à l'activité des Communautés, et l'autorisation ne peut être refusée que «si la publication envisagée est de nature à mettre en jeu les intérêts des Communautés».

93 En l'espèce, pour déterminer si la décision attaquée a été prise dans le respect des règles applicables, il convient, tout d'abord, de déterminer si la Commission a commis une erreur manifeste d'appréciation en refusant l'autorisation de la publication du texte litigieux au motif que celle-ci était de nature à mettre en jeu les intérêts des Communautés.

94 À cet égard, il y a lieu de relever que, pour l'essentiel, le refus d'autorisation de la publication du texte litigieux est fondé sur les motifs examinés ci-après.

55 En premier lieu, dans le texte même de la décision attaquée, il est exposé:

«[Le texte litigieux] présente un point de vue qui n'est pas celui des services de la Commission, même si cette dernière n'a pas adopté une politique officielle à ce sujet.

Je reconnais l'importance d'avoir des débats internes qui reflètent les différentes options des politiques économiques. Néanmoins, lorsque nous sortons à l'extérieur il serait souhaitable de présenter un point de vue commun [...]

Je crains que les intérêts de la Communauté pourraient être mis en jeu lorsque la Commission et ses fonctionnaires manifestent des points de vue différents.»

56 Il y a lieu de constater que, dans la décision attaquée, l'AIPN se limite à déclarer que les intérêts des Communautés pourraient être mis en jeu lorsque la Commission et ses fonctionnaires expriment publiquement des points de vue différents. Cette décision n'explique pas pourquoi, dans le cas d'espèce, ce danger existerait.

57 Or, dans une société démocratique fondée sur le respect des droits fondamentaux, l'expression publique, par un fonctionnaire, de points de vue différents de ceux de l'institution pour laquelle il travaille ne peut pas, en soi, être considérée comme étant de nature à mettre en danger les intérêts des Communautés.

58 À l'évidence, l'utilité de la liberté d'expression est justement la possibilité d'exprimer des opinions différentes de celles retenues au niveau officiel. Admettre que la liberté d'expression puisse être limitée au seul motif que l'opinion en cause diffère de la position retenue par les institutions reviendrait à priver ce droit fondamental de son objet.

59 De la même manière, l'article 17, second alinéa, du statut serait privé d'effet, puisque, tel qu'il résulte de son libellé, cette disposition établit clairement le principe d'octroi de l'autorisation de publication en disposant expressément qu'une telle autorisation ne peut être refusée que si la publication en cause est de nature à mettre en jeu les intérêts des Communautés.

60 Par conséquent, la différence d'opinion entre le requérant et la Commission, dans la mesure où il n'est pas démontré que le fait de la rendre publique serait de nature à mettre en jeu, dans les circonstances de l'espèce, les intérêts des Communautés, ne peut pas justifier une restriction à l'exercice de la liberté d'expression.

61 En second lieu, conformément aux règles applicables, la motivation du refus d'autorisation de publication a été complétée par la décision de rejet de la réclamation (voir, par analogie, arrêt du Tribunal du 12 février 1992, Volger/Parlement, T-52/90, Rec. p. II-121, point 36).

62 Dans cette décision, la Commission affirme:

«[...] les éventuels conflits d'intérêt entre le fonctionnaire et son institution concernant une publication ne se limitent pas à l'hypothèse d'une opposition publique à une politique de l'institution, l'intérêt de celle-ci pouvant résider dans le maintien d'un maximum de marge de manœuvre avant d'arrêter une position définitive. Il est clair que le fait que le réclamant s'exprime nettement et par écrit sur la question [de savoir si l'Union économique et monétaire nécessite ou non une modulation territoriale des politiques salariales ou fiscales (le 'fine-tuning')] revient justement à compromettre le maintien de cette marge de manœuvre; même s'il devait présenter son opinion comme étant purement personnelle, l'on ne saurait exclure que le lecteur, malgré cette réserve, rapproche l'avis du fonctionnaire travaillant dans ce secteur à celui de son institution, à défaut précisément d'une opinion de celle-ci.»

63 En outre, en ce qui concerne l'argument du requérant, présenté dans sa réclamation, selon lequel la décision attaquée serait injustifiée du fait que l'AIPN l'avait autorisé à donner la conférence dont le contenu est repris dans le texte litigieux, la Commission, dans la décision portant rejet de la réclamation, déclare:

«[...] en aucun cas, un résumé d'une page ne peut être assimilé à un article de plus de 20 pages. L'autorisation sur la base du premier ne peut certainement pas emporter autorisation du second. Et ce principe est d'autant plus vrai dans le cas de l'espèce que des divergences importantes sont à relever entre le résumé de la conférence et le texte de l'article.»

64 Il y a lieu de constater que, dans la réponse à la réclamation, l'AIPN ajoute comme motif de sa décision la réduction de la marge de manœuvre de la Commission sur le «fine-tuning» qui découlerait du danger de confusion entre l'opinion du requérant et celle de l'institution.

65 Ce raisonnement ne saurait être accueilli.

66 En effet, il résulte du dossier que, à l'époque des faits, la Commission s'était déjà exprimée publiquement et clairement sur le «fine-tuning», à travers, notamment, des documents officiels, et que, du moins en dehors d'hypothèses exceptionnelles, elle doutait de l'utilité de ce type de mesure et du recours, déjà au niveau des États membres, à des politiques budgétaires discrétionnaires. En outre, le texte litigieux a été écrit par un fonctionnaire qui n'exerce aucune responsabilité de direction et qui s'exprime à titre individuel. De plus, ce texte concerne une matière sur laquelle la Commission prétend ne pas avoir de politique officielle. Par ailleurs, sa publication étant prévue dans le recueil des interventions faites au congrès en cause, il s'adresse à un public construit par des spécialistes en la matière, qui ont vraisemblablement la possibilité d'être bien informés des positions de la Commission.

67 Dans ces circonstances, la thèse de la défenderesse, qui soutient que la publication du texte litigieux pourrait entraîner un risque significatif de confusion de la part du public entre l'opinion du requérant et celle de l'institution, pouvant réduire la marge de manœuvre de celle-ci en la matière et, ainsi, mettre en jeu les intérêts des Communautés, n'est manifestement pas fondée.

68 Par ailleurs, même s'il peut exister une différence de portée entre une conférence et la publication du texte de celle-ci, une telle différence ne suffirait pas, dans les circonstances de l'espèce, à fonder la crainte de la diminution de la marge de manœuvre de la Commission. À cet égard, il suffit de rappeler, outre les éléments déjà mentionnés (voir ci-dessus point 66), que le texte litigieux expose la même thèse que celle présentée par le requérant lors de la conférence, qui avait déjà comme titre «La nécessité d'une modulation des politiques économiques aux niveaux local et régional au sein de l'Union monétaire de l'Union européenne» («The need for local and regional economic fine-tuning in the monetary union of the European Union»). En outre, le fait qu'une telle

conférence a été autorisée par l'AIPN confirme l'absence de risque de confusion entre l'opinion du requérant et celle de la Commission. Dans ces circonstances, la défenderesse ne saurait être fondée à soutenir qu'elle avait une crainte raisonnable de voir sa marge de manœuvre réduite par la publication du texte en cause.

69 Il résulte de tout ce qui précède que la défenderesse a commis une erreur manifeste d'appréciation en refusant l'autorisation de la publication du texte litigieux au motif qu'elle était de nature à mettre en jeu les intérêts des Communautés.

70 Dans cette mesure, le premier moyen du requérant, en ce qu'il invoque l'existence d'une erreur manifeste d'appréciation, doit être accueilli.

71 Il y a donc lieu d'annuler la décision attaquée, sans qu'il soit besoin d'examiner les autres moyens et arguments avancés par le requérant.

Sur les dépens

72 Aux termes de l'article 87, paragraphe 2, du règlement de procédure, toute partie qui succombe est condamnée aux dépens s'il est conclu en ce sens. La défenderesse ayant succombé, il y a lieu de la condamner aux dépens, conformément aux conclusions du requérant.

Par ces motifs,

LE TRIBUNAL (quatrième chambre)

déclare et arrête:

1) **La décision de la Commission du 10 juillet 1998, refusant au requérant l'autorisation de publier le texte de la conférence qu'il a donnée le 30 octobre 1997, est annulée.**

2) **La Commission supportera l'ensemble des dépens.**

Tiili Moura Ramos Mengozzi

Ainsi prononcé en audience publique à Luxembourg, le 14 juillet 2000.

Le greffier
H. Jung

Le président
V. Tiili

JUDGMENT OF THE COURT

6 March 2001 *

In Case C-274/99 P,

Bernard Connolly, a former official of the Commission of the European Communities, residing in London, United Kingdom, represented by J. Sambon and P.-P. van Gehuchten, avocats, with an address for service in Luxembourg,

appellant,

APPEAL against the judgment of the Court of First Instance of the European Communities (First Chamber) of 19 May 1999 in Joined Cases T-34/96 and T-163/96 *Connolly* v *Commission* [1999] ECR-SC I-A-87 and II-463, seeking to have that judgment set aside,

the other party to the proceedings being:

Commission of the European Communities, represented by G. Valsesia and J. Currall, acting as Agents, assisted by D. Waelbroeck, avocat, with an address for service in Luxembourg,

defendant at first instance,

* Language of the case: French.

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, C. Gulmann, A. La Pergola, M. Wathelet (Rapporteur), V. Skouris (Presidents of Chambers), D.A.O. Edward, J.-P. Puissochet, P. Jann, L. Sevón, R. Schintgen and N. Colneric, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: R. Grass,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 12 September 2000,

after hearing the Opinion of the Advocate General at the sitting on 19 October 2000,

gives the following

Judgment

1 By an application lodged at the Registry of the Court of Justice on 20 July 1999, Mr Connolly brought an appeal under Article 49 of the EC Statute of the Court of Justice and the corresponding provisions of the ECSC and the EAEC Statutes

of the Court of Justice against the judgment of the Court of First Instance of 19 May 1999 in Joined Cases T-34/96 and T-163/96 *Connolly v Commission* [1999] ECR-SC I-A-87 and II-463 ('the contested judgment'), by which the Court of First Instance dismissed, first, his action for annulment of the opinion of the Disciplinary Board of 7 December 1995 and of the decision of the appointing authority of 16 January 1996 removing him from his post without withdrawal of his entitlement to a retirement pension ('the contested decision') and, second, his action for damages.

Legal background

2 Article 11 of the Regulations and Rules applicable to officials and other servants of the European Communities ('the Staff Regulations') provides:

'An official shall carry out his duties and conduct himself solely with the interests of the Communities in mind; he shall neither seek nor take instructions from any government, authority, organisation or person outside his institution.

An official shall not without the permission of the appointing authority accept from any government or from any other source outside the institution to which he belongs any honour, decoration, favour, gift or payment of any kind whatever, except for services rendered either before his appointment or during special leave for military or other national service and in respect of such service.'

3 Article 12 of the Staff Regulations provides:

'An official shall abstain from any action and, in particular, any public expression of opinion which may reflect on his position.

...

An official wishing to engage in an outside activity, whether gainful or not, or to carry out any assignment outside the Communities must obtain permission from the appointing authority. Permission shall be refused if the activity or assignment is such as to impair the official's independence or to be detrimental to the work of the Communities.'

4 The second paragraph of Article 17 of the Staff Regulations states:

'An official shall not, whether alone or together with others, publish or cause to be published without the permission of the appointing authority any matter dealing with the work of the Communities. Permission shall be refused only where the proposed publication is liable to prejudice the interests of the Communities.'

The facts giving rise to the dispute

I The facts giving rise to the dispute are set out in the contested judgment as follows:

"1 At the material time, the applicant, Mr Connolly, an official of the Commission in Grade A4, Step 4, was Head of Unit 3, "EMS: National and Community Monetary Policies", in Directorate D, "Monetary Affairs" in the Directorate-General for Economic and Financial Affairs (DG II;...

2 On three occasions, dating from 1991, Mr Connolly submitted draft articles relating, respectively, to the application of monetary theories, the development of the European Monetary System and the monetary implications of the white paper on the future of Europe. Permission to publish the articles, which, under the second paragraph of Article 17 of the Staff Regulations, must be obtained prior to publication, was refused.

3 On 24 April 1995, Mr Connolly applied, under Article 40 of the Staff Regulations, for three months' unpaid leave on personal grounds commencing on 3 July 1995, stating as the reasons for his application (a) to assist his son during the school holidays in his preparation for United Kingdom university entrance; (b) to enable his father to spend some time with his family; (c) to spend some time reflecting on matters of economic theory and policy and to "reestablish acquaintance with the literature". The Commission granted him leave by decision of 2 June 1995.

4 By letter of 18 August 1995, Mr Connolly applied to be reinstated in the Commission service at the end of his leave on personal grounds. The Commission, by decision of 27 September 1995, granted that request and reinstated him in his post with effect from 4 October 1995.

5 Whilst on leave on personal grounds, Mr Connolly published a book entitled *The Rotten Heart of Europe — The Dirty War for Europe's Money* without requesting prior permission.

6 Early in September, more specifically between 4 and 10 September 1995, a series of articles concerning the book was published in the European and, in particular, the British press.

7 By letter of 6 September 1995, the Director-General for Personnel and Administration, in his capacity as appointing authority... informed the applicant of his decision to initiate disciplinary proceedings against him for infringement of Articles 11, 12 and 17 of the Staff Regulations and, in accordance with Article 87 of those regulations, invited him to a preliminary hearing.

8 The first hearing was held on 12 September 1995. The applicant then submitted a written statement indicating that he would not answer any questions unless he was informed in advance of the specific breaches he was alleged to have committed.

9 By letter of 13 September 1995, the appointing authority informed the applicant that the allegations of misconduct followed publication of his book, serialisation of extracts from it in *The Times* newspaper as well as the statements that he had made in an interview published in that newspaper, without having obtained prior permission. The appointing authority again

invited him to attend a hearing regarding those matters in the light of his obligations under Articles 11, 12 and 17 of the Staff Regulations.

10 On 26 September 1995, at a second hearing, the applicant refused to answer any of the questions put to him and filed a written statement in which he submitted that it was legitimate for him to have published a work without requesting prior permission because, when he did so, he was on unpaid leave on personal grounds. He added that the serialisation of extracts from his book in the press had been decided on by his publisher and that some of the statements contained in the interview had been wrongly attributed to him. Finally, Mr Connolly expressed doubts as to the objectivity of the disciplinary proceedings commenced against him in view, notably, of statements made about him to the press by the Commission's President and its spokesperson, and as to whether the confidential nature of the proceedings was being respected.

11 On 27 September 1995, the appointing authority decided, pursuant to Article 88 of the Staff Regulations, to suspend Mr Connolly from his duties with effect from 3 October 1995 and to withhold one-half of his basic salary during the period of his suspension.

12 On 4 October 1995, the appointing authority decided to refer the matter to the Disciplinary Board under Article 1 of Annex IX to the Staff Regulations ('Annex IX').

...

16 On 7 December 1995, the Disciplinary Board delivered an opinion, forwarded to the applicant on 15 December 1995, in which it recommended that the disciplinary measure of removal from post without withdrawal or reduction of his entitlement to a retirement pension should be imposed on him....

17 On 9 January 1996, the applicant was heard by the appointing authority pursuant to the third paragraph of Article 7 of Annex IX.

18 By decision of 16 January 1996, the appointing authority imposed on the applicant the disciplinary measure referred to in Article 86(2)(f) of the Staff Regulations, namely removal from post without withdrawal or reduction of his entitlement to a retirement pension....

19 The decision removing Mr Connolly from his post set out the following statement of reasons:

"Whereas on 16 May 1990 Mr Connolly was appointed Head of Unit [D.D.3];

Whereas by virtue of his duties Mr Connolly has been responsible for, *inter alia*, preparing and taking part in the work of the Monetary Committee, the Monetary Policy Sub-Committee and the Committee of [Governors], monitoring monetary policies in the Member States and analysing the monetary implications of the implementation of European economic and monetary union;

Whereas Mr Connolly has written a book, which was published at the beginning of September 1995 entitled *The Rotten Heart of Europe*;

Whereas that book deals with the development in recent years of the process of European integration in the economic and monetary field and has been written by Mr Connolly on the basis of the professional experience he has gained while carrying out his duties at the Commission;

Whereas Mr Connolly has not requested permission from the appointing authority to publish the book in question in accordance with Article 17 of the Staff Regulations, which is binding on all officials;

Whereas Mr Connolly could not have failed to be aware that he would be refused permission on the same grounds as those on which permission had previously been refused in respect of articles in which he had already outlined the ideas that form the core of the present book;

Whereas Mr Connolly mentions in the preface to *The Rotten Heart of Europe* that the idea for the book arose after he had requested permission to publish a chapter on the EMS in another book; he was refused permission and took the view that it would be worthwhile to work up that chapter and make it into a book in its own right;

Whereas Mr Connolly has approved, and has played an active part in, the promotion of his book, notably granting an interview to *The Times* newspaper on 4 September 1995, on which date *The Times* also published extracts from his book, and writing an article for *The Times*, which was published on 6 September 1995;

Whereas Mr Connolly could not have failed to be aware that the publication of his book reflected a personal opinion that conflicted with the policy adopted by the Commission in its capacity as an institution of the European Union responsible for pursuing a major objective and a fundamental policy choice laid down in the Treaty on European Union, namely economic and monetary union;

Whereas by his conduct Mr Connolly has seriously prejudiced the interests of the Communities and has damaged the image and reputation of the institution;

Whereas Mr Connolly has admitted receiving royalties paid to him by his publishers as consideration for the publication of his book;

Whereas Mr Connolly's overall conduct has reflected on his position as an official, given that an official is required to conduct himself solely with the interests of the Commission in mind;

Whereas, having frequently been refused permission to publish, a reasonably diligent official of his seniority and with his responsibilities could not have been unaware of the nature and gravity of such breaches of his obligations;

Whereas, in disregard of his duties of good faith and loyalty to the institution, Mr Connolly at no time advised his superiors of his intention to publish the book in question even though he was still bound, as an official on leave on personal grounds, by his duty of confidentiality;

Whereas Mr Connolly's conduct, on account of its gravity, involves an irremediable breach of the trust which the Commission is entitled to expect from its officials, and, as a consequence, makes it impossible for any employment relationship to be maintained with the institution;

...»

20 By letter of 7 March 1996, received at the Secretariat-General of the Commission on 14 March 1996, the applicant submitted a complaint under Article 90(2) of the Staff Regulations against the Disciplinary Board's opinion and against the decision to remove him from his post.

...

21 By an application lodged at the Registry of the Court of First Instance on 13 March 1996, the applicant brought an action for annulment of the Disciplinary Board's opinion (Case T-34/96).

...

23 On 18 July 1996 the applicant was informed of the decision expressly dismissing his complaint against the Disciplinary Board's opinion and the decision removing him from his post.

24 By an application lodged at the Registry of the Court of First Instance on 18 October 1996, the applicant brought an action for annulment of the Disciplinary Board's opinion and of the decision removing him from his post and for damages (Case T-163/96).

...

30 At the hearing, it was formally recorded that the claims and the pleas in law relied on in Case T-34/96 were repeated in their entirety in Case T-163/96 and that, consequently, the applicant was discontinuing the proceedings in Case T-34/96."

The contested judgment

6 Before the Court of First Instance, the appellant put forward seven pleas in law in support of his claim for annulment of the Disciplinary Board's opinion and the contested decision. First, he alleged that there had been irregularities in the disciplinary proceedings. Second, he alleged that the reasons given were insufficient and that the Disciplinary Board had infringed Article 7 of Annex IX, the rights of the defence and the principle of sound administration. By his third, fourth and fifth pleas, the applicant submitted that there had been infringements of, respectively, Articles 11, 12 and 17 of the Staff Regulations. The basis of the sixth plea was manifest error of assessment and breach of the principle of proportionality. Finally, the seventh plea alleged misuse of powers.

The first plea in law: irregularities in the disciplinary proceedings

7 The applicant complained, *inter alia*, that the Disciplinary Board and the appointing authority took account of matters which were not dealt with in the disciplinary proceedings, namely, first, the complaint that Mr Connolly's book expressed an opinion which was inconsistent with the Commission's policy of

bringing about economic and monetary union and, second, the fact that he had written an article, published on 6 September 1995 in *The Times* newspaper, and taken part in a television programme on 26 September 1995. He also complained that the Disciplinary Board had not prepared a report on the case as a whole and that the Chairman of the Board had taken an active and biased part in its proceedings.

The claim that matters not dealt with in the disciplinary proceedings were taken into account

8 In particular, the Court of First Instance held as follows:

'44 The Court must also reject the applicant's argument that the appointing authority's report to the Disciplinary Board did not include the contents of the book among the facts complained of but was limited to referring to formal infringements of Articles 11, 12 and 17 of the Staff Regulations. In that regard, it must be observed that the report indicated, without any ambiguity, that the contents of the book at issue, in particular its polemical nature, were among the facts alleged against the applicant. In particular, in paragraph 23 et seq. of the report, the appointing authority considered that there had been an infringement of Article 12 of the Staff Regulations on the grounds that "publication of the book in itself reflects on Mr Connolly's position as he has been head of the unit at the Commission... responsible for the matters recounted in the book" and, "furthermore, in the book, Mr Connolly makes certain derogatory and unsubstantiated attacks on Commissioners and other members of the Commission's staff in such a way as to reflect on his position and to bring the Commission into disrepute contrary to his obligations under Article 12." The report went on to cite specifically certain statements made by the applicant in his book and the annex to the report included numerous extracts from it.

45 It follows that, in accordance with Article 1 of Annex IX, the appointing authority's report apprised the applicant of the facts alleged against him with sufficient precision for him to be in a position to exercise his rights of defence.

46 That interpretation is also borne out by the fact that, as is clear from the minutes of the applicant's hearing before it, the Disciplinary Board, on several occasions during the hearing, made its position clear regarding the purpose and content of his book.

47 Furthermore, the applicant, at his final hearing before the appointing authority on 9 January 1996, neither contended that the Disciplinary Board's opinion was founded on complaints which ought to be regarded as new facts nor applied, as he was entitled to do under Article 11 of Annex IX, for the disciplinary proceedings to be reopened (see, to that effect, the judgment of the Court of First Instance in Case T-549/93 *D* v *Commission* [1995] ECR-SC I-A-13, II-43, paragraph 55).

48 As to the applicant's argument that the report submitted to the Disciplinary Board did not refer to the fact that he had published an article on 6 September 1995 for the purpose of promoting his book or that he had taken part in a television broadcast on 26 September 1995, it need merely be noted that, contrary to the applicant's contention, the appointing authority had specifically referred to those facts in paragraph 19 of the report.

49 Accordingly, the first part of the plea must be rejected."

The Disciplinary Board's failure to draw up a report

s In particular, the Court of First Instance held as follows: "

'73 In the present case, the minutes of the first meeting of the Disciplinary Board show that, in accordance with Article 3 of Annex IX, the Chairman appointed one of the members of the Board as rapporteur to prepare a report on the matter as a whole. Although it appears from the minutes in the file that the rapporteur was not the only member of the Disciplinary Board to question the applicant and the witness at the hearings, it cannot be inferred from that fact that the rapporteur's duties were not performed.

74 Furthermore, as regards the complaint that no report was prepared on the matter as a whole, Article 3 of Annex IX is confined to laying down the rapporteur's duties and does not prescribe any specific formalities concerning the way in which they should be performed, such as whether a written report should be produced or whether such a report should be disclosed to the parties. Consequently, there is no reason why the rapporteur should not present his report orally to the other members of the Disciplinary Board. In the present case, the applicant has failed to establish that no report was presented. Furthermore, the applicant has not produced the slightest evidence to show either that the Disciplinary Board failed to undertake an inquiry which was sufficiently complete and which afforded him all the guarantees intended by the Staff Regulations (see Case 228/83 *F v Commission* [1985] ECR 275, paragraph 30, and Case T-500/93 *Y v Court of Justice* [1996] ECR-SC I-A-335, II-977, paragraph 52), or, therefore, that it was unable to adjudicate on the matter with full knowledge of the facts. In those circumstances, the applicant's argument must be rejected.

...

76 Consequently, the third part of the plea must be rejected.'

The inappropriate participation of the Chairman of the Disciplinary Board in the proceedings

10 In particular, the Court of First Instance held as follows:

'82 In the present case, it is clear from the actual wording of the Disciplinary Board's opinion that it was not necessary for its Chairman to take part in the vote on the reasoned opinion and that the opinion was adopted by a majority of the four other members. It is also clear from the minutes on the file that, when the proceedings were opened, the Chairman of the Disciplinary Board confined himself to inviting the members of the Board to consider whether the facts complained of had been proved and to decide on the severity of the disciplinary measure to be imposed, that being within the normal scope of his authority. Therefore, the applicant cannot reasonably plead an infringement of Article 8 of Annex IX on the ground that the Chairman of the Disciplinary Board played an active part in the deliberations.

83 In any event, it must be emphasised that the Chairman of the Disciplinary Board must be present during its proceedings so that, *inter alia*, he can, if necessary, vote with full knowledge of the facts to resolve tied votes or procedural questions.

84 The bias that the Chairman of the Disciplinary Board is alleged to have demonstrated *vis-à-vis* the applicant during the hearing is not corroborated by any evidence. Consequently, since it has, moreover, been neither alleged nor established that the Disciplinary Board failed in its duty, as an investigative body, to act in an independent and impartial manner (see, in that regard, *F v Commission*, paragraph 16, and Case T-74/96 *Tzoumas v Commission* [1998] ECR-SCT A-129, II-343, paragraph 340), the applicant's argument must be rejected.

85 Therefore, the fourth part of the plea cannot be accepted.'

11 The Court of First Instance therefore rejected the first plea in law.

The second plea in law: the reasons given were insufficient and the Disciplinary Board infringed Article 7 of Annex IX, the rights of the defence and the principle of sound administration

12 The appellant submitted that, while purporting to set out a formal statement of reasons, the Disciplinary Board's opinion and the contested decision were actually vitiated by insufficient reasoning, inasmuch as the arguments raised by him in his defence remained unanswered. In particular, no answer was given to his claims that the second paragraph of Article 17 of the Staff Regulations does not apply to officials taking leave on personal grounds, that the appointing authority incorrectly interpreted Article 12 of the Staff Regulations and that certain statements made by Commission officials were improper and prejudiced the outcome of the proceedings.

13 The Court of First Instance held, in particular, as follows:

'92 Under Article 7 of Annex IX, the Disciplinary Board must, after consideration of the documents submitted and having regard to any statements made orally or in writing by the official concerned and by witnesses, and also to the results of any inquiry undertaken, deliver a reasoned opinion of the disciplinary measure appropriate to the facts complained of.

93 Furthermore, it is settled case-law that the statement of the reasons on which a decision adversely affecting a person is based must allow the Community Courts to exercise their power of review as to its legality and must provide the person concerned with the information necessary to enable him to decide whether or not the decision is well founded (Case C-166/95 P *Commission* v *Daffix* [1997] ECR I-983, paragraph 23; Case C-188/96 P *Commission* v *V* [1997] ECR I-6561, paragraph 26; and Case T-144/96 *Y* v *Parliament* [1998] ECR-SC I-A-405, II-1153, paragraph 21). The question whether the statement of reasons on which the measure at issue is based satisfies the requirements of the Staff Regulations must be assessed in the light not only of its wording but also of its context and all the legal rules regulating the matter concerned (*Y* v *Parliament*, cited above, paragraph 22). It should be emphasised that, although the Disciplinary Board and the appointing authority are required to state the factual and legal matters forming the legal basis for their decisions and the considerations which have led to their adoption, it is not, however, necessary that they discuss all the factual and legal points which have been raised by the person concerned during the proceedings (see, by analogy, Joined Cases 43/82 and 63/82 *VBVB and VBBB* v *Commission* [1984] ECR 19, paragraph 22).

94 In the present case, the Disciplinary Board's opinion specifically drew attention to the applicant's contention that the second paragraph of Article 17 of the Staff Regulations did not apply in his case since he had been on leave on personal grounds. The reason given by the Disciplinary Board and the appointing authority for the fact that Article 17 did apply was that "every official remains bound [by it]". The reasons for the application of Article 12 of the Staff Regulations are also stated to the requisite legal standard. The Disciplinary Board's opinion and the decision removing the applicant from his post outline the applicant's duties, draw attention to the nature of the statements made in his book and the manner in which he ensured that it would be published, and conclude that, as a whole, the applicant's conduct adversely reflected on his position. The opinion and the decision removing him from his post thus clearly establish a link between the applicant's conduct and the prohibition in Article 12 of the Staff Regulations and set out the essential reasons why the Disciplinary Board and the appointing authority considered that that article had been infringed. The question whether such an assessment is sufficient entails consideration of the merits of the case rather than consideration of the adequacy or otherwise of the statement of reasons.

95 As regards the applicant's complaint regarding the lack of response to his argument that certain statements made by members of the Commission jeopardised the impartial nature of the proceedings against him, the documents before the Court show that he confined that argument to a submission to the Disciplinary Board that "this situation call ed] for an exceptional degree of vigilance and independence [on its part]" (Annex A.1 to the application, page 17). The applicant does not allege that, in the present case, the Disciplinary Board failed in its duty as an investigative body to act in an independent and impartial way. Consequently, that complaint is not relevant.

...

97 The Court must also reject the applicant's argument that the Disciplinary Board's opinion and the decision removing him from his post contain an insufficient statement of reasons in that they state that the applicant "could not have failed to be aware that the publication of his book reflected a personal opinion that conflicted with the policy adopted by the Commission in its capacity as an institution of the European Union responsible for pursuing a major objective and a fundamental policy choice laid down in the Treaty on European Union, namely economic and monetary union". The dispute concerned an obvious and well-known difference of opinion between the applicant and the Commission regarding the Union's monetary policy (order in *Connolly* v *Commission*, cited above, paragraph 36) and the book in question, as is clear from the documents before the Court, is the patent expression of that difference of opinion, the applicant stating in particular that "[his] central thesis is that ERM [the Exchange Rate Mechanism] and EMU are not only inefficient but also undemocratic a danger not only to our wealth but to our four freedoms and, ultimately, our peace" (page 12 of the book).

98 It should be added that the opinion and the decision removing the applicant from his post constituted the culmination of the disciplinary proceedings, the

details of which were sufficiently familiar to the applicant (*Daffix v Commission*, paragraph 34). As is clear from the Disciplinary Board's opinion, the applicant had himself explained at the hearing on 5 December 1995 that for several years he had been describing in documents prepared in the course of his duties as Head of Unit II.D.3 "contradictions which he had identified in the Commission's policies on economic and monetary matters" and that "since his critiques and proposals were blocked by his superiors, he had decided, given the vital importance of the matter at issue and the danger that the Commission's policy entailed for the future of the Union, to make them public". Although in his reply the applicant took exception to those statements in the Disciplinary Board's opinion, it is none the less the case that they are clearly confirmed by the minutes of the hearing, the contents of which he does not dispute (see, specifically, pages 4 to 7 of the minutes of the hearing).

99 In view of those factors, the statement of reasons in the Disciplinary Board's opinion and in the decision removing the applicant from his post cannot, consequently, be regarded as insufficient in that regard.

...

101 Finally, taking account of the factors set out above, there can be no grounds for alleging breach of the principle of sound administration or of the rights of the defence on the basis that the Disciplinary Board conducted its proceedings on the same day as the applicant was heard, since that fact rather tends to show that, on the contrary, the Board acted diligently. It must also be observed that the Disciplinary Board's opinion was finally adopted two days after that hearing.

102 It follows that the plea must be rejected."

The third plea in law: infringement of Article 11 of the Staff Regulations

11 The appellant submitted that the purpose of Article 11 of the Staff Regulations is not to prohibit officials from receiving royalties from the publication of their work but to ensure their independence by prohibiting them from taking instructions from persons outside their institution. Moreover, in receiving royalties, the appellant did not take instructions from any person outside the Commission.

13 The Court of First Instance held as follows:

> '108 In that regard, it is clear both from the applicant's statements to the Disciplinary Board and from the deposition of his publisher submitted by the applicant at that time that royalties on the sales of his book were actually paid to him by his publisher. Therefore, the applicant's argument that there was no infringement of Article 11 of the Staff Regulations on the basis that receipt of those royalties did not result in any person outside his institution exercising influence over him cannot be accepted. Such an argument takes no account of the objective conditions in which the prohibition laid down by the second paragraph of Article 11 of the Staff Regulations operates, namely acceptance of payment of any kind from any person outside the institution, without the permission of the appointing authority. The Court finds that those conditions were met in the present case.
>
> 109 The applicant cannot reasonably maintain that that interpretation of the second paragraph of Article 11 of the Staff Regulations entails a breach of the right to property as laid down in Article 1 of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950 (hereinafter "the ECHR").

110 First, it should be observed that in the present case there has been no infringement of the right to property, since the Commission has not confiscated any sums received by the applicant by way of remuneration for his book.

111 Furthermore, according to the case-law, the exercise of fundamental rights, such as the right to property, may be subject to restrictions, provided that the restrictions correspond to objectives of general interest pursued by the Community and do not constitute a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed (see Case 265/87 *Schräder v Hauptzollamt Gronau* [1989] ECR 2237, paragraph 15 and the case-law cited therein). The rules laid down by Article 11 of the Staff Regulations, under which officials must conduct themselves solely with the interests of the Communities in mind, are a response to the legitimate concern to ensure that officials are not only independent but also loyal *vis-à-vis* their institution (see, in that regard, Case T-273/94 *N v Commission* [1997] ECR-SC I-A-97, II-289, paragraphs 128 and 129), an objective whose pursuit justifies the slight inconvenience of obtaining the appointing authority's permission to receive sums from sources outside the institution to which the official belongs.

..

113 There is no evidence at all of the practice which allegedly existed within the Commission of allowing royalties to be received for services provided by officials on leave on personal grounds. Furthermore, that argument is of no relevance in the absence of any contention that the practice concerned applied to works published without the prior permission provided for in Article 17 of the Staff Regulations. The applicant is not maintaining therefore that he had received any clear assurances which might have given him real grounds for expecting that he would not be required to apply for permission under Article 11 of the Staff Regulations.

114 Accordingly, the plea must be rejected.'

The fourth plea in law infringement of Article 12 of the Staff Regulations

16 The appellant submitted that the complaint that he had infringed Article 12 of the Staff Regulations was unlawful since it was in breach of the principle of freedom of expression laid down in Article 10 of the ECHR, that the book at issue was a work of economic analysis and was not contrary to the interests of the Community, that the Commission misrepresents the scope of the duty of loyalty and that the alleged personal attacks in the book are merely instances of 'lightness of style' in the context of an economic analysis.

17 So far as this plea in law is concerned, the Court of First Instance held as follows:

'124 According to settled case-law, [the first paragraph of Article 12 of the Staff Regulations] is designed, primarily, to ensure that Community officials, in their conduct, present a dignified image which is in keeping with the particularly correct and respectable behaviour one is entitled to expect from members of an international civil service (Case T-146/94 *Williams v Court of Auditors* [1996] ECR-SC I-A-103, II-329, paragraph 65; hereinafter "*Williams II*"; *N v Commission*, paragraph 127, and Case T-183/96 *E v ESC* [1998] ECR-SC I-A-67, II-159, paragraph 39). It follows, in particular, that where insulting remarks are made publicly by an official, which are detrimental to the honour of the persons to whom they refer, that in itself constitutes a reflection on the official's position for the purposes of the first paragraph of Article 12 of the Staff Regulations (order of 21 January 1997 in Case C-156/96 P *Williams v Court of Auditors* [1997] ECR I-239, paragraph 21; Case T-146/89 *Williams v Court of Auditors* [1991] ECR II-1293, paragraphs 76 and 80 (hereinafter "*Williams I*"), and *Williams II*, paragraph 66).

125 In the present case, the documents before the Court and the extracts which the Commission has cited show that the book at issue contains numerous aggressive, derogatory and frequently insulting statements, which are detrimental to the honour of the persons and institutions to which they refer and which have been extremely well publicised, particularly in the press. Contrary to the appellant's contention, the statements cited by the Commission, and referred to in the appointing authority's report to the Disciplinary Board, cannot be categorised as mere instances of "lightness of style" but must be regarded as, in themselves, reflecting on the official's position.

126 The argument that ultimately neither the Disciplinary Board nor the appointing authority relied on the abovementioned complaint when giving reasons for the dismissal is unfounded. Both of them specifically stated in the opinion and in the decision removing Mr Connolly from his post, that "Mr Connolly's behaviour, taken as a whole, has reflected on his position". The fact that extracts from the book are not expressly cited in the decision removing the applicant from his post (as they were in the appointing authority's report to the Disciplinary Board) cannot therefore be interpreted as meaning that the complaint concerning an infringement of the first paragraph of Article 12 of the Staff Regulations had been dropped. That is particularly so since the decision removing the applicant from his post constitutes the culmination of disciplinary proceedings, with whose details the applicant was sufficiently familiar and during which, as is clear from the minutes in the file, the applicant had had an opportunity to give his views on the content of the statements found in his book.

127 Further, the first paragraph of Article 12 of the Staff Regulations specifically sets out, as do Articles 11 and 21, the duty of loyalty incumbent upon every official (see *N v Commission*, paragraph 129, approved on appeal by the Court of Justice's order in Case C-252/97 P *N v Commission* [1998] ECR I-4871). Contrary to the applicant's contention, it cannot be concluded from the judgment in *Williams I* that that duty arises only under Article 21 of the Staff Regulations, since the Court of First Instance drew attention in that judgment to the fact that the duty of loyalty constitutes a fundamental duty owed by every official to the institution to which he belongs and to his superiors, a duty "of which Article 21 of the Staff Regulations is a particular manifestation".

Consequently, the Court must reject the argument that the appointing authority could not legitimately invoke, *vis-à-vis* the applicant, a breach of his duty of loyalty, on the ground that the report to the Disciplinary Board did not cite an infringement of Article 21 of the Staff Regulations.

128 Similarly, the Court must reject the argument that the duty of loyalty does not involve preserving the relationship of trust between the official and his institution but involves only loyalty as regards the Treaties. The duty of loyalty requires not only that the official concerned refrains from conduct which reflects on his position and is detrimental to the respect due to the institution and its authorities (see, for example, the judgment in *Williams I*, paragraph 72, and Case T-293/94 *Vela Palacios v ESC* [1996] ECR-SC I A 297, II-893, paragraph 43), but also that he must conduct himself, particularly if he is of senior grade, in a manner that is beyond suspicion in order that the relationship of trust between that institution and himself may at all times be maintained (*N v Commission*, paragraph 129). In the present case, it should be observed that the book at issue, in addition to including statements which in themselves reflected on his position, publicly expressed, as the appointing authority has pointed out, the applicant's fundamental opposition to the Commission's policy, which it was his responsibility to implement, namely bringing about economic and monetary union, an objective which is, moreover, laid down in the Treaty.

129 In that context, it is not reasonable for the applicant to contend that there has been a breach of the principle of freedom of expression. It is clear from the case-law on the subject that, although freedom of expression constitutes a fundamental right which Community officials also enjoy (Case C-100/88 *Oyowe and Traore v Commission* [1989] ECR 4285, paragraph 16), it is nevertheless the case that Article 12 of the Staff Regulations, as construed above, does not constitute a bar to the freedom of expression of those officials but imposes reasonable limits on the exercise of that right in the interest of the service (*E v ESC*, paragraph 41).

130 Finally, it must be emphasised that that interpretation of the first paragraph of Article 12 of the Staff Regulations cannot be challenged on the ground that, in the present case, publication of the book at issue

occurred during a period of leave on personal grounds. In that regard, it is clear from Article 35 of the Staff Regulations that leave on personal grounds constitutes one of the administrative statuses which an official may be assigned, with the result that, during such a period, the person concerned remains bound by the obligations borne by every official, in the absence of express provision to the contrary. Since Article 12 of the Staff Regulations applies to all officials, without any distinction based on their status, the fact that the applicant was on such leave cannot release him from his obligations under that article. That is particularly so since an official's concern for the respect due to his position is not confined to the particular time at which he carries out a specific task but is expected from him under all circumstances (*Williams II*, paragraph 68). The same is true of the duty of loyalty which, according to the case-law, applies not only in the performance of specific tasks but extends to the whole relationship between the official and the institution ; *Williams I*, paragraph 72 and *E* v *ESC*, paragraph 47).

131 Accordingly, the appointing authority was fully entitled to take the view that the applicant's behaviour had reflected on his position and involved an irremediable breach of the trust which the Commission is entitled to expect from its officials.

132 It follows that the plea must be rejected.'

The fifth plea in law: infringement of Article 17 of the Staff Regulations

133 The appellant submitted, *inter alia*, that the interpretation of the second paragraph of Article 17 of the Staff Regulations on which the Disciplinary Board's opinion and the contested decision are based is contrary to the principle of freedom of expression laid down in Article 10 of the ECHR, in that it leads, inherently, to the prohibition of any publication. Constraints on freedom of expression are permissible only in the exceptional cases listed in Article 10(2) of the ECHR. Furthermore, Article 17 of the Staff Regulations does not apply to

officials who are on leave on personal grounds and the appellant was, in any event, justified in believing that to be the case, having regard to the practice followed by the Commission, at least in DG II.

19 The Court of First Instance rejected this plea for the following reasons:

> '147 In the present case, it is not disputed that the applicant went ahead with publication of his book without applying for the prior permission required by the provision cited above. However, the applicant, without expressly raising an objection of illegality to the effect that the second paragraph of Article 17 of the Staff Regulations as a whole is unlawful, submits that the Commission's interpretation of the provision is contrary to the principle of freedom of expression.
>
> 148 In that regard, it must be recalled that the right to freedom of expression laid down in Article 10 of the ECHR constitutes, as has already been made clear, a fundamental right, the observance of which is guaranteed by the Community Courts and which Community officials also enjoy (*Oyowe and Traore v Commission*, paragraph 16, and *L v ESC*, paragraph 41). None the less, it is also clear from settled case law that fundamental rights do not constitute an unfettered prerogative but may be subject to restrictions, provided that the restrictions in fact correspond to objectives of general public interest pursued by the Community and do not constitute, with regard to the objectives pursued, a disproportionate and intolerable interference which infringes upon the very substance of the rights protected (see *Schräder v Hauptzollamt Gronau*, paragraph 15; Case C-404/92 P *X v Commission* [1994] ECR I-4737, paragraph 18; Case T-176/94 *K v Commission* [1995] ECR-SC I-A-203, II-621, paragraph 33; and *N v Commission*, paragraph 73).

149 In the light of those principles and the case-law on Article 12 of the Staff Regulations (see paragraph 129 above and *F* v *ESC*, paragraph 41), the second paragraph of Article 17 of the Staff Regulations, as interpreted by the decision removing the applicant from his post, cannot be regarded as imposing an unwarranted restriction on the freedom of expression of officials.

150 First, it must be emphasised that the requirement that permission be obtained prior to publication corresponds to the legitimate aim that material dealing with the work of the Communities should not undermine their interests and, in particular, as in the present case, the reputation and image of one of the institutions.

151 Second, the second paragraph of Article 17 of the Staff Regulations does not constitute a disproportionate measure in relation to the public-interest objective which the article concerned seeks to protect.

152 In that connection, it should be observed at the outset that, contrary to the applicant's contention, it cannot be inferred from the second paragraph of Article 17 of the Staff Regulations that the rules it lays down in respect of prior permission thereby enable the institution concerned to exercise unlimited censorship. First, under that provision, prior permission is required only when the material that the official wishes to publish, or to have published, "[deals] with the work of the Communities". Second, it is clear from that provision that there is no absolute prohibition on publication, a measure which, in itself, would be detrimental to the very substance of the right to freedom of expression. On the contrary, the last sentence of the second paragraph of Article 17 of the Staff Regulations sets out clearly the principles governing the grant of permission, specifically providing that permission may be refused only where the publication in point is liable to prejudice the interests of the Communities. Moreover, such a decision may be contested under Articles 90 and 91 of the Staff Regulations, so that an official who takes the view that he was refused permission in breach of the Staff Regulations is able to have

recourse to the legal remedies available to him with a view to securing review by the Community Courts of the assessment made by the institution concerned.

153 It must also be emphasised that the second paragraph of Article 17 of the Staff Regulations is a preventive measure designed on the one hand, to ensure that the Communities' interests are not jeopardised, and, on the other, as the Commission has rightly pointed out, to make it unnecessary for the institution concerned, after publication of material prejudicing the Communities' interests, to take disciplinary measures against an official who has exercised his right of expression in a way that is incompatible with his duties.

154 In the present case, the appointing authority maintained, in its decision removing the applicant from his post, that he had failed to comply with that provision on the grounds that, first, he had not requested permission to publish his book, second, he could not have failed to be aware that he would be refused permission on the same grounds as those on which permission had previously been refused in respect of articles of similar content, and, finally, his conduct had seriously prejudiced the Communities' interests and had damaged the institution's image and reputation.

155 In the light of all those considerations, therefore, it cannot be inferred from the decision removing the applicant from his post that the finding that he had infringed the second paragraph of Article 17 of the Staff Regulations would have been made even if the Communities' interests had not been prejudiced. Accordingly there is nothing to indicate that the scope attributed by the appointing authority to that provision goes further than the aim pursued and is therefore contrary to the principle of freedom of expression.

156 In those circumstances, the plea alleging breach of the right to freedom of expression must be rejected.

157 The argument that the second paragraph of Article 17 of the Staff Regulations does not apply to officials who are on leave on personal grounds is also unfounded. As pointed out above (paragraph 130), it follows from Article 35 of the Staff Regulations that an official on such leave retains his status as an official throughout the period of leave and therefore remains bound by his obligations under the regulations in the absence of express provision to the contrary. The second paragraph of Article 17 of the Staff Regulations applies to all officials and does not draw any distinction based on the status of the person concerned. Consequently, the fact that the applicant was on leave on personal grounds when his book was published does not release him from his obligation under the second paragraph of Article 17 of the Staff Regulations to request permission from the appointing authority prior to publication.

158 That interpretation is not undermined by the fact that, unlike the second paragraph of Article 17 of the Staff Regulations, the first paragraph thereof expressly provides that an official continues to be bound by his duty of confidentiality after leaving the service. An official on leave on personal grounds is not comparable to an official whose service has terminated, as provided in Article 47 of the Staff Regulations, and who, therefore, does not fall within any of the administrative statuses listed in Article 35 of the Staff Regulations.

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160 Accordingly, the Disciplinary Board and the appointing authority were right to find that the applicant had infringed the second paragraph of Article 17 of the Staff Regulations.

161 Finally, the applicant's allegation that a general practice existed in the Commission, by virtue of which officials on leave on personal grounds were not required to request prior permission for publication, is in no way

substantiated by the statement cited by him. In that statement, the former Director-General of DG II confines himself to saying that Mr Connolly had taken unpaid leave of one year in 1985 in order to work for a private financial institution and, during that period, he had not considered it necessary to approve the texts prepared by Mr Connolly for that institution or even to comment on them. It follows that there is no basis for the argument.

162 Consequently, the plea must be rejected.'

The sixth plea in law: manifest error of assessment and breach of the principle of proportionality

20 The appellant claimed that the contested decision was vitiated by a manifest error of assessment as to the facts and that it was in breach of the principle of proportionality, in that it failed to take account of various mitigating circumstances.

21 The Court of First Instance held as follows:

'165 It is settled case-law that once the truth of the allegations against the official has been established, the choice of appropriate disciplinary measure is a matter for the appointing authority and the Community Courts may not substitute their own assessment for that of the authority, save in cases of manifest error or a misuse of powers (Case 46/72 *De Greef v Commission* [1973] ECR 543, paragraph 45; *F v Commission*, paragraph 34; *Williams I*, paragraph 83; and *D v Commission*, paragraph 96). It must also be borne in mind that the determination of the penalty to be imposed is based on a comprehensive appraisal by the appointing authority of all the particular facts and circumstances peculiar to each

individual case, since Articles 86 to 89 of the Staff Regulations do not specify any fixed relationship between the measures provided for and the various sorts of infringements and do not state the extent to which the existence of aggravating or mitigating circumstances should affect the choice of penalty (Case 403/85 *F* v *Commission* [1987] ECR 645, paragraph 26; *Williams I*, paragraph 83; and *V* v *Parliament*, paragraph 34).

166 In the present case, it must be first be pointed out that the truth of the allegations against the applicant has been established.

167 Second, the penalty imposed cannot be regarded as either disproportionate or as resulting from a manifest error of assessment. Even though it is not disputed that the applicant had a good service record, the appointing authority was nevertheless fully entitled to find that, having regard to the gravity of the facts established and the applicant's grade and responsibilities, such a factor was not capable of mitigating the penalty to be imposed.

168 Furthermore, the applicant's argument that account should have been taken of his good faith regarding what he believed to be the scope of the duties of an official on leave on personal grounds cannot be accepted. It is clear from the case-law that officials are deemed to know the Staff Regulations (Case T-12/94 *Daffix* v *Commission* [1997] ECR-SC I-A-453, II-1197, paragraph 116; Joined Cases T-116/96, T-212/96 and T-215/96 *Telchini and Others* v *Commission* [1998] ECR-SC I-A-327, II-947, paragraph 59), with the result that their alleged ignorance of their obligations cannot constitute good faith. That argument has even less force in the present case since the applicant has admitted that his colleagues knew of his intention to work on the book at issue during his leave on personal grounds, whereas, in his request to the appointing authority under Article 40 of the Staff Regulations, he had given reasons unconnected with his book. Given that such statements are contrary to the honesty and trust which should govern relations between the administration and officials and are incompatible with the integrity which each

official is required to show (see, to that effect, Joined Cases 175/86 and 209/86 *M* v *Council* [1988] ECR 1891, paragraph 21), the appointing authority was entitled to treat the applicant's argument concerning his alleged good faith as unfounded.

169 Consequently, the plea must be rejected.'

The seventh plea in law: misuse of powers

21 Finally, the appellant asserted that there was a body of evidence establishing misuse of powers.

22 In rejecting this plea, the Court of First Instance gave the following grounds:

'171 According to the case-law, a misuse of powers consists in an administrative authority using its powers for a purpose other than that for which they were conferred on it. Thus, a decision may amount to a misuse of powers only if it appears, on the basis of objective, relevant and consistent indicia, to have been taken for purposes other than those stated (*Williams* I, paragraphs 87 and 88).

172 As regards the statements made by certain members of the Commission before commencement of the disciplinary proceedings, it need merely be observed that... those statements constituted no more than a provisional

assessment by the relevant members of the Commission and could not, in the circumstances of the case, adversely affect the proper conduct of the disciplinary proceedings.

173 Nor can the applicant's argument that the Commission should have warned him of the risks that he was running by publishing his book be accepted. The Commission rightly points out that it cannot be held liable for initiatives which the applicant had taken care to conceal from it when he requested leave on personal grounds. Furthermore, the arguments alleging that there were irregularities in the disciplinary proceedings and that the applicant acted in good faith must also be rejected for the reasons set out in connection with the first and sixth pleas.

174 As to the argument alleging that the Commission changed the general rules for calculating salary reductions in cases of suspension, it need merely be pointed out that the change was not specifically linked to the applicant's removal from his post and cannot therefore constitute proof of the alleged misuse of powers.

175 Accordingly, it has not been established that, when imposing the disciplinary measure, the appointing authority pursued any aim other than that of safeguarding the internal order of the Community civil service. The seventh plea must therefore be rejected."

176 The Court of First Instance therefore rejected the pleas for annulment and, consequently, the claim for damages.

177 Accordingly, the Court of First Instance dismissed the application and ordered each of the parties to bear its own costs.

The appeal

25 Mr Connolly claims that the Court of Justice should:

— set aside the contested judgment;

annul so far as necessary the opinion of the Disciplinary Board;

— annul the contested decision;

— annul the decision of 12 July 1996 rejecting his administrative complaint;

order the Commission to pay him BEF 7 500 000 in respect of material damage and BEF 1 500 000 in respect of non-material damage;

— order the Commission to pay the costs both of the proceedings before the Court of First Instance and of the present proceedings.

26 The Commission contends that the Court of Justice should:

— dismiss the appeal as partially inadmissible and, in any event, as entirely unfounded;

— dismiss the claim for damages as inadmissible and unfounded;

— order Mr Connolly to pay the costs in their entirety.

28 In his appeal the appellant puts forward 13 grounds of appeal.

The first ground of appeal

29 By his first ground of appeal, Mr Connolly complains that the Court of First Instance failed to take account of the fact that Articles 12 and 17 of the Staff Regulations establish a system of prior censorship which is, in principle, contrary to Article 10 of the ECHR as interpreted by the European Court of Human Rights (hereinafter "the Court of Human Rights").

30 Furthermore, that system does not incorporate the substantive and procedural conditions required by Article 10 of the ECHR whenever a restriction is imposed on freedom of expression as safeguarded by that provision. In particular, it fails to comply with the requirement that any restriction must pursue a legitimate aim, must be prescribed by a legislative provision which makes the restriction foreseeable, must be necessary and appropriate to the aim pursued and must be amenable to effective judicial review.

31 The appellant also complains that the Court of First Instance neither balanced the interests involved nor ascertained whether the contested decision was actually justified by a pressing social need. In that regard, the appellant submits that if that decision was taken in order to safeguard the interests of the institution and the people affected by the book at issue, that, to be effective, it should have been accompanied by measures designed to prevent distribution of the book. Such measures were not, however, adopted by the Commission.

32 The Commission contends, as a preliminary point, that the first ground of appeal should be rejected as inadmissible on the ground that it is concerned with the substantive legality of the rules concerning permission laid down by Article 17 of the Staff Regulations rather than with the Court of First Instance's interpretation thereof. At no time during the proceedings at first instance did the appellant specifically raise an objection of illegality under Article 241 EC.

33 As to the substance, the Commission contends that Article 17 contains all the safeguards needed to meet the requirements of Article 10 of the ECHR and that, as the Court of First Instance held in paragraphs 148 to 154 of the contested judgment, it is confined to imposing reasonable limits on freedom of publication in cases where the interests of the Community might be adversely affected.

The admissibility of the ground of appeal

34 It is true that, in his first ground of appeal, the appellant appears to be challenging, by reference to Article 10 of the ECHR, the substantive legality of the rules concerning permission laid down by Article 17 of the Staff Regulations, even though before the Court of First Instance, as indicated in paragraph 147 of the contested judgment, he only contested the Commission's 'interpretation' of the second paragraph of Article 17 of the Staff Regulations as being contrary to freedom of expression.

55 Nevertheless, before the Court of First Instance, the appellant, by reference to the requirements of Article 10 of the ECHR, challenged the way in which the second paragraph of Article 17 of the Staff Regulations was applied in his case. Before this Court, he is criticising the reasoning of the contested judgment to justify rejection of his plea alleging failure to observe the principle of freedom of expression.

56 The first ground of appeal must therefore be held to be admissible.

Substance

57 First, according to settled case law, fundamental rights form an integral part of the general principles of law, whose observance the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international 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, in particular, Case C-260/89 *ERT* [1991] ECR I-2925, paragraph 41).

58 Those principles have, moreover, been restated in Article 6(2) of the Treaty on European Union, which provides: 'The 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.'

59 As the Court of Human Rights has held, 'Freedom of expression constitutes one of the essential foundations of [a democratic society], one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of

Article 10 [of the ECHR], it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb; such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society" (Eur. Court H. R. Handyside v United Kingdom judgment of 7 December 1976, Series A no. 24, § 49; Müller and Others judgment of 24 May 1988, Series A no. 133, § 33; and Vogt v Germany judgment of 26 September 1995, Series A no. 323, § 52).

40 Freedom of expression may be subject to the limitations set out in Article 10(2) of the ECHR, in terms of which the exercise of that freedom, '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, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary'.

41 Those limitations must, however, be interpreted restrictively. According to the Court of Human Rights, the adjective 'necessary' involves, for the purposes of Article 10(2), a 'pressing social need' and, although '[t]he contracting States have a certain margin of appreciation in assessing whether such a need exists', the interference must be 'proportionate to the legitimate aim pursued' and 'the reasons adduced by the national authorities to justify it' must be 'relevant and sufficient' (see, in particular, Vogt v Germany, § 52; and Wille v Liechtenstein judgment of 28 October 1999, no 28396/95, § 61 to § 63). Furthermore, any prior restriction requires particular consideration (see Wingrove v United Kingdom judgment of 25 November 1996, *Reports of Judgments and Decisions* 1996-V, p. 1957, § 58 and § 60).

42 Furthermore, the restrictions must be prescribed by legislative provisions which are worded with sufficient precision to enable interested parties to regulate their

conduct, taking, if need be, appropriate advice (Eur. Court H. R. Sunday Times v United Kingdom judgment of 26 April 1979, Series A no. 30, § 49).

41 As the Court has ruled, officials and other employees of the European Communities enjoy the right of freedom of expression (see *Oyowe and Traore v Commission*, paragraph 16), even in areas falling within the scope of the activities of the Community institutions. That freedom extends to the expression, orally or in writing, of opinions that dissent from or conflict with those held by the employing institution.

42 However, it is also legitimate in a democratic society to subject public servants, on account of their status, to obligations such as those contained in Articles 11 and 12 of the Staff Regulations. Such obligations are intended primarily to preserve the relationship of trust which must exist between the institution and its officials or other employees.

43 It is settled that the scope of those obligations must vary according to the nature of the duties performed by the person concerned or his place in the hierarchy (see, to that effect, Wille v Liechtenstein, § 63, and the opinion of the Commission of Human Rights in its report of 11 May 1984 in Glasenapp v Germany, Series A no. 104, § 124).

44 In terms of Article 10(2) of the ECHR, specific restrictions on the exercise of the right of freedom of expression can, in principle, be justified by the legitimate aim of protecting the rights of others. The rights at issue here are those of the institutions that are charged with the responsibility of carrying out tasks in the public interest. Citizens must be able to rely on their doing so effectively.

45 That is the aim of the regulations setting out the duties and responsibilities of the European public service. So an official may not, by oral or written expression, act

in breach of his obligations under the regulations, particularly Articles 11, 12 and 17, towards the institution that he is supposed to serve. That would destroy the relationship of trust between himself and that institution and make it thereafter more difficult, if not impossible, for the work of the institution to be carried out in cooperation with that official.

48 In exercising their power of review, the Community Courts must decide, having regard to all the circumstances of the case, whether a fair balance has been struck between the individual's fundamental right to freedom of expression and the legitimate concern of the institution to ensure that its officials and agents observe the duties and responsibilities implicit in the performance of their tasks.

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49 As the Court of Human Rights has held in that regard, it must '[be borne in mind] that whenever civil servants' right to freedom of expression is in issue the "duties and responsibilities" referred to in Article 10(2) assume a special significance, which justifies leaving to the national authorities a certain margin of appreciation in determining whether the impugned interference is proportionate to the above aim' (see Eur. Court H. R. Vogt v Germany, cited above; Ahmed and Others v United Kingdom judgment of 2 September 1998, *Reports of Judgments and Decisions* 1998-VI, p. 2378, § 56; and Wille v Liechtenstein, cited above, § 62).

50 The second paragraph of Article 17 of the Staff Regulations must be interpreted in the light of those general considerations, as was done by the Court of First Instance in paragraphs 148 to 155 of the contested judgment.

51 The second paragraph of Article 17 requires permission for publication of any matter dealing with the work of the Communities. Permission may be refused only where the proposed publication is liable 'to prejudice the interests of the Communities'. That eventuality, referred to in a Council regulation in restrictive terms, is a matter that falls within the scope of 'the protection of the rights of others', which, according to Article 10(2) of the ECHR as interpreted by the Court of Human Rights, is such as to justify restricting freedom of expression.

Consequently, the appellant's allegations that the second paragraph of Article 17 of the Staff Regulations does not pursue a legitimate aim and that the restriction of freedom of expression is not prescribed by a legislative provision must be rejected.

v The fact that the restriction at issue takes the form of prior permission cannot render it contrary, as such, to the fundamental right of freedom of expression, as the Court of First Instance held in paragraph 152 of the contested judgment.

vi The second paragraph of Article 17 of the Staff Regulations clearly provides that, in principle, permission is to be granted, refusal being possible only in exceptional cases. Indeed, in so far as that provision enables institutions to refuse permission to publish, and thus potentially interfere to a serious extent with freedom of expression, one of the fundamental pillars of a democratic society, it must be interpreted restrictively and applied in strict compliance with the requirements mentioned in paragraph 41 above. Thus, permission to publish may be refused only where publication is liable to cause serious harm to the Communities' interests.

vii Furthermore, as their scope is restricted to publications dealing with the work of the Communities, the rules are designed solely to allow the institution to keep itself informed of the views expressed in writing by its officials or other employees about its work so as to satisfy itself that they are carrying out their duties and conducting themselves with the interests of the Communities in mind and not in a way that would adversely reflect on their position.

viii Remedies against a decision refusing permission are available under Articles 90 and 91 of the Staff Regulations. There is thus no basis for the appellant to claim, as he does, that the rules in Article 17 of the Staff Regulations are not amenable to effective judicial review. Review of that kind enables the Community Courts to ascertain whether the appointing authority has exercised its power under the

second paragraph of Article 17 of the Staff Regulations in strict compliance with the limitations to which any interference with the right to freedom of expression is subject.

56 Such rules reflect the relationship of trust which must exist between employers and employees, particularly when they discharge high-level responsibilities in the public service. The way in which the rules are applied can be assessed solely in the light of all the relevant circumstances and the implications thereof for the performance of public duties. In that respect, the rules meet the criteria set out in paragraph 41 above for the acceptability of interference with the right to freedom of expression.

57 It is also clear from the foregoing that, when applying the second paragraph of Article 17 of the Staff Regulations, the appointing authority must balance the various interests at stake and is in a position to do so by taking account, in particular, of the gravity of the potential prejudice to the interests of the Communities.

58 In the present case, the Court of First Instance found, in paragraph 154 of the contested judgment, that 'the appointing authority maintained, in its decision removing the applicant from his post, that he had failed to comply with [the second paragraph of Article 17 of the Staff Regulations] on the grounds that, first, he had not requested permission to publish his book, second, he could not have failed to be aware that he would be refused permission on the same grounds as those on which permission had previously been refused in respect of articles of similar content, and, finally, his conduct had seriously prejudiced the Communities' interests and damaged the institution's image and reputation.'

59 In relation to the latter infringement, the Court of First Instance observed first, in paragraph 125 of the contested judgment, that 'the book at issue contains numerous aggressive, derogatory and frequently insulting statements, which are detrimental to the honour of the persons and institutions to which they refer and which have been extremely well publicised, particularly in the press.' The Court

of First Instance was thus entitled to reach the conclusion, on the basis of an assessment which cannot be challenged on appeal, that those statements constituted an infringement of Article 12 of the Staff Regulations.

60 The Court of First Instance then referred, in paragraph 128 of the contested judgment, not only to Mr Connolly's high-ranking grade but also to the fact that the book at issue 'publicly expressed... the applicant's fundamental opposition to the Commission's policy, which it was his responsibility to implement, namely bringing about economic and monetary union, an objective which is, moreover, laid down in the Treaty'.

61 Finally, the Court of First Instance made it clear, in paragraph 155 of the contested judgment, that it had not been established 'that the finding that he had infringed the second paragraph of Article 17 of the Staff Regulations would have been made even if the Communities' interests had not been prejudiced'.

62 The foregoing observations of the Court of First Instance, based on the statement of reasons in the preamble to the contested decision (see, in particular, the fifth, sixth, ninth, tenth, twelfth and fifteenth recitals to that decision), make it clear that Mr Connolly was dismissed not merely because he had failed to apply for prior permission, contrary to the requirements of the second paragraph of Article 17 of the Staff Regulations, or because he had expressed a dissentient opinion, but because he had published, without permission, material in which he had severely criticised, and even insulted, members of the Commission and other superiors and had challenged fundamental aspects of Community policies which had been written into the Treaty by the Member States and to whose implementation the Commission had specifically assigned him the responsibility of contributing in good faith. In those circumstances, he committed 'an irremediable breach of the trust which the Commission is entitled to expect from its officials' and, as a result, made 'it impossible for any employment relationship to be maintained with the institution' (see the 15th recital to the decision removing Mr Connolly from his post).

63 As to the measures intended to prevent distribution of the book, which, the appellant claims, the Commission should have adopted in order to protect its

interests effectively, suffice it to say that the adoption of such measures would not have restored the relationship of trust between the appellant and the institution and would have made no difference to the fact that it had become impossible for him to continue to have any sort of employment relationship with the institution.

64 It follows that the Court of First Instance was entitled to conclude, as it did in paragraph 156 of the contested judgment, that the allegation of breach of the right to freedom of expression, resulting from the application thereto of the second paragraph of Article 17 of the Staff Regulations, was unfounded.

65 The first ground of appeal must therefore be rejected.

The second ground of appeal

66 By his second ground of appeal, the appellant claims that the Court of First Instance (in paragraph 157 of the contested judgment) failed to apply the second paragraph of Article 17 and Article 38 of the Staff Regulations correctly by holding that officials on leave on personal grounds were also required to obtain permission prior to publishing material. It is the appellant's contention that, on the contrary, the fact of being on leave on personal grounds releases the official from the requirement of complying with the second paragraph of Article 17 of the Staff Regulations.

67 The appellant also complains that the Court of First Instance did not give reasons for rejecting his offer of evidence as to the practice followed in DG II at the Commission and thus infringed the principle of legitimate expectations.

68 In that regard, paragraph 161 of the contested judgment indicates that, to establish the existence of a general practice within the Commission, by virtue of which officials on leave on personal grounds were not required to request prior permission, the appellant relied merely on the fact that in 1985 he had been granted one year's leave in order to work for a private financial institution and that the former Director-General of DG II had not deemed it necessary to approve or comment on the texts prepared by him for that institution. It cannot be concluded from that fact alone that the Court of First Instance has in any way distorted the evidence adduced by the appellant.

69 Moreover, it is patently clear from the wording of Article 35 of the Staff Regulations that an official on leave on personal grounds does not lose his status as an official during the period of leave. He therefore remains subject to the obligations incumbent upon every official, unless express provision is made to the contrary.

70 Consequently, the second ground of appeal must be rejected as manifestly unfounded.

The third ground of appeal

71 By his third ground of appeal, the appellant complains that the Court of First Instance failed to apply the second paragraph of Article 11 of the Staff Regulations correctly in that it equated royalties with remuneration for the purposes of that provision.

72 In the first part of this ground of appeal, the appellant maintains that that interpretation is wrong since royalties do not constitute consideration for services rendered and do not undermine an official's independence.

70 He asserts in the second part of this ground of appeal that the Court of First Instance's interpretation entails a breach of the right to property laid down by Article 1 of the First Protocol to the ECHR.

71 Finally, by the third part of this ground of appeal, the appellant complains that in paragraph 113 of the contested judgment the Court of First Instance misapplied Article 11 in making its application subordinate to the rules on prior permission laid down in Article 17 of the Staff Regulations. He submits that Article 11 applies independently of Article 17.

72 So far as the first two parts of this ground of appeal are concerned, the appellant confines himself to reproducing the arguments and submissions made before the Court of First Instance without developing any specific argument that identifies the error of law that is said to vitiate the contested judgment.

73 Since the first two parts of the third ground of appeal in reality seek no more than a re-examination of the submissions made before the Court of First Instance, which under Article 51 of the EC Statute of the Court of Justice the Court does not have jurisdiction to undertake, they must be rejected as inadmissible (see Case C-352/98 P *Bergaderm and Goupil* v *Commission* [2000] ECR I-5291, paragraph 35).

74 The third part of this ground of appeal, as the Advocate General observed in point 32 of his Opinion, concerns reasoning which the Court of First Instance included only for the sake of completeness in the second sentence of paragraph 113 of the contested judgment. The Court of First Instance ruled principally that the appellant had not proved the existence of the alleged practice of the

Commission to permit officials on leave on personal grounds to receive royalties. That reasoning was a sufficient answer in law to the appellant's argument. The complaint concerning the second sentence of paragraph 113 of the contested judgment must, therefore, be held on any view to be ineffectual.

Consequently, the third ground of appeal must be rejected in its entirety as manifestly inadmissible.

The fourth ground of appeal

The fourth ground of appeal comprises three parts.

In the first part, the appellant complains that in paragraphs 125 and 126 of the contested judgment the Court of First Instance itself continued the investigative phase of the disciplinary proceedings and substituted its assessment of the facts for that of the disciplinary authority by accepting outright a number of the complaints concerning the contents of the book which had been made by the Commission during the disciplinary procedure, although neither the Disciplinary Board's opinion nor the contested decision included an express statement of reasons regarding the allegedly insulting nature of the book. Furthermore, the contested judgment merely reproduced those complaints without verifying whether they were well founded.

In paragraph 126 of the contested judgment, the Court of First Instance rejected the appellant's argument that ultimately neither the Disciplinary Board nor the appointing authority relied on the allegations that the book at issue was aggressive, derogatory and insulting. According to the Court of First Instance both bodies 'specifically stated in the opinion and in the decision removing Mr

Connolly from his post, that "Mr Connolly's behaviour, taken as a whole, has reflected on his position"'. That statement must be read in the light of the appointing authority's report to the Disciplinary Board which, as the Advocate General observed in point 35 of his Opinion, includes an appraisal, in essence identical to that made by the Court of First Instance in paragraph 125 of the contested judgment, of the aggressive, derogatory, even insulting, nature of certain passages of the book (see, in particular, paragraphs 25 and 26 of the appointing authority's report).

82 The appellant is therefore mistaken when he claims that the Court of First Instance substituted its own assessment for that of the appointing authority by formulating fresh allegations against him.

83 Furthermore, provided the evidence has not been misconstrued and the general principles of law and the rules of procedure in relation to the burden of proof and the taking of evidence have been observed, findings of fact are not, in principle, subject to review by the Court of Justice in an appeal (see Case C-7/95 P *Deere* v *Commission* [1998] ECR I-3111, paragraph 22).

84 The first part of the fourth ground of appeal must therefore be rejected.

85 By the second part of this ground of appeal, Mr Connolly complains that the Court of First Instance found in paragraph 128 of the contested judgment that the book in question publicly expressed 'his fundamental opposition to the Commission's policy, which it was his responsibility to implement' with the result that the relationship of trust between the appellant and his institution was destroyed.

86 According to the appellant, that charge was not made against him in the disciplinary proceedings. Furthermore, if any expression of dissent from the

policy of a Community institution on the part of one of its officials were regarded as a breach of the duty of loyalty, freedom of expression as laid down in Article 10 of the ECHR would become meaningless. Besides, Mr Connolly's responsibility was not to implement Commission policy but, as stated in the Disciplinary Board's opinion, was 'monitoring monetary policy in the Member States and analysing progress towards economic and monetary union'.

87 As to that, it is sufficient to note that the finding of the Court of First Instance of which the appellant complains is also, as the Commission rightly points out, to be found, in essence, in the eighth recital to the opinion of the Disciplinary Board and in the tenth recital to the contested decision. Assessment of the nature of Mr Connolly's duties is a question of fact on which the Court of Justice cannot rule in an appeal.

88 The alleged breach of the principle of freedom of expression and the restrictions which may exceptionally be imposed on it are dealt with at paragraphs 37 to 64 of the present judgment, relating to the first ground of appeal.

89 The second part of the fourth ground of appeal must therefore also be rejected.

90 By the third part of this ground of appeal, the appellant asserts that in paragraph 126 of the contested judgment the Court of First Instance was wrong to hold that the Disciplinary Board and the appointing authority had not abandoned their complaint relating to an infringement of Article 12 of the Staff Regulations, since the Commission has acknowledged, in its defence, that it had decided not to proceed with the allegation of breach of confidentiality.

91 Irrespective of the arguments relied on by the Commission in this appeal — and it disputes the appellant's interpretation thereof — it is clear from the grounds

set out by the Court of First Instance in paragraph 126 of the contested judgment and approved in paragraph 81 of the present judgment, that neither the Disciplinary Board nor the appointing authority abandoned the allegation of infringement of Article 12 of the Staff Regulations.

94 Therefore, the third part of this ground of appeal cannot be upheld.

95 Consequently, the fourth ground of appeal must be dismissed as being partly inadmissible and partly unfounded.

The fifth ground of appeal

96 By his fifth ground of appeal, the appellant complains that in paragraph 41 of the contested judgment the Court of First Instance held that the appointing authority's report included 'the contents of the book among the facts complained of' in that they expounded economic theories which were at odds with the policy adopted by the Commission and that the Court thus failed to give the requisite credence to the appointing authority's report, paragraph 25 of which referred solely to 'derogatory and unsubstantiated attacks'.

97 The appellant's claim that the Court of First Instance was confused cannot be upheld since in paragraph 44, having cited certain passages from the appointing authority's report for the Disciplinary Board, it confined itself to stating that the very contents of the book at issue, in particular its polemical nature, were among the facts alleged against the appellant.

98 The fifth ground of appeal is therefore completely unfounded.

The sixth ground of appeal

9 The sixth ground of appeal comprises two parts.

10 By the first part, the appellant accuses the Court of First Instance of having, in paragraphs 97 and 98 of the contested judgment, failed to give due credence to the documents in the case by dealing with a complaint which had not been established in the course of the disciplinary proceedings, namely that a difference of opinion had been expressed between Mr Connolly and the Commission regarding the introduction of economic and monetary union, and by relying for that purpose on a quotation from the book at issue — in this instance, page 12 — which does not appear in the documents in the case.

11 It must be pointed out, as the Court of First Instance did in paragraphs 97 and 98 of the contested judgment, that the appellant's disagreement with the Commission's policy was obvious, as evidenced by the passage cited from the book, which was manifestly part of the case-file, and that the appellant himself gave an explanation of it before the Disciplinary Board (see the minutes of the hearing on 5 December 1995, pages 4 to 7).

12 In any event purely factual appraisals of that kind are not subject to review by the Court of Justice in an appeal.

13 In the second part of the fifth ground of appeal, the appellant maintains that in paragraph 98 of the contested judgment the Court of First Instance wrongly attributed to him certain statements which he had not made, to the effect that: 'since his critiques and proposals were blocked by his superiors, he had decided, given the vital importance of the matter at issue and the danger that the Commission's policy entailed for the future of the Union, to make them public'.

102 The material accuracy of that statement, which is taken verbatim from the Disciplinary Board's opinion on which the Court of First Instance's assessment is based, cannot be challenged solely on the basis of a mere affirmation unsupported by precise and coherent evidence to the contrary. As the Court of First Instance observed in paragraph 98 of the contested judgment, that statement is, furthermore, confirmed by the minutes of the hearing on 5 December 1995 (pages 4 to 7), the contents of which were not disputed by the appellant.

103 Consequently, the sixth ground of appeal must be rejected as partially inadmissible and partially unfounded.

The seventh ground of appeal

104 By his seventh ground of appeal, Mr Connolly disputes the Court of First Instance's finding in paragraph 47 of the contested judgment that, at his final hearing before the appointing authority on 9 January 1996, he neither claimed that the Disciplinary Board's opinion was founded on complaints which ought to be regarded as new facts nor applied, as he was entitled to do under Article 11 of Annex IX, for the disciplinary proceedings to be reopened. According to the appellant, it is clear from the minutes of the hearing that in the course of it his adviser provided the appointing authority with the submissions lodged with the Disciplinary Board, in which he applied for the proceedings to be stayed and for the case to be referred back to the appointing authority for a rehearing in the event of the Board seeking to rely on a material breach of Article 12 of the Staff Regulations.

105 Irrespective of whether this ground of appeal is admissible, the appellant's argument does not, in any event, prove that paragraph 47 of the contested judgment is vitiated by an error of assessment. That paragraph merely states that at the hearing on 9 January 1996 the appellant neither contended that the opinion of the Disciplinary Board was founded on new complaints nor applied for the disciplinary proceedings to be reopened. The Court of First Instance's

finding cannot be challenged on the basis that the appellant produced at that hearing the submissions lodged with the Disciplinary Board, in which he generally reserved his position in the event of new complaints being put forward in the future.

106 The seventh ground of appeal must therefore be rejected.

The eighth ground of appeal

107 By his eighth ground of appeal, the appellant claims that in paragraph 48 of the contested judgment the Court of First Instance failed to respond adequately to his plea alleging that the second paragraph of Article 87 of the Staff Regulations had not been complied with in that he had not previously been heard in relation to two matters, namely the article published by *The Times* newspaper on 6 September 1995 and the interview given to a television journalist on 26 September 1995.

108 In that regard, it is clear from paragraph 48 of the contested judgment that the Court of First Instance addressed the 'argument that the report submitted to the Disciplinary Board did not refer to the fact that he had published an article on 6 September 1995 for the purpose of promoting his book or that he had taken part in a television broadcast on 26 September 1995'. Furthermore, as regards the arguments put forward in support of the eighth ground of appeal, it need merely be pointed out that paragraph 19 of the report to the Board specifically refers to the facts on which the appellant relies.

109 Even if the appellant's plea at first instance, whose terms were indeed not particularly clear, be taken as meaning that, contrary to the requirements of the second paragraph of Article 87 of the Staff Regulations, he had not been heard on the two matters in question before the report for the Disciplinary Board was

drawn up, suffice it to note that in paragraph 9 of the contested judgment the Court of First Instance stated that, by letter of 13 September 1995, the appointing authority invited the appellant to attend a hearing on the facts at issue in the light of his obligations under Articles 11, 12 and 17 of the Staff Regulations and that at the hearing on 26 September 1995 he refused to answer any of the questions put to him and filed a written statement, the contents of which are summarised in paragraph 10 of the contested judgment. It was only after that second hearing, that is to say on 4 October 1995, that the appointing authority decided to refer the matter to the Disciplinary Board under Article 1 of Annex IX.

110 The eighth ground of appeal must therefore be rejected as manifestly unfounded.

The ninth ground of appeal

111 By his ninth ground of appeal, the appellant criticises the Court of First Instance for stating in paragraph 74 of the contested judgment that it was permissible for the rapporteur to present his report orally to other members of the Disciplinary Board and that at several points (in paragraphs 71, 84, 95 and 101 of the contested judgment) the Court objected that the appellant had not provided any proof to support his allegation that the Disciplinary Board and its Chairman had performed their task in a superficial and biased manner, despite the offers of proof in both his application and reply.

112 As regards the fact that the Disciplinary Board did not produce a report, the Court must reiterate the finding made by the Court of First Instance in paragraph 74 of the contested judgment that 'Article 3 of Annex IX is confined to laying down the rapporteur's duties and does not prescribe any specific formalities concerning the way in which they should be performed, such as whether a written report should be produced or whether such a report should be disclosed to the parties.' The Court of First Instance was therefore correct to infer that 'there is no reason why the rapporteur should not present his report orally to the other members of the Disciplinary Board'.

113 As to the allegation that the Court of First Instance failed to comply with the rules relating to the burden of proof and the taking of evidence, an allegation intended in the present case to establish a lack of independence and impartiality on the part of the Disciplinary Board, it must be pointed out that, as a general rule, in order to satisfy the Court as to a party's claims or, at the very least, as to the need for the Court itself to take evidence, it is not sufficient merely to refer to certain facts in support of the claim. There must also be adduced sufficiently precise, objective and consistent indicia of their truth or probability.

114 The Court of First Instance's appraisal of the evidence produced to it does not constitute, save where the sense of the evidence has been distorted — and no such distortion has been proved by Mr Connolly in this case — a point of law which is subject, as such, to review by the Court of Justice (Case C-362/95 P *Blackspur DIY and Others* v *Council and Commission* [1997] ECR I-4775, paragraph 29).

115 Consequently, the ninth ground of appeal must be rejected.

The tenth ground of appeal

116 By his tenth ground of appeal the appellant claims that the Court of First Instance, first, refused in paragraph 174 of the contested judgment to grant his application for production of a memorandum dated 28 July 1995 on the calculation of salary reductions in cases of suspension although that memorandum would have helped him to establish that the Commission had misused its powers and, second, held that the memorandum did not 'specifically' concern Mr Connolly's dismissal, even though neither of the parties had produced the memorandum in the proceedings. The Court of First Instance infringed the rights of the defence and unlawfully made use of a fact of which it had 'special knowledge'.

117 In the absence of objective, relevant and consistent indicia, which it is for the Court of First Instance alone to assess, that Court was entitled to refuse the application for production of the Commission's memorandum altering the general rules for calculating salary reductions in cases in which officials are suspended, which, by reason of its very subject-matter, did not concern either dismissals in general or the appellant's particular situation following the measure removing him from his post.

118 The tenth ground of appeal must therefore be rejected as manifestly unfounded.

The eleventh ground of appeal

119 By his eleventh ground of appeal, the appellant disputes paragraphs 172 to 175 of the contested judgment on the ground that the Court of First Instance failed to answer various arguments capable of establishing that the disciplinary proceedings were vitiated by a misuse of powers. The arguments relied on concerned 'parallel proceedings', 'the failure to reply to the question concerning the exact scope of the disciplinary proceedings in relation to Articles 11, 12 and 17 of the Staff Regulations', 'the absence of a logical connection between the premisses and the conclusions drawn in relation to the disciplinary proceedings', the fact that 'the Commission maintained in its pleadings that the Disciplinary Board was not even obliged to read the contested book' and 'the deliberate and provocative appointment of the Secretary General as Chairman of the Disciplinary Board'.

120 In that regard, it is clear from paragraphs 171 to 175 of the contested judgment that the Court of First Instance did not regard the appellant's arguments as 'objective, relevant and consistent indicia' capable of supporting his argument that the disciplinary measure imposed on him pursued an aim other than that of

safeguarding the internal order of the Community public service. The grounds set out in the contested judgment must, in light of the circumstances of the case, be regarded as a proper response to the appellant's arguments and, therefore, as being sufficient to enable the Court of Justice to exercise its power of review.

121 As the Advocate General observed in point 61 of his Opinion, although the Court of First Instance is required to give reasons for its decisions, it is not obliged to respond in detail to every single argument advanced by the appellant, particularly if the argument was not sufficiently clear and precise and was not adequately supported by evidence. In that regard, the appellant has not proved, or even asserted, that the arguments referred to in paragraph 119 of this judgment meet those requirements or that they were supported by evidence which was distorted by the Court of First Instance, or that in its assessment of that evidence the Court of First Instance contravened the rules of procedure or general legal principles concerning the burden of proof or the taking of evidence.

122 In those circumstances, the eleventh ground of appeal must be rejected.

The twelfth ground of appeal

123 By his twelfth ground of appeal, the appellant asserts that the reasoning in paragraph 155 of the contested judgment is logically flawed in that the Court of First Instance inferred a previously unknown fact from one that was uncertain, whereas a properly drawn presumption involves an unknown fact being inferred from one that is certain. Furthermore, a negative inference, ('it cannot be inferred from...'), cannot serve as a basis for sound reasoning.

124 This ground of appeal cannot be upheld since it is based on an inaccurate reading, taken out of context, of the abovementioned paragraph of the contested judgment.

125 As the Advocate General has correctly pointed out in point 64 of his Opinion, paragraph 155 of the contested judgment answers the appellant's objection that the system of prior permission in the second paragraph of Article 17 of the Staff Regulations entailed unlimited censorship contrary to Article 10 of the ECHR. The Court of First Instance began by stating in paragraph 152 that permission is refused only exceptionally and that refusal may be justified only where the publication concerned is likely to prejudice the interests of the Communities, and went on to say (paragraph 154) that the contested decision was based, amongst other things, on the fact that the appellant's behaviour caused serious prejudice to the interests of the Communities, and damaged the reputation and image of the Commission. It concluded (paragraph 155) that there was nothing to suggest that the appellant would have been found to have infringed the second paragraph of Article 17 if the Communities' interests had not been prejudiced, for which reason there can be no basis for speaking of 'unlimited censorship'.

126 The twelfth ground of appeal must therefore be rejected as manifestly unfounded.

The thirteenth ground of appeal

127 By his thirteenth ground of appeal, the appellant submits that it is apparent from a review of his other grounds of appeal that the charges against him have not been proved, with the result that the Court of First Instance's assessment of the proportionality of the disciplinary measure is invalid, since it is based on the premiss in paragraph 166 of the contested judgment that 'the truth of the allegations against the applicant has been established'.

128 Since none of the other grounds of appeal put forward by the appellant can be upheld, the thirteenth ground of appeal must also be rejected as unfounded.

129 As the pleas for annulment of the disputed decision were held to be either inadmissible or unfounded, the Court of First Instance, in paragraphs 178 and 179 of the contested judgment, properly rejected the appellant's claim for compensation for the material and non-material damage allegedly suffered by him, since that claim was closely linked with the earlier pleas. The appellant has not put forward any argument capable of undermining that reasoning and accordingly his claim for damages before the Court of Justice is manifestly inadmissible.

130 The appeal must therefore be dismissed in its entirety.

Costs

131 Under Article 69(2) of the Rules of Procedure, which is applicable to appeal proceedings pursuant to Article 118 thereof, the unsuccessful party is to be ordered to pay the costs, if they have been applied for in the successful party's pleadings. Under Article 70 of those Rules, in proceedings between the Communities and their servants, institutions are to bear their own costs. However, by virtue of the second paragraph of Article 122 of the Rules of Procedure, Article 70 does not apply to appeals brought by officials or other servants of an institution against the latter. Since the appellant has been unsuccessful in his appeal, he must therefore be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. Dismisses the appeal;

2. Orders Mr Connolly to pay the costs.

Rodríguez Iglesias	Gulmann	La Pergola
Wathelet	Skouris	Edward
Puissochet	Jann	Sevón
Schintgen	Colneric	

Delivered in open court in Luxembourg on 6 March 2001.

R. Grass	G.C. Rodríguez Iglesias
Registrar	President

JUDGMENT OF THE COURT

6 March 2001 *

In Case C-274/99 P,

Bernard Connolly, a former official of the Commission of the European Communities, residing in London, United Kingdom, represented by J. Sambon and P.-P. van Gehuchten, avocats, with an address for service in Luxembourg,

appellant,

APPEAL against the judgment of the Court of First Instance of the European Communities (First Chamber) of 19 May 1999 in Joined Cases T-34/96 and T-163/96 *Connolly* v *Commission* [1999] ECR-SC I-A-87 and II-463, seeking to have that judgment set aside,

the other party to the proceedings being:

Commission of the European Communities, represented by G. Valsesia and J. Currall, acting as Agents, assisted by D. Waelbroeck, avocat, with an address for service in Luxembourg,

defendant at first instance,

* Language of the case: French.

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, C. Gulmann, A. La Pergola, M. Wathelet (Rapporteur), V. Skouris (Presidents of Chambers), D.A.O. Edward, J.-P. Puissochet, P. Jann, L. Sevón, R. Schintgen and N. Colneric, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: R. Grass,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 12 September 2000,

after hearing the Opinion of the Advocate General at the sitting on 19 October 2000,

gives the following

Judgment

1 By an application lodged at the Registry of the Court of Justice on 20 July 1999, Mr Connolly brought an appeal under Article 49 of the EC Statute of the Court of Justice and the corresponding provisions of the ECSC and the EAEC Statutes

of the Court of Justice against the judgment of the Court of First Instance of 19 May 1999 in Joined Cases T-34/96 and T-163/96 *Connolly v Commission* [1999] ECR-SC I-A-87 and II-463 ('the contested judgment'), by which the Court of First Instance dismissed, first, his action for annulment of the opinion of the Disciplinary Board of 7 December 1995 and of the decision of the appointing authority of 16 January 1996 removing him from his post without withdrawal of his entitlement to a retirement pension ('the contested decision') and, second, his action for damages.

Legal background

2 Article 11 of the Regulations and Rules applicable to officials and other servants of the European Communities ('the Staff Regulations') provides:

'An official shall carry out his duties and conduct himself solely with the interests of the Communities in mind; he shall neither seek nor take instructions from any government, authority, organisation or person outside his institution.

An official shall not without the permission of the appointing authority accept from any government or from any other source outside the institution to which he belongs any honour, decoration, favour, gift or payment of any kind whatever, except for services rendered either before his appointment or during special leave for military or other national service and in respect of such service.'

3 Article 12 of the Staff Regulations provides:

'An official shall abstain from any action and, in particular, any public expression of opinion which may reflect on his position.

...

An official wishing to engage in an outside activity, whether gainful or not, or to carry out any assignment outside the Communities must obtain permission from the appointing authority. Permission shall be refused if the activity or assignment is such as to impair the official's independence or to be detrimental to the work of the Communities.'

4 The second paragraph of Article 17 of the Staff Regulations states:

'An official shall not, whether alone or together with others, publish or cause to be published without the permission of the appointing authority any matter dealing with the work of the Communities. Permission shall be refused only where the proposed publication is liable to prejudice the interests of the Communities.'

The facts giving rise to the dispute

I The facts giving rise to the dispute are set out in the contested judgment as follows:

"1 At the material time, the applicant, Mr Connolly, an official of the Commission in Grade A4, Step 4, was Head of Unit 3, "EMS: National and Community Monetary Policies", in Directorate D, "Monetary Affairs" in the Directorate-General for Economic and Financial Affairs (DG II;...

2 On three occasions, dating from 1991, Mr Connolly submitted draft articles relating, respectively, to the application of monetary theories, the development of the European Monetary System and the monetary implications of the white paper on the future of Europe. Permission to publish the articles, which, under the second paragraph of Article 17 of the Staff Regulations, must be obtained prior to publication, was refused.

3 On 24 April 1995, Mr Connolly applied, under Article 40 of the Staff Regulations, for three months' unpaid leave on personal grounds commencing on 3 July 1995, stating as the reasons for his application (a) to assist his son during the school holidays in his preparation for United Kingdom university entrance; (b) to enable his father to spend some time with his family; (c) to spend some time reflecting on matters of economic theory and policy and to "reestablish acquaintance with the literature". The Commission granted him leave by decision of 2 June 1995.

4 By letter of 18 August 1995, Mr Connolly applied to be reinstated in the Commission service at the end of his leave on personal grounds. The Commission, by decision of 27 September 1995, granted that request and reinstated him in his post with effect from 4 October 1995.

5 Whilst on leave on personal grounds, Mr Connolly published a book entitled *The Rotten Heart of Europe — The Dirty War for Europe's Money* without requesting prior permission.

6 Early in September, more specifically between 4 and 10 September 1995, a series of articles concerning the book was published in the European and, in particular, the British press.

7 By letter of 6 September 1995, the Director-General for Personnel and Administration, in his capacity as appointing authority... informed the applicant of his decision to initiate disciplinary proceedings against him for infringement of Articles 11, 12 and 17 of the Staff Regulations and, in accordance with Article 87 of those regulations, invited him to a preliminary hearing.

8 The first hearing was held on 12 September 1995. The applicant then submitted a written statement indicating that he would not answer any questions unless he was informed in advance of the specific breaches he was alleged to have committed.

9 By letter of 13 September 1995, the appointing authority informed the applicant that the allegations of misconduct followed publication of his book, serialisation of extracts from it in *The Times* newspaper as well as the statements that he had made in an interview published in that newspaper, without having obtained prior permission. The appointing authority again

invited him to attend a hearing regarding those matters in the light of his obligations under Articles 11, 12 and 17 of the Staff Regulations.

10 On 26 September 1995, at a second hearing, the applicant refused to answer any of the questions put to him and filed a written statement in which he submitted that it was legitimate for him to have published a work without requesting prior permission because, when he did so, he was on unpaid leave on personal grounds. He added that the serialisation of extracts from his book in the press had been decided on by his publisher and that some of the statements contained in the interview had been wrongly attributed to him. Finally, Mr Connolly expressed doubts as to the objectivity of the disciplinary proceedings commenced against him in view, notably, of statements made about him to the press by the Commission's President and its spokesperson, and as to whether the confidential nature of the proceedings was being respected.

11 On 27 September 1995, the appointing authority decided, pursuant to Article 88 of the Staff Regulations, to suspend Mr Connolly from his duties with effect from 3 October 1995 and to withhold one-half of his basic salary during the period of his suspension.

12 On 4 October 1995, the appointing authority decided to refer the matter to the Disciplinary Board under Article 1 of Annex IX to the Staff Regulations ('Annex IX').

...

16 On 7 December 1995, the Disciplinary Board delivered an opinion, forwarded to the applicant on 15 December 1995, in which it recommended that the disciplinary measure of removal from post without withdrawal or reduction of his entitlement to a retirement pension should be imposed on him....

17 On 9 January 1996, the applicant was heard by the appointing authority pursuant to the third paragraph of Article 7 of Annex IX.

18 By decision of 16 January 1996, the appointing authority imposed on the applicant the disciplinary measure referred to in Article 86(2)(f) of the Staff Regulations, namely removal from post without withdrawal or reduction of his entitlement to a retirement pension....

19 The decision removing Mr Connolly from his post set out the following statement of reasons:

"Whereas on 16 May 1990 Mr Connolly was appointed Head of Unit [D.D.3];

Whereas by virtue of his duties Mr Connolly has been responsible for, *inter alia*, preparing and taking part in the work of the Monetary Committee, the Monetary Policy Sub-Committee and the Committee of [Governors], monitoring monetary policies in the Member States and analysing the monetary implications of the implementation of European economic and monetary union;

Whereas Mr Connolly has written a book, which was published at the beginning of September 1995 entitled *The Rotten Heart of Europe*;

Whereas that book deals with the development in recent years of the process of European integration in the economic and monetary field and has been written by Mr Connolly on the basis of the professional experience he has gained while carrying out his duties at the Commission;

Whereas Mr Connolly has not requested permission from the appointing authority to publish the book in question in accordance with Article 17 of the Staff Regulations, which is binding on all officials;

Whereas Mr Connolly could not have failed to be aware that he would be refused permission on the same grounds as those on which permission had previously been refused in respect of articles in which he had already outlined the ideas that form the core of the present book;

Whereas Mr Connolly mentions in the preface to *The Rotten Heart of Europe* that the idea for the book arose after he had requested permission to publish a chapter on the EMS in another book; he was refused permission and took the view that it would be worthwhile to work up that chapter and make it into a book in its own right;

Whereas Mr Connolly has approved, and has played an active part in, the promotion of his book, notably granting an interview to *The Times* newspaper on 4 September 1995, on which date *The Times* also published extracts from his book, and writing an article for *The Times*, which was published on 6 September 1995;

Whereas Mr Connolly could not have failed to be aware that the publication of his book reflected a personal opinion that conflicted with the policy adopted by the Commission in its capacity as an institution of the European Union responsible for pursuing a major objective and a fundamental policy choice laid down in the Treaty on European Union, namely economic and monetary union;

Whereas by his conduct Mr Connolly has seriously prejudiced the interests of the Communities and has damaged the image and reputation of the institution;

Whereas Mr Connolly has admitted receiving royalties paid to him by his publishers as consideration for the publication of his book;

Whereas Mr Connolly's overall conduct has reflected on his position as an official, given that an official is required to conduct himself solely with the interests of the Commission in mind;

Whereas, having frequently been refused permission to publish, a reasonably diligent official of his seniority and with his responsibilities could not have been unaware of the nature and gravity of such breaches of his obligations;

Whereas, in disregard of his duties of good faith and loyalty to the institution, Mr Connolly at no time advised his superiors of his intention to publish the book in question even though he was still bound, as an official on leave on personal grounds, by his duty of confidentiality;

Whereas Mr Connolly's conduct, on account of its gravity, involves an irremediable breach of the trust which the Commission is entitled to expect from its officials, and, as a consequence, makes it impossible for any employment relationship to be maintained with the institution;

...»

20 By letter of 7 March 1996, received at the Secretariat-General of the Commission on 14 March 1996, the applicant submitted a complaint under Article 90(2) of the Staff Regulations against the Disciplinary Board's opinion and against the decision to remove him from his post.

...

21 By an application lodged at the Registry of the Court of First Instance on 13 March 1996, the applicant brought an action for annulment of the Disciplinary Board's opinion (Case T-34/96).

...

23 On 18 July 1996 the applicant was informed of the decision expressly dismissing his complaint against the Disciplinary Board's opinion and the decision removing him from his post.

24 By an application lodged at the Registry of the Court of First Instance on 18 October 1996, the applicant brought an action for annulment of the Disciplinary Board's opinion and of the decision removing him from his post and for damages (Case T-163/96).

...

30 At the hearing, it was formally recorded that the claims and the pleas in law relied on in Case T-34/96 were repeated in their entirety in Case T-163/96 and that, consequently, the applicant was discontinuing the proceedings in Case T-34/96."

The contested judgment

6 Before the Court of First Instance, the appellant put forward seven pleas in law in support of his claim for annulment of the Disciplinary Board's opinion and the contested decision. First, he alleged that there had been irregularities in the disciplinary proceedings. Second, he alleged that the reasons given were insufficient and that the Disciplinary Board had infringed Article 7 of Annex IX, the rights of the defence and the principle of sound administration. By his third, fourth and fifth pleas, the applicant submitted that there had been infringements of, respectively, Articles 11, 12 and 17 of the Staff Regulations. The basis of the sixth plea was manifest error of assessment and breach of the principle of proportionality. Finally, the seventh plea alleged misuse of powers.

The first plea in law: irregularities in the disciplinary proceedings

7 The applicant complained, *inter alia*, that the Disciplinary Board and the appointing authority took account of matters which were not dealt with in the disciplinary proceedings, namely, first, the complaint that Mr Connolly's book expressed an opinion which was inconsistent with the Commission's policy of

bringing about economic and monetary union and, second, the fact that he had written an article, published on 6 September 1995 in *The Times* newspaper, and taken part in a television programme on 26 September 1995. He also complained that the Disciplinary Board had not prepared a report on the case as a whole and that the Chairman of the Board had taken an active and biased part in its proceedings.

The claim that matters not dealt with in the disciplinary proceedings were taken into account

8 In particular, the Court of First Instance held as follows:

'44 The Court must also reject the applicant's argument that the appointing authority's report to the Disciplinary Board did not include the contents of the book among the facts complained of but was limited to referring to formal infringements of Articles 11, 12 and 17 of the Staff Regulations. In that regard, it must be observed that the report indicated, without any ambiguity, that the contents of the book at issue, in particular its polemical nature, were among the facts alleged against the applicant. In particular, in paragraph 23 et seq. of the report, the appointing authority considered that there had been an infringement of Article 12 of the Staff Regulations on the grounds that "publication of the book in itself reflects on Mr Connolly's position as he has been head of the unit at the Commission... responsible for the matters recounted in the book" and, "furthermore, in the book, Mr Connolly makes certain derogatory and unsubstantiated attacks on Commissioners and other members of the Commission's staff in such a way as to reflect on his position and to bring the Commission into disrepute contrary to his obligations under Article 12." The report went on to cite specifically certain statements made by the applicant in his book and the annex to the report included numerous extracts from it.

45 It follows that, in accordance with Article 1 of Annex IX, the appointing authority's report apprised the applicant of the facts alleged against him with sufficient precision for him to be in a position to exercise his rights of defence.

46 That interpretation is also borne out by the fact that, as is clear from the minutes of the applicant's hearing before it, the Disciplinary Board, on several occasions during the hearing, made its position clear regarding the purpose and content of his book.

47 Furthermore, the applicant, at his final hearing before the appointing authority on 9 January 1996, neither contended that the Disciplinary Board's opinion was founded on complaints which ought to be regarded as new facts nor applied, as he was entitled to do under Article 11 of Annex IX, for the disciplinary proceedings to be reopened (see, to that effect, the judgment of the Court of First Instance in Case T-549/93 *D* v *Commission* [1995] ECR-SC I-A-13, II-43, paragraph 55).

48 As to the applicant's argument that the report submitted to the Disciplinary Board did not refer to the fact that he had published an article on 6 September 1995 for the purpose of promoting his book or that he had taken part in a television broadcast on 26 September 1995, it need merely be noted that, contrary to the applicant's contention, the appointing authority had specifically referred to those facts in paragraph 19 of the report.

49 Accordingly, the first part of the plea must be rejected."

The Disciplinary Board's failure to draw up a report

s In particular, the Court of First Instance held as follows: "

'73 In the present case, the minutes of the first meeting of the Disciplinary Board show that, in accordance with Article 3 of Annex IX, the Chairman appointed one of the members of the Board as rapporteur to prepare a report on the matter as a whole. Although it appears from the minutes in the file that the rapporteur was not the only member of the Disciplinary Board to question the applicant and the witness at the hearings, it cannot be inferred from that fact that the rapporteur's duties were not performed.

74 Furthermore, as regards the complaint that no report was prepared on the matter as a whole, Article 3 of Annex IX is confined to laying down the rapporteur's duties and does not prescribe any specific formalities concerning the way in which they should be performed, such as whether a written report should be produced or whether such a report should be disclosed to the parties. Consequently, there is no reason why the rapporteur should not present his report orally to the other members of the Disciplinary Board. In the present case, the applicant has failed to establish that no report was presented. Furthermore, the applicant has not produced the slightest evidence to show either that the Disciplinary Board failed to undertake an inquiry which was sufficiently complete and which afforded him all the guarantees intended by the Staff Regulations (see Case 228/83 *F v Commission* [1985] ECR 275, paragraph 30, and Case T-500/93 *Y v Court of Justice* [1996] ECR-SC I-A-335, II-977, paragraph 52), or, therefore, that it was unable to adjudicate on the matter with full knowledge of the facts. In those circumstances, the applicant's argument must be rejected.

...

76 Consequently, the third part of the plea must be rejected.'

The inappropriate participation of the Chairman of the Disciplinary Board in the proceedings

10 In particular, the Court of First Instance held as follows:

'82 In the present case, it is clear from the actual wording of the Disciplinary Board's opinion that it was not necessary for its Chairman to take part in the vote on the reasoned opinion and that the opinion was adopted by a majority of the four other members. It is also clear from the minutes on the file that, when the proceedings were opened, the Chairman of the Disciplinary Board confined himself to inviting the members of the Board to consider whether the facts complained of had been proved and to decide on the severity of the disciplinary measure to be imposed, that being within the normal scope of his authority. Therefore, the applicant cannot reasonably plead an infringement of Article 8 of Annex IX on the ground that the Chairman of the Disciplinary Board played an active part in the deliberations.

83 In any event, it must be emphasised that the Chairman of the Disciplinary Board must be present during its proceedings so that, *inter alia*, he can, if necessary, vote with full knowledge of the facts to resolve tied votes or procedural questions.

84 The bias that the Chairman of the Disciplinary Board is alleged to have demonstrated *vis-à-vis* the applicant during the hearing is not corroborated by any evidence. Consequently, since it has, moreover, been neither alleged nor established that the Disciplinary Board failed in its duty, as an investigative body, to act in an independent and impartial manner (see, in that regard, *F v Commission*, paragraph 16, and Case T-74/96 *Tzoumas v Commission* [1998] ECR-SCT A-129, II-343, paragraph 340), the applicant's argument must be rejected.

85 Therefore, the fourth part of the plea cannot be accepted.'

11 The Court of First Instance therefore rejected the first plea in law.

The second plea in law: the reasons given were insufficient and the Disciplinary Board infringed Article 7 of Annex IX, the rights of the defence and the principle of sound administration

12 The appellant submitted that, while purporting to set out a formal statement of reasons, the Disciplinary Board's opinion and the contested decision were actually vitiated by insufficient reasoning, inasmuch as the arguments raised by him in his defence remained unanswered. In particular, no answer was given to his claims that the second paragraph of Article 17 of the Staff Regulations does not apply to officials taking leave on personal grounds, that the appointing authority incorrectly interpreted Article 12 of the Staff Regulations and that certain statements made by Commission officials were improper and prejudiced the outcome of the proceedings.

13 The Court of First Instance held, in particular, as follows:

'92 Under Article 7 of Annex IX, the Disciplinary Board must, after consideration of the documents submitted and having regard to any statements made orally or in writing by the official concerned and by witnesses, and also to the results of any inquiry undertaken, deliver a reasoned opinion of the disciplinary measure appropriate to the facts complained of.

93 Furthermore, it is settled case-law that the statement of the reasons on which a decision adversely affecting a person is based must allow the Community Courts to exercise their power of review as to its legality and must provide the person concerned with the information necessary to enable him to decide whether or not the decision is well founded (Case C-166/95 P *Commission* v *Daffix* [1997] ECR I-983, paragraph 23; Case C-188/96 P *Commission* v *V* [1997] ECR I-6561, paragraph 26; and Case T-144/96 *Y* v *Parliament* [1998] ECR-SC I-A-405, II-1153, paragraph 21). The question whether the statement of reasons on which the measure at issue is based satisfies the requirements of the Staff Regulations must be assessed in the light not only of its wording but also of its context and all the legal rules regulating the matter concerned (*Y* v *Parliament*, cited above, paragraph 22). It should be emphasised that, although the Disciplinary Board and the appointing authority are required to state the factual and legal matters forming the legal basis for their decisions and the considerations which have led to their adoption, it is not, however, necessary that they discuss all the factual and legal points which have been raised by the person concerned during the proceedings (see, by analogy, Joined Cases 43/82 and 63/82 *VBVB and VBBB* v *Commission* [1984] ECR 19, paragraph 22).

94 In the present case, the Disciplinary Board's opinion specifically drew attention to the applicant's contention that the second paragraph of Article 17 of the Staff Regulations did not apply in his case since he had been on leave on personal grounds. The reason given by the Disciplinary Board and the appointing authority for the fact that Article 17 did apply was that "every official remains bound [by it]". The reasons for the application of Article 12 of the Staff Regulations are also stated to the requisite legal standard. The Disciplinary Board's opinion and the decision removing the applicant from his post outline the applicant's duties, draw attention to the nature of the statements made in his book and the manner in which he ensured that it would be published, and conclude that, as a whole, the applicant's conduct adversely reflected on his position. The opinion and the decision removing him from his post thus clearly establish a link between the applicant's conduct and the prohibition in Article 12 of the Staff Regulations and set out the essential reasons why the Disciplinary Board and the appointing authority considered that that article had been infringed. The question whether such an assessment is sufficient entails consideration of the merits of the case rather than consideration of the adequacy or otherwise of the statement of reasons.

95 As regards the applicant's complaint regarding the lack of response to his argument that certain statements made by members of the Commission jeopardised the impartial nature of the proceedings against him, the documents before the Court show that he confined that argument to a submission to the Disciplinary Board that "this situation call ed] for an exceptional degree of vigilance and independence [on its part]" (Annex A.1 to the application, page 17). The applicant does not allege that, in the present case, the Disciplinary Board failed in its duty as an investigative body to act in an independent and impartial way. Consequently, that complaint is not relevant.

...

97 The Court must also reject the applicant's argument that the Disciplinary Board's opinion and the decision removing him from his post contain an insufficient statement of reasons in that they state that the applicant "could not have failed to be aware that the publication of his book reflected a personal opinion that conflicted with the policy adopted by the Commission in its capacity as an institution of the European Union responsible for pursuing a major objective and a fundamental policy choice laid down in the Treaty on European Union, namely economic and monetary union". The dispute concerned an obvious and well-known difference of opinion between the applicant and the Commission regarding the Union's monetary policy (order in *Connolly* v *Commission*, cited above, paragraph 36) and the book in question, as is clear from the documents before the Court, is the patent expression of that difference of opinion, the applicant stating in particular that "[his] central thesis is that ERM [the Exchange Rate Mechanism] and EMU are not only inefficient but also undemocratic a danger not only to our wealth but to our four freedoms and, ultimately, our peace" (page 12 of the book).

98 It should be added that the opinion and the decision removing the applicant from his post constituted the culmination of the disciplinary proceedings, the

details of which were sufficiently familiar to the applicant (*Daffix v Commission*, paragraph 34). As is clear from the Disciplinary Board's opinion, the applicant had himself explained at the hearing on 5 December 1995 that for several years he had been describing in documents prepared in the course of his duties as Head of Unit II.D.3 "contradictions which he had identified in the Commission's policies on economic and monetary matters" and that "since his critiques and proposals were blocked by his superiors, he had decided, given the vital importance of the matter at issue and the danger that the Commission's policy entailed for the future of the Union, to make them public". Although in his reply the applicant took exception to those statements in the Disciplinary Board's opinion, it is none the less the case that they are clearly confirmed by the minutes of the hearing, the contents of which he does not dispute (see, specifically, pages 4 to 7 of the minutes of the hearing).

99 In view of those factors, the statement of reasons in the Disciplinary Board's opinion and in the decision removing the applicant from his post cannot, consequently, be regarded as insufficient in that regard.

...

101 Finally, taking account of the factors set out above, there can be no grounds for alleging breach of the principle of sound administration or of the rights of the defence on the basis that the Disciplinary Board conducted its proceedings on the same day as the applicant was heard, since that fact rather tends to show that, on the contrary, the Board acted diligently. It must also be observed that the Disciplinary Board's opinion was finally adopted two days after that hearing.

102 It follows that the plea must be rejected."

The third plea in law: infringement of Article 11 of the Staff Regulations

11 The appellant submitted that the purpose of Article 11 of the Staff Regulations is not to prohibit officials from receiving royalties from the publication of their work but to ensure their independence by prohibiting them from taking instructions from persons outside their institution. Moreover, in receiving royalties, the appellant did not take instructions from any person outside the Commission.

13 The Court of First Instance held as follows:

> '108 In that regard, it is clear both from the applicant's statements to the Disciplinary Board and from the deposition of his publisher submitted by the applicant at that time that royalties on the sales of his book were actually paid to him by his publisher. Therefore, the applicant's argument that there was no infringement of Article 11 of the Staff Regulations on the basis that receipt of those royalties did not result in any person outside his institution exercising influence over him cannot be accepted. Such an argument takes no account of the objective conditions in which the prohibition laid down by the second paragraph of Article 11 of the Staff Regulations operates, namely acceptance of payment of any kind from any person outside the institution, without the permission of the appointing authority. The Court finds that those conditions were met in the present case.
>
> 109 The applicant cannot reasonably maintain that that interpretation of the second paragraph of Article 11 of the Staff Regulations entails a breach of the right to property as laid down in Article 1 of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950 (hereinafter "the ECHR").

110 First, it should be observed that in the present case there has been no infringement of the right to property, since the Commission has not confiscated any sums received by the applicant by way of remuneration for his book.

111 Furthermore, according to the case-law, the exercise of fundamental rights, such as the right to property, may be subject to restrictions, provided that the restrictions correspond to objectives of general interest pursued by the Community and do not constitute a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed (see Case 265/87 *Schräder v Hauptzollamt Gronau* [1989] ECR 2237, paragraph 15 and the case-law cited therein). The rules laid down by Article 11 of the Staff Regulations, under which officials must conduct themselves solely with the interests of the Communities in mind, are a response to the legitimate concern to ensure that officials are not only independent but also loyal *vis-à-vis* their institution (see, in that regard, Case T-273/94 *N v Commission* [1997] ECR-SC I-A-97, II-289, paragraphs 128 and 129), an objective whose pursuit justifies the slight inconvenience of obtaining the appointing authority's permission to receive sums from sources outside the institution to which the official belongs.

..

113 There is no evidence at all of the practice which allegedly existed within the Commission of allowing royalties to be received for services provided by officials on leave on personal grounds. Furthermore, that argument is of no relevance in the absence of any contention that the practice concerned applied to works published without the prior permission provided for in Article 17 of the Staff Regulations. The applicant is not maintaining therefore that he had received any clear assurances which might have given him real grounds for expecting that he would not be required to apply for permission under Article 11 of the Staff Regulations.

114 Accordingly, the plea must be rejected.'

The fourth plea in law infringement of Article 12 of the Staff Regulations

16 The appellant submitted that the complaint that he had infringed Article 12 of the Staff Regulations was unlawful since it was in breach of the principle of freedom of expression laid down in Article 10 of the ECHR, that the book at issue was a work of economic analysis and was not contrary to the interests of the Community, that the Commission misrepresents the scope of the duty of loyalty and that the alleged personal attacks in the book are merely instances of 'lightness of style' in the context of an economic analysis.

17 So far as this plea in law is concerned, the Court of First Instance held as follows:

'124 According to settled case-law, [the first paragraph of Article 12 of the Staff Regulations] is designed, primarily, to ensure that Community officials, in their conduct, present a dignified image which is in keeping with the particularly correct and respectable behaviour one is entitled to expect from members of an international civil service (Case T-146/94 *Williams v Court of Auditors* [1996] ECR-SC I-A-103, II-329, paragraph 65; hereinafter "*Williams II*"; *N v Commission*, paragraph 127, and Case T-183/96 *E v ESC* [1998] ECR-SC I-A-67, II-159, paragraph 39). It follows, in particular, that where insulting remarks are made publicly by an official, which are detrimental to the honour of the persons to whom they refer, that in itself constitutes a reflection on the official's position for the purposes of the first paragraph of Article 12 of the Staff Regulations (order of 21 January 1997 in Case C-156/96 P *Williams v Court of Auditors* [1997] ECR I-239, paragraph 21; Case T-146/89 *Williams v Court of Auditors* [1991] ECR II-1293, paragraphs 76 and 80 (hereinafter "*Williams I*"), and *Williams II*, paragraph 66).

125 In the present case, the documents before the Court and the extracts which the Commission has cited show that the book at issue contains numerous aggressive, derogatory and frequently insulting statements, which are detrimental to the honour of the persons and institutions to which they refer and which have been extremely well publicised, particularly in the press. Contrary to the appellant's contention, the statements cited by the Commission, and referred to in the appointing authority's report to the Disciplinary Board, cannot be categorised as mere instances of "lightness of style" but must be regarded as, in themselves, reflecting on the official's position.

126 The argument that ultimately neither the Disciplinary Board nor the appointing authority relied on the abovementioned complaint when giving reasons for the dismissal is unfounded. Both of them specifically stated in the opinion and in the decision removing Mr Connolly from his post, that "Mr Connolly's behaviour, taken as a whole, has reflected on his position". The fact that extracts from the book are not expressly cited in the decision removing the applicant from his post (as they were in the appointing authority's report to the Disciplinary Board) cannot therefore be interpreted as meaning that the complaint concerning an infringement of the first paragraph of Article 12 of the Staff Regulations had been dropped. That is particularly so since the decision removing the applicant from his post constitutes the culmination of disciplinary proceedings, with whose details the applicant was sufficiently familiar and during which, as is clear from the minutes in the file, the applicant had had an opportunity to give his views on the content of the statements found in his book.

127 Further, the first paragraph of Article 12 of the Staff Regulations specifically sets out, as do Articles 11 and 21, the duty of loyalty incumbent upon every official (see *N v Commission*, paragraph 129, approved on appeal by the Court of Justice's order in Case C-252/97 P *N v Commission* [1998] ECR I-4871). Contrary to the applicant's contention, it cannot be concluded from the judgment in *Williams I* that that duty arises only under Article 21 of the Staff Regulations, since the Court of First Instance drew attention in that judgment to the fact that the duty of loyalty constitutes a fundamental duty owed by every official to the institution to which he belongs and to his superiors, a duty "of which Article 21 of the Staff Regulations is a particular manifestation".

Consequently, the Court must reject the argument that the appointing authority could not legitimately invoke, *vis-à-vis* the applicant, a breach of his duty of loyalty, on the ground that the report to the Disciplinary Board did not cite an infringement of Article 21 of the Staff Regulations.

128 Similarly, the Court must reject the argument that the duty of loyalty does not involve preserving the relationship of trust between the official and his institution but involves only loyalty as regards the Treaties. The duty of loyalty requires not only that the official concerned refrains from conduct which reflects on his position and is detrimental to the respect due to the institution and its authorities (see, for example, the judgment in *Williams I*, paragraph 72, and Case T-293/94 *Vela Palacios v ESC* [1996] ECR-SC I A 297, II-893, paragraph 43), but also that he must conduct himself, particularly if he is of senior grade, in a manner that is beyond suspicion in order that the relationship of trust between that institution and himself may at all times be maintained (*N v Commission*, paragraph 129). In the present case, it should be observed that the book at issue, in addition to including statements which in themselves reflected on his position, publicly expressed, as the appointing authority has pointed out, the applicant's fundamental opposition to the Commission's policy, which it was his responsibility to implement, namely bringing about economic and monetary union, an objective which is, moreover, laid down in the Treaty.

129 In that context, it is not reasonable for the applicant to contend that there has been a breach of the principle of freedom of expression. It is clear from the case-law on the subject that, although freedom of expression constitutes a fundamental right which Community officials also enjoy (Case C-100/88 *Oyowe and Traore v Commission* [1989] ECR 4285, paragraph 16), it is nevertheless the case that Article 12 of the Staff Regulations, as construed above, does not constitute a bar to the freedom of expression of those officials but imposes reasonable limits on the exercise of that right in the interest of the service (*E v ESC*, paragraph 41).

130 Finally, it must be emphasised that that interpretation of the first paragraph of Article 12 of the Staff Regulations cannot be challenged on the ground that, in the present case, publication of the book at issue

occurred during a period of leave on personal grounds. In that regard, it is clear from Article 35 of the Staff Regulations that leave on personal grounds constitutes one of the administrative statuses which an official may be assigned, with the result that, during such a period, the person concerned remains bound by the obligations borne by every official, in the absence of express provision to the contrary. Since Article 12 of the Staff Regulations applies to all officials, without any distinction based on their status, the fact that the applicant was on such leave cannot release him from his obligations under that article. That is particularly so since an official's concern for the respect due to his position is not confined to the particular time at which he carries out a specific task but is expected from him under all circumstances (*Williams II*, paragraph 68). The same is true of the duty of loyalty which, according to the case-law, applies not only in the performance of specific tasks but extends to the whole relationship between the official and the institution ; *Williams I*, paragraph 72 and *E* v *ESC*, paragraph 47).

131 Accordingly, the appointing authority was fully entitled to take the view that the applicant's behaviour had reflected on his position and involved an irremediable breach of the trust which the Commission is entitled to expect from its officials.

132 It follows that the plea must be rejected.'

The fifth plea in law: infringement of Article 17 of the Staff Regulations

133 The appellant submitted, *inter alia*, that the interpretation of the second paragraph of Article 17 of the Staff Regulations on which the Disciplinary Board's opinion and the contested decision are based is contrary to the principle of freedom of expression laid down in Article 10 of the ECHR, in that it leads, inherently, to the prohibition of any publication. Constraints on freedom of expression are permissible only in the exceptional cases listed in Article 10(2) of the ECHR. Furthermore, Article 17 of the Staff Regulations does not apply to

officials who are on leave on personal grounds and the appellant was, in any event, justified in believing that to be the case, having regard to the practice followed by the Commission, at least in DG II.

19 The Court of First Instance rejected this plea for the following reasons:

> '147 In the present case, it is not disputed that the applicant went ahead with publication of his book without applying for the prior permission required by the provision cited above. However, the applicant, without expressly raising an objection of illegality to the effect that the second paragraph of Article 17 of the Staff Regulations as a whole is unlawful, submits that the Commission's interpretation of the provision is contrary to the principle of freedom of expression.
>
> 148 In that regard, it must be recalled that the right to freedom of expression laid down in Article 10 of the ECHR constitutes, as has already been made clear, a fundamental right, the observance of which is guaranteed by the Community Courts and which Community officials also enjoy (*Oyowe and Traore v Commission*, paragraph 16, and *L v ESC*, paragraph 41). None the less, it is also clear from settled case law that fundamental rights do not constitute an unfettered prerogative but may be subject to restrictions, provided that the restrictions in fact correspond to objectives of general public interest pursued by the Community and do not constitute, with regard to the objectives pursued, a disproportionate and intolerable interference which infringes upon the very substance of the rights protected (see *Schräder v Hauptzollamt Gronau*, paragraph 15; Case C-404/92 P *X v Commission* [1994] ECR I-4737, paragraph 18; Case T-176/94 *K v Commission* [1995] ECR-SC I-A-203, II-621, paragraph 33; and *N v Commission*, paragraph 73).

149 In the light of those principles and the case-law on Article 12 of the Staff Regulations (see paragraph 129 above and *F* v *ESC*, paragraph 41), the second paragraph of Article 17 of the Staff Regulations, as interpreted by the decision removing the applicant from his post, cannot be regarded as imposing an unwarranted restriction on the freedom of expression of officials.

150 First, it must be emphasised that the requirement that permission be obtained prior to publication corresponds to the legitimate aim that material dealing with the work of the Communities should not undermine their interests and, in particular, as in the present case, the reputation and image of one of the institutions.

151 Second, the second paragraph of Article 17 of the Staff Regulations does not constitute a disproportionate measure in relation to the public-interest objective which the article concerned seeks to protect.

152 In that connection, it should be observed at the outset that, contrary to the applicant's contention, it cannot be inferred from the second paragraph of Article 17 of the Staff Regulations that the rules it lays down in respect of prior permission thereby enable the institution concerned to exercise unlimited censorship. First, under that provision, prior permission is required only when the material that the official wishes to publish, or to have published, "[deals] with the work of the Communities". Second, it is clear from that provision that there is no absolute prohibition on publication, a measure which, in itself, would be detrimental to the very substance of the right to freedom of expression. On the contrary, the last sentence of the second paragraph of Article 17 of the Staff Regulations sets out clearly the principles governing the grant of permission, specifically providing that permission may be refused only where the publication in point is liable to prejudice the interests of the Communities. Moreover, such a decision may be contested under Articles 90 and 91 of the Staff Regulations, so that an official who takes the view that he was refused permission in breach of the Staff Regulations is able to have

recourse to the legal remedies available to him with a view to securing review by the Community Courts of the assessment made by the institution concerned.

153 It must also be emphasised that the second paragraph of Article 17 of the Staff Regulations is a preventive measure designed on the one hand, to ensure that the Communities' interests are not jeopardised, and, on the other, as the Commission has rightly pointed out, to make it unnecessary for the institution concerned, after publication of material prejudicing the Communities' interests, to take disciplinary measures against an official who has exercised his right of expression in a way that is incompatible with his duties.

154 In the present case, the appointing authority maintained, in its decision removing the applicant from his post, that he had failed to comply with that provision on the grounds that, first, he had not requested permission to publish his book, second, he could not have failed to be aware that he would be refused permission on the same grounds as those on which permission had previously been refused in respect of articles of similar content, and, finally, his conduct had seriously prejudiced the Communities' interests and had damaged the institution's image and reputation.

155 In the light of all those considerations, therefore, it cannot be inferred from the decision removing the applicant from his post that the finding that he had infringed the second paragraph of Article 17 of the Staff Regulations would have been made even if the Communities' interests had not been prejudiced. Accordingly there is nothing to indicate that the scope attributed by the appointing authority to that provision goes further than the aim pursued and is therefore contrary to the principle of freedom of expression.

156 In those circumstances, the plea alleging breach of the right to freedom of expression must be rejected.

157 The argument that the second paragraph of Article 17 of the Staff Regulations does not apply to officials who are on leave on personal grounds is also unfounded. As pointed out above (paragraph 130), it follows from Article 35 of the Staff Regulations that an official on such leave retains his status as an official throughout the period of leave and therefore remains bound by his obligations under the regulations in the absence of express provision to the contrary. The second paragraph of Article 17 of the Staff Regulations applies to all officials and does not draw any distinction based on the status of the person concerned. Consequently, the fact that the applicant was on leave on personal grounds when his book was published does not release him from his obligation under the second paragraph of Article 17 of the Staff Regulations to request permission from the appointing authority prior to publication.

158 That interpretation is not undermined by the fact that, unlike the second paragraph of Article 17 of the Staff Regulations, the first paragraph thereof expressly provides that an official continues to be bound by his duty of confidentiality after leaving the service. An official on leave on personal grounds is not comparable to an official whose service has terminated, as provided in Article 47 of the Staff Regulations, and who, therefore, does not fall within any of the administrative statuses listed in Article 35 of the Staff Regulations.

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160 Accordingly, the Disciplinary Board and the appointing authority were right to find that the applicant had infringed the second paragraph of Article 17 of the Staff Regulations.

161 Finally, the applicant's allegation that a general practice existed in the Commission, by virtue of which officials on leave on personal grounds were not required to request prior permission for publication, is in no way

substantiated by the statement cited by him. In that statement, the former Director-General of DG II confines himself to saying that Mr Connolly had taken unpaid leave of one year in 1985 in order to work for a private financial institution and, during that period, he had not considered it necessary to approve the texts prepared by Mr Connolly for that institution or even to comment on them. It follows that there is no basis for the argument.

162 Consequently, the plea must be rejected.'

The sixth plea in law: manifest error of assessment and breach of the principle of proportionality

20 The appellant claimed that the contested decision was vitiated by a manifest error of assessment as to the facts and that it was in breach of the principle of proportionality, in that it failed to take account of various mitigating circumstances.

21 The Court of First Instance held as follows:

'165 It is settled case-law that once the truth of the allegations against the official has been established, the choice of appropriate disciplinary measure is a matter for the appointing authority and the Community Courts may not substitute their own assessment for that of the authority, save in cases of manifest error or a misuse of powers (Case 46/72 *De Greef v Commission* [1973] ECR 543, paragraph 45; *F v Commission*, paragraph 34; *Williams I*, paragraph 83; and *D v Commission*, paragraph 96). It must also be borne in mind that the determination of the penalty to be imposed is based on a comprehensive appraisal by the appointing authority of all the particular facts and circumstances peculiar to each

individual case, since Articles 86 to 89 of the Staff Regulations do not specify any fixed relationship between the measures provided for and the various sorts of infringements and do not state the extent to which the existence of aggravating or mitigating circumstances should affect the choice of penalty (Case 403/85 *F* v *Commission* [1987] ECR 645, paragraph 26; *Williams I*, paragraph 83; and *V* v *Parliament*, paragraph 34).

166 In the present case, it must be first be pointed out that the truth of the allegations against the applicant has been established.

167 Second, the penalty imposed cannot be regarded as either disproportionate or as resulting from a manifest error of assessment. Even though it is not disputed that the applicant had a good service record, the appointing authority was nevertheless fully entitled to find that, having regard to the gravity of the facts established and the applicant's grade and responsibilities, such a factor was not capable of mitigating the penalty to be imposed.

168 Furthermore, the applicant's argument that account should have been taken of his good faith regarding what he believed to be the scope of the duties of an official on leave on personal grounds cannot be accepted. It is clear from the case-law that officials are deemed to know the Staff Regulations (Case T-12/94 *Daffix* v *Commission* [1997] ECR-SC I-A-453, II-1197, paragraph 116; Joined Cases T-116/96, T-212/96 and T-215/96 *Telchini and Others* v *Commission* [1998] ECR-SC I-A-327, II-947, paragraph 59), with the result that their alleged ignorance of their obligations cannot constitute good faith. That argument has even less force in the present case since the applicant has admitted that his colleagues knew of his intention to work on the book at issue during his leave on personal grounds, whereas, in his request to the appointing authority under Article 40 of the Staff Regulations, he had given reasons unconnected with his book. Given that such statements are contrary to the honesty and trust which should govern relations between the administration and officials and are incompatible with the integrity which each

official is required to show (see, to that effect, Joined Cases 175/86 and 209/86 *M* v *Council* [1988] ECR 1891, paragraph 21), the appointing authority was entitled to treat the applicant's argument concerning his alleged good faith as unfounded.

169 Consequently, the plea must be rejected.'

The seventh plea in law: misuse of powers

21 Finally, the appellant asserted that there was a body of evidence establishing misuse of powers.

22 In rejecting this plea, the Court of First Instance gave the following grounds:

'171 According to the case-law, a misuse of powers consists in an administrative authority using its powers for a purpose other than that for which they were conferred on it. Thus, a decision may amount to a misuse of powers only if it appears, on the basis of objective, relevant and consistent indicia, to have been taken for purposes other than those stated (*Williams* I, paragraphs 87 and 88).

172 As regards the statements made by certain members of the Commission before commencement of the disciplinary proceedings, it need merely be observed that... those statements constituted no more than a provisional

assessment by the relevant members of the Commission and could not, in the circumstances of the case, adversely affect the proper conduct of the disciplinary proceedings.

173 Nor can the applicant's argument that the Commission should have warned him of the risks that he was running by publishing his book be accepted. The Commission rightly points out that it cannot be held liable for initiatives which the applicant had taken care to conceal from it when he requested leave on personal grounds. Furthermore, the arguments alleging that there were irregularities in the disciplinary proceedings and that the applicant acted in good faith must also be rejected for the reasons set out in connection with the first and sixth pleas.

174 As to the argument alleging that the Commission changed the general rules for calculating salary reductions in cases of suspension, it need merely be pointed out that the change was not specifically linked to the applicant's removal from his post and cannot therefore constitute proof of the alleged misuse of powers.

175 Accordingly, it has not been established that, when imposing the disciplinary measure, the appointing authority pursued any aim other than that of safeguarding the internal order of the Community civil service. The seventh plea must therefore be rejected."

176 The Court of First Instance therefore rejected the pleas for annulment and, consequently, the claim for damages.

177 Accordingly, the Court of First Instance dismissed the application and ordered each of the parties to bear its own costs.

The appeal

25 Mr Connolly claims that the Court of Justice should:

— set aside the contested judgment;

annul so far as necessary the opinion of the Disciplinary Board;

— annul the contested decision;

— annul the decision of 12 July 1996 rejecting his administrative complaint;

order the Commission to pay him BEF 7 500 000 in respect of material damage and BEF 1 500 000 in respect of non-material damage;

— order the Commission to pay the costs both of the proceedings before the Court of First Instance and of the present proceedings.

26 The Commission contends that the Court of Justice should:

— dismiss the appeal as partially inadmissible and, in any event, as entirely unfounded;

— dismiss the claim for damages as inadmissible and unfounded;

— order Mr Connolly to pay the costs in their entirety.

28 In his appeal the appellant puts forward 13 grounds of appeal.

The first ground of appeal

29 By his first ground of appeal, Mr Connolly complains that the Court of First Instance failed to take account of the fact that Articles 12 and 17 of the Staff Regulations establish a system of prior censorship which is, in principle, contrary to Article 10 of the ECHR as interpreted by the European Court of Human Rights (hereinafter "the Court of Human Rights").

30 Furthermore, that system does not incorporate the substantive and procedural conditions required by Article 10 of the ECHR whenever a restriction is imposed on freedom of expression as safeguarded by that provision. In particular, it fails to comply with the requirement that any restriction must pursue a legitimate aim, must be prescribed by a legislative provision which makes the restriction foreseeable, must be necessary and appropriate to the aim pursued and must be amenable to effective judicial review.

31 The appellant also complains that the Court of First Instance neither balanced the interests involved nor ascertained whether the contested decision was actually justified by a pressing social need. In that regard, the appellant submits that if that decision was taken in order to safeguard the interests of the institution and the people affected by the book at issue, that, to be effective, it should have been accompanied by measures designed to prevent distribution of the book. Such measures were not, however, adopted by the Commission.

32 The Commission contends, as a preliminary point, that the first ground of appeal should be rejected as inadmissible on the ground that it is concerned with the substantive legality of the rules concerning permission laid down by Article 17 of the Staff Regulations rather than with the Court of First Instance's interpretation thereof. At no time during the proceedings at first instance did the appellant specifically raise an objection of illegality under Article 241 EC.

33 As to the substance, the Commission contends that Article 17 contains all the safeguards needed to meet the requirements of Article 10 of the ECHR and that, as the Court of First Instance held in paragraphs 148 to 154 of the contested judgment, it is confined to imposing reasonable limits on freedom of publication in cases where the interests of the Community might be adversely affected.

The admissibility of the ground of appeal

34 It is true that, in his first ground of appeal, the appellant appears to be challenging, by reference to Article 10 of the ECHR, the substantive legality of the rules concerning permission laid down by Article 17 of the Staff Regulations, even though before the Court of First Instance, as indicated in paragraph 147 of the contested judgment, he only contested the Commission's 'interpretation' of the second paragraph of Article 17 of the Staff Regulations as being contrary to freedom of expression.

55 Nevertheless, before the Court of First Instance, the appellant, by reference to the requirements of Article 10 of the ECHR, challenged the way in which the second paragraph of Article 17 of the Staff Regulations was applied in his case. Before this Court, he is criticising the reasoning of the contested judgment to justify rejection of his plea alleging failure to observe the principle of freedom of expression.

56 The first ground of appeal must therefore be held to be admissible.

Substance

57 First, according to settled case law, fundamental rights form an integral part of the general principles of law, whose observance the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international 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, in particular, Case C-260/89 *ERT* [1991] ECR I-2925, paragraph 41).

58 Those principles have, moreover, been restated in Article 6(2) of the Treaty on European Union, which provides: 'The 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.'

59 As the Court of Human Rights has held, 'Freedom of expression constitutes one of the essential foundations of [a democratic society], one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of

Article 10 [of the ECHR], it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb; such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society" (Eur. Court H. R. Handyside v United Kingdom judgment of 7 December 1976, Series A no. 24, § 49; Müller and Others judgment of 24 May 1988, Series A no. 133, § 33; and Vogt v Germany judgment of 26 September 1995, Series A no. 323, § 52).

40 Freedom of expression may be subject to the limitations set out in Article 10(2) of the ECHR, in terms of which the exercise of that freedom, '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, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary'.

41 Those limitations must, however, be interpreted restrictively. According to the Court of Human Rights, the adjective 'necessary' involves, for the purposes of Article 10(2), a 'pressing social need' and, although '[t]he contracting States have a certain margin of appreciation in assessing whether such a need exists', the interference must be 'proportionate to the legitimate aim pursued' and 'the reasons adduced by the national authorities to justify it' must be 'relevant and sufficient' (see, in particular, Vogt v Germany, § 52; and Wille v Liechtenstein judgment of 28 October 1999, no 28396/95, § 61 to § 63). Furthermore, any prior restriction requires particular consideration (see Wingrove v United Kingdom judgment of 25 November 1996, *Reports of Judgments and Decisions* 1996-V, p. 1957, § 58 and § 60).

42 Furthermore, the restrictions must be prescribed by legislative provisions which are worded with sufficient precision to enable interested parties to regulate their

conduct, taking, if need be, appropriate advice (Eur. Court H. R. Sunday Times v United Kingdom judgment of 26 April 1979, Series A no. 30, § 49).

41 As the Court has ruled, officials and other employees of the European Communities enjoy the right of freedom of expression (see *Oyowe and Traore v Commission*, paragraph 16), even in areas falling within the scope of the activities of the Community institutions. That freedom extends to the expression, orally or in writing, of opinions that dissent from or conflict with those held by the employing institution.

42 However, it is also legitimate in a democratic society to subject public servants, on account of their status, to obligations such as those contained in Articles 11 and 12 of the Staff Regulations. Such obligations are intended primarily to preserve the relationship of trust which must exist between the institution and its officials or other employees.

43 It is settled that the scope of those obligations must vary according to the nature of the duties performed by the person concerned or his place in the hierarchy (see, to that effect, Wille v Liechtenstein, § 63, and the opinion of the Commission of Human Rights in its report of 11 May 1984 in Glasenapp v Germany, Series A no. 104, § 124).

44 In terms of Article 10(2) of the ECHR, specific restrictions on the exercise of the right of freedom of expression can, in principle, be justified by the legitimate aim of protecting the rights of others. The rights at issue here are those of the institutions that are charged with the responsibility of carrying out tasks in the public interest. Citizens must be able to rely on their doing so effectively.

45 That is the aim of the regulations setting out the duties and responsibilities of the European public service. So an official may not, by oral or written expression, act

in breach of his obligations under the regulations, particularly Articles 11, 12 and 17, towards the institution that he is supposed to serve. That would destroy the relationship of trust between himself and that institution and make it thereafter more difficult, if not impossible, for the work of the institution to be carried out in cooperation with that official.

48 In exercising their power of review, the Community Courts must decide, having regard to all the circumstances of the case, whether a fair balance has been struck between the individual's fundamental right to freedom of expression and the legitimate concern of the institution to ensure that its officials and agents observe the duties and responsibilities implicit in the performance of their tasks.

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49 As the Court of Human Rights has held in that regard, it must '[be borne in mind] that whenever civil servants' right to freedom of expression is in issue the "duties and responsibilities" referred to in Article 10(2) assume a special significance, which justifies leaving to the national authorities a certain margin of appreciation in determining whether the impugned interference is proportionate to the above aim' (see Eur. Court H. R. Vogt v Germany, cited above; Ahmed and Others v United Kingdom judgment of 2 September 1998, *Reports of Judgments and Decisions* 1998-VI, p. 2378, § 56; and Wille v Liechtenstein, cited above, § 62).

50 The second paragraph of Article 17 of the Staff Regulations must be interpreted in the light of those general considerations, as was done by the Court of First Instance in paragraphs 148 to 155 of the contested judgment.

51 The second paragraph of Article 17 requires permission for publication of any matter dealing with the work of the Communities. Permission may be refused only where the proposed publication is liable 'to prejudice the interests of the Communities'. That eventuality, referred to in a Council regulation in restrictive terms, is a matter that falls within the scope of 'the protection of the rights of others', which, according to Article 10(2) of the ECHR as interpreted by the Court of Human Rights, is such as to justify restricting freedom of expression.

Consequently, the appellant's allegations that the second paragraph of Article 17 of the Staff Regulations does not pursue a legitimate aim and that the restriction of freedom of expression is not prescribed by a legislative provision must be rejected.

v The fact that the restriction at issue takes the form of prior permission cannot render it contrary, as such, to the fundamental right of freedom of expression, as the Court of First Instance held in paragraph 152 of the contested judgment.

vi The second paragraph of Article 17 of the Staff Regulations clearly provides that, in principle, permission is to be granted, refusal being possible only in exceptional cases. Indeed, in so far as that provision enables institutions to refuse permission to publish, and thus potentially interfere to a serious extent with freedom of expression, one of the fundamental pillars of a democratic society, it must be interpreted restrictively and applied in strict compliance with the requirements mentioned in paragraph 41 above. Thus, permission to publish may be refused only where publication is liable to cause serious harm to the Communities' interests.

vii Furthermore, as their scope is restricted to publications dealing with the work of the Communities, the rules are designed solely to allow the institution to keep itself informed of the views expressed in writing by its officials or other employees about its work so as to satisfy itself that they are carrying out their duties and conducting themselves with the interests of the Communities in mind and not in a way that would adversely reflect on their position.

viii Remedies against a decision refusing permission are available under Articles 90 and 91 of the Staff Regulations. There is thus no basis for the appellant to claim, as he does, that the rules in Article 17 of the Staff Regulations are not amenable to effective judicial review. Review of that kind enables the Community Courts to ascertain whether the appointing authority has exercised its power under the

second paragraph of Article 17 of the Staff Regulations in strict compliance with the limitations to which any interference with the right to freedom of expression is subject.

56 Such rules reflect the relationship of trust which must exist between employers and employees, particularly when they discharge high-level responsibilities in the public service. The way in which the rules are applied can be assessed solely in the light of all the relevant circumstances and the implications thereof for the performance of public duties. In that respect, the rules meet the criteria set out in paragraph 41 above for the acceptability of interference with the right to freedom of expression.

57 It is also clear from the foregoing that, when applying the second paragraph of Article 17 of the Staff Regulations, the appointing authority must balance the various interests at stake and is in a position to do so by taking account, in particular, of the gravity of the potential prejudice to the interests of the Communities.

58 In the present case, the Court of First Instance found, in paragraph 154 of the contested judgment, that 'the appointing authority maintained, in its decision removing the applicant from his post, that he had failed to comply with [the second paragraph of Article 17 of the Staff Regulations] on the grounds that, first, he had not requested permission to publish his book, second, he could not have failed to be aware that he would be refused permission on the same grounds as those on which permission had previously been refused in respect of articles of similar content, and, finally, his conduct had seriously prejudiced the Communities' interests and damaged the institution's image and reputation.'

59 In relation to the latter infringement, the Court of First Instance observed first, in paragraph 125 of the contested judgment, that 'the book at issue contains numerous aggressive, derogatory and frequently insulting statements, which are detrimental to the honour of the persons and institutions to which they refer and which have been extremely well publicised, particularly in the press.' The Court

of First Instance was thus entitled to reach the conclusion, on the basis of an assessment which cannot be challenged on appeal, that those statements constituted an infringement of Article 12 of the Staff Regulations.

60 The Court of First Instance then referred, in paragraph 128 of the contested judgment, not only to Mr Connolly's high-ranking grade but also to the fact that the book at issue 'publicly expressed... the applicant's fundamental opposition to the Commission's policy, which it was his responsibility to implement, namely bringing about economic and monetary union, an objective which is, moreover, laid down in the Treaty'.

61 Finally, the Court of First Instance made it clear, in paragraph 155 of the contested judgment, that it had not been established 'that the finding that he had infringed the second paragraph of Article 17 of the Staff Regulations would have been made even if the Communities' interests had not been prejudiced'.

62 The foregoing observations of the Court of First Instance, based on the statement of reasons in the preamble to the contested decision (see, in particular, the fifth, sixth, ninth, tenth, twelfth and fifteenth recitals to that decision), make it clear that Mr Connolly was dismissed not merely because he had failed to apply for prior permission, contrary to the requirements of the second paragraph of Article 17 of the Staff Regulations, or because he had expressed a dissentient opinion, but because he had published, without permission, material in which he had severely criticised, and even insulted, members of the Commission and other superiors and had challenged fundamental aspects of Community policies which had been written into the Treaty by the Member States and to whose implementation the Commission had specifically assigned him the responsibility of contributing in good faith. In those circumstances, he committed 'an irremediable breach of the trust which the Commission is entitled to expect from its officials' and, as a result, made 'it impossible for any employment relationship to be maintained with the institution' (see the 15th recital to the decision removing Mr Connolly from his post).

63 As to the measures intended to prevent distribution of the book, which, the appellant claims, the Commission should have adopted in order to protect its

interests effectively, suffice it to say that the adoption of such measures would not have restored the relationship of trust between the appellant and the institution and would have made no difference to the fact that it had become impossible for him to continue to have any sort of employment relationship with the institution.

64 It follows that the Court of First Instance was entitled to conclude, as it did in paragraph 156 of the contested judgment, that the allegation of breach of the right to freedom of expression, resulting from the application thereto of the second paragraph of Article 17 of the Staff Regulations, was unfounded.

65 The first ground of appeal must therefore be rejected.

The second ground of appeal

66 By his second ground of appeal, the appellant claims that the Court of First Instance (in paragraph 157 of the contested judgment) failed to apply the second paragraph of Article 17 and Article 38 of the Staff Regulations correctly by holding that officials on leave on personal grounds were also required to obtain permission prior to publishing material. It is the appellant's contention that, on the contrary, the fact of being on leave on personal grounds releases the official from the requirement of complying with the second paragraph of Article 17 of the Staff Regulations.

67 The appellant also complains that the Court of First Instance did not give reasons for rejecting his offer of evidence as to the practice followed in DG II at the Commission and thus infringed the principle of legitimate expectations.

68 In that regard, paragraph 161 of the contested judgment indicates that, to establish the existence of a general practice within the Commission, by virtue of which officials on leave on personal grounds were not required to request prior permission, the appellant relied merely on the fact that in 1985 he had been granted one year's leave in order to work for a private financial institution and that the former Director-General of DG II had not deemed it necessary to approve or comment on the texts prepared by him for that institution. It cannot be concluded from that fact alone that the Court of First Instance has in any way distorted the evidence adduced by the appellant.

69 Moreover, it is patently clear from the wording of Article 35 of the Staff Regulations that an official on leave on personal grounds does not lose his status as an official during the period of leave. He therefore remains subject to the obligations incumbent upon every official, unless express provision is made to the contrary.

70 Consequently, the second ground of appeal must be rejected as manifestly unfounded.

The third ground of appeal

71 By his third ground of appeal, the appellant complains that the Court of First Instance failed to apply the second paragraph of Article 11 of the Staff Regulations correctly in that it equated royalties with remuneration for the purposes of that provision.

72 In the first part of this ground of appeal, the appellant maintains that that interpretation is wrong since royalties do not constitute consideration for services rendered and do not undermine an official's independence.

70 He asserts in the second part of this ground of appeal that the Court of First Instance's interpretation entails a breach of the right to property laid down by Article 1 of the First Protocol to the ECHR.

71 Finally, by the third part of this ground of appeal, the appellant complains that in paragraph 113 of the contested judgment the Court of First Instance misapplied Article 11 in making its application subordinate to the rules on prior permission laid down in Article 17 of the Staff Regulations. He submits that Article 11 applies independently of Article 17.

72 So far as the first two parts of this ground of appeal are concerned, the appellant confines himself to reproducing the arguments and submissions made before the Court of First Instance without developing any specific argument that identifies the error of law that is said to vitiate the contested judgment.

73 Since the first two parts of the third ground of appeal in reality seek no more than a re-examination of the submissions made before the Court of First Instance, which under Article 51 of the EC Statute of the Court of Justice the Court does not have jurisdiction to undertake, they must be rejected as inadmissible (see Case C-352/98 P *Bergaderm and Goupil* v *Commission* [2000] ECR I-5291, paragraph 35).

74 The third part of this ground of appeal, as the Advocate General observed in point 32 of his Opinion, concerns reasoning which the Court of First Instance included only for the sake of completeness in the second sentence of paragraph 113 of the contested judgment. The Court of First Instance ruled principally that the appellant had not proved the existence of the alleged practice of the

Commission to permit officials on leave on personal grounds to receive royalties. That reasoning was a sufficient answer in law to the appellant's argument. The complaint concerning the second sentence of paragraph 113 of the contested judgment must, therefore, be held on any view to be ineffectual.

Consequently, the third ground of appeal must be rejected in its entirety as manifestly inadmissible.

The fourth ground of appeal

The fourth ground of appeal comprises three parts.

In the first part, the appellant complains that in paragraphs 125 and 126 of the contested judgment the Court of First Instance itself continued the investigative phase of the disciplinary proceedings and substituted its assessment of the facts for that of the disciplinary authority by accepting outright a number of the complaints concerning the contents of the book which had been made by the Commission during the disciplinary procedure, although neither the Disciplinary Board's opinion nor the contested decision included an express statement of reasons regarding the allegedly insulting nature of the book. Furthermore, the contested judgment merely reproduced those complaints without verifying whether they were well founded.

In paragraph 126 of the contested judgment, the Court of First Instance rejected the appellant's argument that ultimately neither the Disciplinary Board nor the appointing authority relied on the allegations that the book at issue was aggressive, derogatory and insulting. According to the Court of First Instance both bodies 'specifically stated in the opinion and in the decision removing Mr

Connolly from his post, that "Mr Connolly's behaviour, taken as a whole, has reflected on his position"'. That statement must be read in the light of the appointing authority's report to the Disciplinary Board which, as the Advocate General observed in point 35 of his Opinion, includes an appraisal, in essence identical to that made by the Court of First Instance in paragraph 125 of the contested judgment, of the aggressive, derogatory, even insulting, nature of certain passages of the book (see, in particular, paragraphs 25 and 26 of the appointing authority's report).

82 The appellant is therefore mistaken when he claims that the Court of First Instance substituted its own assessment for that of the appointing authority by formulating fresh allegations against him.

83 Furthermore, provided the evidence has not been misconstrued and the general principles of law and the rules of procedure in relation to the burden of proof and the taking of evidence have been observed, findings of fact are not, in principle, subject to review by the Court of Justice in an appeal (see Case C-7/95 P *Deere* v *Commission* [1998] ECR I-3111, paragraph 22).

84 The first part of the fourth ground of appeal must therefore be rejected.

85 By the second part of this ground of appeal, Mr Connolly complains that the Court of First Instance found in paragraph 128 of the contested judgment that the book in question publicly expressed 'his fundamental opposition to the Commission's policy, which it was his responsibility to implement' with the result that the relationship of trust between the appellant and his institution was destroyed.

86 According to the appellant, that charge was not made against him in the disciplinary proceedings. Furthermore, if any expression of dissent from the

policy of a Community institution on the part of one of its officials were regarded as a breach of the duty of loyalty, freedom of expression as laid down in Article 10 of the ECHR would become meaningless. Besides, Mr Connolly's responsibility was not to implement Commission policy but, as stated in the Disciplinary Board's opinion, was 'monitoring monetary policy in the Member States and analysing progress towards economic and monetary union'.

87 As to that, it is sufficient to note that the finding of the Court of First Instance of which the appellant complains is also, as the Commission rightly points out, to be found, in essence, in the eighth recital to the opinion of the Disciplinary Board and in the tenth recital to the contested decision. Assessment of the nature of Mr Connolly's duties is a question of fact on which the Court of Justice cannot rule in an appeal.

88 The alleged breach of the principle of freedom of expression and the restrictions which may exceptionally be imposed on it are dealt with at paragraphs 37 to 64 of the present judgment, relating to the first ground of appeal.

89 The second part of the fourth ground of appeal must therefore also be rejected.

90 By the third part of this ground of appeal, the appellant asserts that in paragraph 126 of the contested judgment the Court of First Instance was wrong to hold that the Disciplinary Board and the appointing authority had not abandoned their complaint relating to an infringement of Article 12 of the Staff Regulations, since the Commission has acknowledged, in its defence, that it had decided not to proceed with the allegation of breach of confidentiality.

91 Irrespective of the arguments relied on by the Commission in this appeal — and it disputes the appellant's interpretation thereof — it is clear from the grounds

set out by the Court of First Instance in paragraph 126 of the contested judgment and approved in paragraph 81 of the present judgment, that neither the Disciplinary Board nor the appointing authority abandoned the allegation of infringement of Article 12 of the Staff Regulations.

94 Therefore, the third part of this ground of appeal cannot be upheld.

95 Consequently, the fourth ground of appeal must be dismissed as being partly inadmissible and partly unfounded.

The fifth ground of appeal

96 By his fifth ground of appeal, the appellant complains that in paragraph 41 of the contested judgment the Court of First Instance held that the appointing authority's report included 'the contents of the book among the facts complained of' in that they expounded economic theories which were at odds with the policy adopted by the Commission and that the Court thus failed to give the requisite credence to the appointing authority's report, paragraph 25 of which referred solely to 'derogatory and unsubstantiated attacks'.

97 The appellant's claim that the Court of First Instance was confused cannot be upheld since in paragraph 44, having cited certain passages from the appointing authority's report for the Disciplinary Board, it confined itself to stating that the very contents of the book at issue, in particular its polemical nature, were among the facts alleged against the appellant.

98 The fifth ground of appeal is therefore completely unfounded.

The sixth ground of appeal

9 The sixth ground of appeal comprises two parts.

10 By the first part, the appellant accuses the Court of First Instance of having, in paragraphs 97 and 98 of the contested judgment, failed to give due credence to the documents in the case by dealing with a complaint which had not been established in the course of the disciplinary proceedings, namely that a difference of opinion had been expressed between Mr Connolly and the Commission regarding the introduction of economic and monetary union, and by relying for that purpose on a quotation from the book at issue — in this instance, page 12 — which does not appear in the documents in the case.

11 It must be pointed out, as the Court of First Instance did in paragraphs 97 and 98 of the contested judgment, that the appellant's disagreement with the Commission's policy was obvious, as evidenced by the passage cited from the book, which was manifestly part of the case-file, and that the appellant himself gave an explanation of it before the Disciplinary Board (see the minutes of the hearing on 5 December 1995, pages 4 to 7).

12 In any event purely factual appraisals of that kind are not subject to review by the Court of Justice in an appeal.

13 In the second part of the fifth ground of appeal, the appellant maintains that in paragraph 98 of the contested judgment the Court of First Instance wrongly attributed to him certain statements which he had not made, to the effect that: 'since his critiques and proposals were blocked by his superiors, he had decided, given the vital importance of the matter at issue and the danger that the Commission's policy entailed for the future of the Union, to make them public'.

102 The material accuracy of that statement, which is taken verbatim from the Disciplinary Board's opinion on which the Court of First Instance's assessment is based, cannot be challenged solely on the basis of a mere affirmation unsupported by precise and coherent evidence to the contrary. As the Court of First Instance observed in paragraph 98 of the contested judgment, that statement is, furthermore, confirmed by the minutes of the hearing on 5 December 1995 (pages 4 to 7), the contents of which were not disputed by the appellant.

103 Consequently, the sixth ground of appeal must be rejected as partially inadmissible and partially unfounded.

The seventh ground of appeal

104 By his seventh ground of appeal, Mr Connolly disputes the Court of First Instance's finding in paragraph 47 of the contested judgment that, at his final hearing before the appointing authority on 9 January 1996, he neither claimed that the Disciplinary Board's opinion was founded on complaints which ought to be regarded as new facts nor applied, as he was entitled to do under Article 11 of Annex IX, for the disciplinary proceedings to be reopened. According to the appellant, it is clear from the minutes of the hearing that in the course of it his adviser provided the appointing authority with the submissions lodged with the Disciplinary Board, in which he applied for the proceedings to be stayed and for the case to be referred back to the appointing authority for a rehearing in the event of the Board seeking to rely on a material breach of Article 12 of the Staff Regulations.

105 Irrespective of whether this ground of appeal is admissible, the appellant's argument does not, in any event, prove that paragraph 47 of the contested judgment is vitiated by an error of assessment. That paragraph merely states that at the hearing on 9 January 1996 the appellant neither contended that the opinion of the Disciplinary Board was founded on new complaints nor applied for the disciplinary proceedings to be reopened. The Court of First Instance's

finding cannot be challenged on the basis that the appellant produced at that hearing the submissions lodged with the Disciplinary Board, in which he generally reserved his position in the event of new complaints being put forward in the future.

106 The seventh ground of appeal must therefore be rejected.

The eighth ground of appeal

107 By his eighth ground of appeal, the appellant claims that in paragraph 48 of the contested judgment the Court of First Instance failed to respond adequately to his plea alleging that the second paragraph of Article 87 of the Staff Regulations had not been complied with in that he had not previously been heard in relation to two matters, namely the article published by *The Times* newspaper on 6 September 1995 and the interview given to a television journalist on 26 September 1995.

108 In that regard, it is clear from paragraph 48 of the contested judgment that the Court of First Instance addressed the 'argument that the report submitted to the Disciplinary Board did not refer to the fact that he had published an article on 6 September 1995 for the purpose of promoting his book or that he had taken part in a television broadcast on 26 September 1995'. Furthermore, as regards the arguments put forward in support of the eighth ground of appeal, it need merely be pointed out that paragraph 19 of the report to the Board specifically refers to the facts on which the appellant relies.

109 Even if the appellant's plea at first instance, whose terms were indeed not particularly clear, be taken as meaning that, contrary to the requirements of the second paragraph of Article 87 of the Staff Regulations, he had not been heard on the two matters in question before the report for the Disciplinary Board was

drawn up, suffice it to note that in paragraph 9 of the contested judgment the Court of First Instance stated that, by letter of 13 September 1995, the appointing authority invited the appellant to attend a hearing on the facts at issue in the light of his obligations under Articles 11, 12 and 17 of the Staff Regulations and that at the hearing on 26 September 1995 he refused to answer any of the questions put to him and filed a written statement, the contents of which are summarised in paragraph 10 of the contested judgment. It was only after that second hearing, that is to say on 4 October 1995, that the appointing authority decided to refer the matter to the Disciplinary Board under Article 1 of Annex IX.

110 The eighth ground of appeal must therefore be rejected as manifestly unfounded.

The ninth ground of appeal

111 By his ninth ground of appeal, the appellant criticises the Court of First Instance for stating in paragraph 74 of the contested judgment that it was permissible for the rapporteur to present his report orally to other members of the Disciplinary Board and that at several points (in paragraphs 71, 84, 95 and 101 of the contested judgment) the Court objected that the appellant had not provided any proof to support his allegation that the Disciplinary Board and its Chairman had performed their task in a superficial and biased manner, despite the offers of proof in both his application and reply.

112 As regards the fact that the Disciplinary Board did not produce a report, the Court must reiterate the finding made by the Court of First Instance in paragraph 74 of the contested judgment that 'Article 3 of Annex IX is confined to laying down the rapporteur's duties and does not prescribe any specific formalities concerning the way in which they should be performed, such as whether a written report should be produced or whether such a report should be disclosed to the parties.' The Court of First Instance was therefore correct to infer that 'there is no reason why the rapporteur should not present his report orally to the other members of the Disciplinary Board'.

113 As to the allegation that the Court of First Instance failed to comply with the rules relating to the burden of proof and the taking of evidence, an allegation intended in the present case to establish a lack of independence and impartiality on the part of the Disciplinary Board, it must be pointed out that, as a general rule, in order to satisfy the Court as to a party's claims or, at the very least, as to the need for the Court itself to take evidence, it is not sufficient merely to refer to certain facts in support of the claim. There must also be adduced sufficiently precise, objective and consistent indicia of their truth or probability.

114 The Court of First Instance's appraisal of the evidence produced to it does not constitute, save where the sense of the evidence has been distorted — and no such distortion has been proved by Mr Connolly in this case — a point of law which is subject, as such, to review by the Court of Justice (Case C-362/95 P *Blackspur DIY and Others* v *Council and Commission* [1997] ECR I-4775, paragraph 29).

115 Consequently, the ninth ground of appeal must be rejected.

The tenth ground of appeal

116 By his tenth ground of appeal the appellant claims that the Court of First Instance, first, refused in paragraph 174 of the contested judgment to grant his application for production of a memorandum dated 28 July 1995 on the calculation of salary reductions in cases of suspension although that memorandum would have helped him to establish that the Commission had misused its powers and, second, held that the memorandum did not 'specifically' concern Mr Connolly's dismissal, even though neither of the parties had produced the memorandum in the proceedings. The Court of First Instance infringed the rights of the defence and unlawfully made use of a fact of which it had 'special knowledge'.

117 In the absence of objective, relevant and consistent indicia, which it is for the Court of First Instance alone to assess, that Court was entitled to refuse the application for production of the Commission's memorandum altering the general rules for calculating salary reductions in cases in which officials are suspended, which, by reason of its very subject-matter, did not concern either dismissals in general or the appellant's particular situation following the measure removing him from his post.

118 The tenth ground of appeal must therefore be rejected as manifestly unfounded.

The eleventh ground of appeal

119 By his eleventh ground of appeal, the appellant disputes paragraphs 172 to 175 of the contested judgment on the ground that the Court of First Instance failed to answer various arguments capable of establishing that the disciplinary proceedings were vitiated by a misuse of powers. The arguments relied on concerned 'parallel proceedings', 'the failure to reply to the question concerning the exact scope of the disciplinary proceedings in relation to Articles 11, 12 and 17 of the Staff Regulations', 'the absence of a logical connection between the premisses and the conclusions drawn in relation to the disciplinary proceedings', the fact that 'the Commission maintained in its pleadings that the Disciplinary Board was not even obliged to read the contested book' and 'the deliberate and provocative appointment of the Secretary General as Chairman of the Disciplinary Board'.

120 In that regard, it is clear from paragraphs 171 to 175 of the contested judgment that the Court of First Instance did not regard the appellant's arguments as 'objective, relevant and consistent indicia' capable of supporting his argument that the disciplinary measure imposed on him pursued an aim other than that of

safeguarding the internal order of the Community public service. The grounds set out in the contested judgment must, in light of the circumstances of the case, be regarded as a proper response to the appellant's arguments and, therefore, as being sufficient to enable the Court of Justice to exercise its power of review.

121 As the Advocate General observed in point 61 of his Opinion, although the Court of First Instance is required to give reasons for its decisions, it is not obliged to respond in detail to every single argument advanced by the appellant, particularly if the argument was not sufficiently clear and precise and was not adequately supported by evidence. In that regard, the appellant has not proved, or even asserted, that the arguments referred to in paragraph 119 of this judgment meet those requirements or that they were supported by evidence which was distorted by the Court of First Instance, or that in its assessment of that evidence the Court of First Instance contravened the rules of procedure or general legal principles concerning the burden of proof or the taking of evidence.

122 In those circumstances, the eleventh ground of appeal must be rejected.

The twelfth ground of appeal

123 By his twelfth ground of appeal, the appellant asserts that the reasoning in paragraph 155 of the contested judgment is logically flawed in that the Court of First Instance inferred a previously unknown fact from one that was uncertain, whereas a properly drawn presumption involves an unknown fact being inferred from one that is certain. Furthermore, a negative inference, ('it cannot be inferred from...'), cannot serve as a basis for sound reasoning.

124 This ground of appeal cannot be upheld since it is based on an inaccurate reading, taken out of context, of the abovementioned paragraph of the contested judgment.

125 As the Advocate General has correctly pointed out in point 64 of his Opinion, paragraph 155 of the contested judgment answers the appellant's objection that the system of prior permission in the second paragraph of Article 17 of the Staff Regulations entailed unlimited censorship contrary to Article 10 of the ECHR. The Court of First Instance began by stating in paragraph 152 that permission is refused only exceptionally and that refusal may be justified only where the publication concerned is likely to prejudice the interests of the Communities, and went on to say (paragraph 154) that the contested decision was based, amongst other things, on the fact that the appellant's behaviour caused serious prejudice to the interests of the Communities, and damaged the reputation and image of the Commission. It concluded (paragraph 155) that there was nothing to suggest that the appellant would have been found to have infringed the second paragraph of Article 17 if the Communities' interests had not been prejudiced, for which reason there can be no basis for speaking of 'unlimited censorship'.

126 The twelfth ground of appeal must therefore be rejected as manifestly unfounded.

The thirteenth ground of appeal

127 By his thirteenth ground of appeal, the appellant submits that it is apparent from a review of his other grounds of appeal that the charges against him have not been proved, with the result that the Court of First Instance's assessment of the proportionality of the disciplinary measure is invalid, since it is based on the premiss in paragraph 166 of the contested judgment that 'the truth of the allegations against the applicant has been established'.

128 Since none of the other grounds of appeal put forward by the appellant can be upheld, the thirteenth ground of appeal must also be rejected as unfounded.

129 As the pleas for annulment of the disputed decision were held to be either inadmissible or unfounded, the Court of First Instance, in paragraphs 178 and 179 of the contested judgment, properly rejected the appellant's claim for compensation for the material and non-material damage allegedly suffered by him, since that claim was closely linked with the earlier pleas. The appellant has not put forward any argument capable of undermining that reasoning and accordingly his claim for damages before the Court of Justice is manifestly inadmissible.

130 The appeal must therefore be dismissed in its entirety.

Costs

131 Under Article 69(2) of the Rules of Procedure, which is applicable to appeal proceedings pursuant to Article 118 thereof, the unsuccessful party is to be ordered to pay the costs, if they have been applied for in the successful party's pleadings. Under Article 70 of those Rules, in proceedings between the Communities and their servants, institutions are to bear their own costs. However, by virtue of the second paragraph of Article 122 of the Rules of Procedure, Article 70 does not apply to appeals brought by officials or other servants of an institution against the latter. Since the appellant has been unsuccessful in his appeal, he must therefore be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. Dismisses the appeal;

2. Orders Mr Connolly to pay the costs.

Rodríguez Iglesias	Gulmann	La Pergola
Wathelet	Skouris	Edward
Puissochet	Jann	Sevón
Schintgen	Colneric	

Delivered in open court in Luxembourg on 6 March 2001.

R. Grass	G.C. Rodríguez Iglesias
Registrar	President

JUDGMENT OF THE COURT

6 March 2001 *

In Case C-274/99 P,

Bernard Connolly, a former official of the Commission of the European Communities, residing in London, United Kingdom, represented by J. Sambon and P.-P. van Gehuchten, avocats, with an address for service in Luxembourg,

appellant,

APPEAL against the judgment of the Court of First Instance of the European Communities (First Chamber) of 19 May 1999 in Joined Cases T-34/96 and T-163/96 *Connolly* v *Commission* [1999] ECR-SC I-A-87 and II-463, seeking to have that judgment set aside,

the other party to the proceedings being:

Commission of the European Communities, represented by G. Valsesia and J. Currall, acting as Agents, assisted by D. Waelbroeck, avocat, with an address for service in Luxembourg,

defendant at first instance,

* Language of the case: French.

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, C. Gulmann, A. La Pergola, M. Wathelet (Rapporteur), V. Skouris (Presidents of Chambers), D.A.O. Edward, J.-P. Puissochet, P. Jann, L. Sevón, R. Schintgen and N. Colneric, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: R. Grass,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 12 September 2000,

after hearing the Opinion of the Advocate General at the sitting on 19 October 2000,

gives the following

Judgment

1 By an application lodged at the Registry of the Court of Justice on 20 July 1999, Mr Connolly brought an appeal under Article 49 of the EC Statute of the Court of Justice and the corresponding provisions of the ECSC and the EAEC Statutes

of the Court of Justice against the judgment of the Court of First Instance of 19 May 1999 in Joined Cases T-34/96 and T-163/96 *Connolly v Commission* [1999] ECR-SC I-A-87 and II-463 ('the contested judgment'), by which the Court of First Instance dismissed, first, his action for annulment of the opinion of the Disciplinary Board of 7 December 1995 and of the decision of the appointing authority of 16 January 1996 removing him from his post without withdrawal of his entitlement to a retirement pension ('the contested decision') and, second, his action for damages.

Legal background

2 Article 11 of the Regulations and Rules applicable to officials and other servants of the European Communities ('the Staff Regulations') provides:

'An official shall carry out his duties and conduct himself solely with the interests of the Communities in mind; he shall neither seek nor take instructions from any government, authority, organisation or person outside his institution.

An official shall not without the permission of the appointing authority accept from any government or from any other source outside the institution to which he belongs any honour, decoration, favour, gift or payment of any kind whatever, except for services rendered either before his appointment or during special leave for military or other national service and in respect of such service.'

3 Article 12 of the Staff Regulations provides:

'An official shall abstain from any action and, in particular, any public expression of opinion which may reflect on his position.

...

An official wishing to engage in an outside activity, whether gainful or not, or to carry out any assignment outside the Communities must obtain permission from the appointing authority. Permission shall be refused if the activity or assignment is such as to impair the official's independence or to be detrimental to the work of the Communities.'

4 The second paragraph of Article 17 of the Staff Regulations states:

'An official shall not, whether alone or together with others, publish or cause to be published without the permission of the appointing authority any matter dealing with the work of the Communities. Permission shall be refused only where the proposed publication is liable to prejudice the interests of the Communities.'

The facts giving rise to the dispute

I The facts giving rise to the dispute are set out in the contested judgment as follows:

"1 At the material time, the applicant, Mr Connolly, an official of the Commission in Grade A4, Step 4, was Head of Unit 3, "EMS: National and Community Monetary Policies", in Directorate D, "Monetary Affairs" in the Directorate-General for Economic and Financial Affairs (DG II;...

2 On three occasions, dating from 1991, Mr Connolly submitted draft articles relating, respectively, to the application of monetary theories, the development of the European Monetary System and the monetary implications of the white paper on the future of Europe. Permission to publish the articles, which, under the second paragraph of Article 17 of the Staff Regulations, must be obtained prior to publication, was refused.

3 On 24 April 1995, Mr Connolly applied, under Article 40 of the Staff Regulations, for three months' unpaid leave on personal grounds commencing on 3 July 1995, stating as the reasons for his application (a) to assist his son during the school holidays in his preparation for United Kingdom university entrance; (b) to enable his father to spend some time with his family; (c) to spend some time reflecting on matters of economic theory and policy and to "reestablish acquaintance with the literature". The Commission granted him leave by decision of 2 June 1995.

4 By letter of 18 August 1995, Mr Connolly applied to be reinstated in the Commission service at the end of his leave on personal grounds. The Commission, by decision of 27 September 1995, granted that request and reinstated him in his post with effect from 4 October 1995.

5 Whilst on leave on personal grounds, Mr Connolly published a book entitled *The Rotten Heart of Europe — The Dirty War for Europe's Money* without requesting prior permission.

6 Early in September, more specifically between 4 and 10 September 1995, a series of articles concerning the book was published in the European and, in particular, the British press.

7 By letter of 6 September 1995, the Director-General for Personnel and Administration, in his capacity as appointing authority... informed the applicant of his decision to initiate disciplinary proceedings against him for infringement of Articles 11, 12 and 17 of the Staff Regulations and, in accordance with Article 87 of those regulations, invited him to a preliminary hearing.

8 The first hearing was held on 12 September 1995. The applicant then submitted a written statement indicating that he would not answer any questions unless he was informed in advance of the specific breaches he was alleged to have committed.

9 By letter of 13 September 1995, the appointing authority informed the applicant that the allegations of misconduct followed publication of his book, serialisation of extracts from it in *The Times* newspaper as well as the statements that he had made in an interview published in that newspaper, without having obtained prior permission. The appointing authority again

invited him to attend a hearing regarding those matters in the light of his obligations under Articles 11, 12 and 17 of the Staff Regulations.

10 On 26 September 1995, at a second hearing, the applicant refused to answer any of the questions put to him and filed a written statement in which he submitted that it was legitimate for him to have published a work without requesting prior permission because, when he did so, he was on unpaid leave on personal grounds. He added that the serialisation of extracts from his book in the press had been decided on by his publisher and that some of the statements contained in the interview had been wrongly attributed to him. Finally, Mr Connolly expressed doubts as to the objectivity of the disciplinary proceedings commenced against him in view, notably, of statements made about him to the press by the Commission's President and its spokesperson, and as to whether the confidential nature of the proceedings was being respected.

11 On 27 September 1995, the appointing authority decided, pursuant to Article 88 of the Staff Regulations, to suspend Mr Connolly from his duties with effect from 3 October 1995 and to withhold one-half of his basic salary during the period of his suspension.

12 On 4 October 1995, the appointing authority decided to refer the matter to the Disciplinary Board under Article 1 of Annex IX to the Staff Regulations ('Annex IX').

...

16 On 7 December 1995, the Disciplinary Board delivered an opinion, forwarded to the applicant on 15 December 1995, in which it recommended that the disciplinary measure of removal from post without withdrawal or reduction of his entitlement to a retirement pension should be imposed on him....

17 On 9 January 1996, the applicant was heard by the appointing authority pursuant to the third paragraph of Article 7 of Annex IX.

18 By decision of 16 January 1996, the appointing authority imposed on the applicant the disciplinary measure referred to in Article 86(2)(f) of the Staff Regulations, namely removal from post without withdrawal or reduction of his entitlement to a retirement pension....

19 The decision removing Mr Connolly from his post set out the following statement of reasons:

"Whereas on 16 May 1990 Mr Connolly was appointed Head of Unit [D.D.3];

Whereas by virtue of his duties Mr Connolly has been responsible for, *inter alia*, preparing and taking part in the work of the Monetary Committee, the Monetary Policy Sub-Committee and the Committee of [Governors], monitoring monetary policies in the Member States and analysing the monetary implications of the implementation of European economic and monetary union;

Whereas Mr Connolly has written a book, which was published at the beginning of September 1995 entitled *The Rotten Heart of Europe*;

Whereas that book deals with the development in recent years of the process of European integration in the economic and monetary field and has been written by Mr Connolly on the basis of the professional experience he has gained while carrying out his duties at the Commission;

Whereas Mr Connolly has not requested permission from the appointing authority to publish the book in question in accordance with Article 17 of the Staff Regulations, which is binding on all officials;

Whereas Mr Connolly could not have failed to be aware that he would be refused permission on the same grounds as those on which permission had previously been refused in respect of articles in which he had already outlined the ideas that form the core of the present book;

Whereas Mr Connolly mentions in the preface to *The Rotten Heart of Europe* that the idea for the book arose after he had requested permission to publish a chapter on the EMS in another book; he was refused permission and took the view that it would be worthwhile to work up that chapter and make it into a book in its own right;

Whereas Mr Connolly has approved, and has played an active part in, the promotion of his book, notably granting an interview to *The Times* newspaper on 4 September 1995, on which date *The Times* also published extracts from his book, and writing an article for *The Times*, which was published on 6 September 1995;

Whereas Mr Connolly could not have failed to be aware that the publication of his book reflected a personal opinion that conflicted with the policy adopted by the Commission in its capacity as an institution of the European Union responsible for pursuing a major objective and a fundamental policy choice laid down in the Treaty on European Union, namely economic and monetary union;

Whereas by his conduct Mr Connolly has seriously prejudiced the interests of the Communities and has damaged the image and reputation of the institution;

Whereas Mr Connolly has admitted receiving royalties paid to him by his publishers as consideration for the publication of his book;

Whereas Mr Connolly's overall conduct has reflected on his position as an official, given that an official is required to conduct himself solely with the interests of the Commission in mind;

Whereas, having frequently been refused permission to publish, a reasonably diligent official of his seniority and with his responsibilities could not have been unaware of the nature and gravity of such breaches of his obligations;

Whereas, in disregard of his duties of good faith and loyalty to the institution, Mr Connolly at no time advised his superiors of his intention to publish the book in question even though he was still bound, as an official on leave on personal grounds, by his duty of confidentiality;

Whereas Mr Connolly's conduct, on account of its gravity, involves an irremediable breach of the trust which the Commission is entitled to expect from its officials, and, as a consequence, makes it impossible for any employment relationship to be maintained with the institution;

...»

20 By letter of 7 March 1996, received at the Secretariat-General of the Commission on 14 March 1996, the applicant submitted a complaint under Article 90(2) of the Staff Regulations against the Disciplinary Board's opinion and against the decision to remove him from his post.

...

21 By an application lodged at the Registry of the Court of First Instance on 13 March 1996, the applicant brought an action for annulment of the Disciplinary Board's opinion (Case T-34/96).

...

23 On 18 July 1996 the applicant was informed of the decision expressly dismissing his complaint against the Disciplinary Board's opinion and the decision removing him from his post.

24 By an application lodged at the Registry of the Court of First Instance on 18 October 1996, the applicant brought an action for annulment of the Disciplinary Board's opinion and of the decision removing him from his post and for damages (Case T-163/96).

...

30 At the hearing, it was formally recorded that the claims and the pleas in law relied on in Case T-34/96 were repeated in their entirety in Case T-163/96 and that, consequently, the applicant was discontinuing the proceedings in Case T-34/96."

The contested judgment

6 Before the Court of First Instance, the appellant put forward seven pleas in law in support of his claim for annulment of the Disciplinary Board's opinion and the contested decision. First, he alleged that there had been irregularities in the disciplinary proceedings. Second, he alleged that the reasons given were insufficient and that the Disciplinary Board had infringed Article 7 of Annex IX, the rights of the defence and the principle of sound administration. By his third, fourth and fifth pleas, the applicant submitted that there had been infringements of, respectively, Articles 11, 12 and 17 of the Staff Regulations. The basis of the sixth plea was manifest error of assessment and breach of the principle of proportionality. Finally, the seventh plea alleged misuse of powers.

The first plea in law: irregularities in the disciplinary proceedings

7 The applicant complained, *inter alia*, that the Disciplinary Board and the appointing authority took account of matters which were not dealt with in the disciplinary proceedings, namely, first, the complaint that Mr Connolly's book expressed an opinion which was inconsistent with the Commission's policy of

bringing about economic and monetary union and, second, the fact that he had written an article, published on 6 September 1995 in *The Times* newspaper, and taken part in a television programme on 26 September 1995. He also complained that the Disciplinary Board had not prepared a report on the case as a whole and that the Chairman of the Board had taken an active and biased part in its proceedings.

The claim that matters not dealt with in the disciplinary proceedings were taken into account

8 In particular, the Court of First Instance held as follows:

'44 The Court must also reject the applicant's argument that the appointing authority's report to the Disciplinary Board did not include the contents of the book among the facts complained of but was limited to referring to formal infringements of Articles 11, 12 and 17 of the Staff Regulations. In that regard, it must be observed that the report indicated, without any ambiguity, that the contents of the book at issue, in particular its polemical nature, were among the facts alleged against the applicant. In particular, in paragraph 23 et seq. of the report, the appointing authority considered that there had been an infringement of Article 12 of the Staff Regulations on the grounds that "publication of the book in itself reflects on Mr Connolly's position as he has been head of the unit at the Commission... responsible for the matters recounted in the book" and, "furthermore, in the book, Mr Connolly makes certain derogatory and unsubstantiated attacks on Commissioners and other members of the Commission's staff in such a way as to reflect on his position and to bring the Commission into disrepute contrary to his obligations under Article 12." The report went on to cite specifically certain statements made by the applicant in his book and the annex to the report included numerous extracts from it.

45 It follows that, in accordance with Article 1 of Annex IX, the appointing authority's report apprised the applicant of the facts alleged against him with sufficient precision for him to be in a position to exercise his rights of defence.

46 That interpretation is also borne out by the fact that, as is clear from the minutes of the applicant's hearing before it, the Disciplinary Board, on several occasions during the hearing, made its position clear regarding the purpose and content of his book.

47 Furthermore, the applicant, at his final hearing before the appointing authority on 9 January 1996, neither contended that the Disciplinary Board's opinion was founded on complaints which ought to be regarded as new facts nor applied, as he was entitled to do under Article 11 of Annex IX, for the disciplinary proceedings to be reopened (see, to that effect, the judgment of the Court of First Instance in Case T-549/93 *D* v *Commission* [1995] ECR-SC I-A-13, II-43, paragraph 55).

48 As to the applicant's argument that the report submitted to the Disciplinary Board did not refer to the fact that he had published an article on 6 September 1995 for the purpose of promoting his book or that he had taken part in a television broadcast on 26 September 1995, it need merely be noted that, contrary to the applicant's contention, the appointing authority had specifically referred to those facts in paragraph 19 of the report.

49 Accordingly, the first part of the plea must be rejected."

The Disciplinary Board's failure to draw up a report

s In particular, the Court of First Instance held as follows: "

'73 In the present case, the minutes of the first meeting of the Disciplinary Board show that, in accordance with Article 3 of Annex IX, the Chairman appointed one of the members of the Board as rapporteur to prepare a report on the matter as a whole. Although it appears from the minutes in the file that the rapporteur was not the only member of the Disciplinary Board to question the applicant and the witness at the hearings, it cannot be inferred from that fact that the rapporteur's duties were not performed.

74 Furthermore, as regards the complaint that no report was prepared on the matter as a whole, Article 3 of Annex IX is confined to laying down the rapporteur's duties and does not prescribe any specific formalities concerning the way in which they should be performed, such as whether a written report should be produced or whether such a report should be disclosed to the parties. Consequently, there is no reason why the rapporteur should not present his report orally to the other members of the Disciplinary Board. In the present case, the applicant has failed to establish that no report was presented. Furthermore, the applicant has not produced the slightest evidence to show either that the Disciplinary Board failed to undertake an inquiry which was sufficiently complete and which afforded him all the guarantees intended by the Staff Regulations (see Case 228/83 *F v Commission* [1985] ECR 275, paragraph 30, and Case T-500/93 *Y v Court of Justice* [1996] ECR-SC I-A-335, II-977, paragraph 52), or, therefore, that it was unable to adjudicate on the matter with full knowledge of the facts. In those circumstances, the applicant's argument must be rejected.

...

76 Consequently, the third part of the plea must be rejected.'

The inappropriate participation of the Chairman of the Disciplinary Board in the proceedings

10 In particular, the Court of First Instance held as follows:

'82 In the present case, it is clear from the actual wording of the Disciplinary Board's opinion that it was not necessary for its Chairman to take part in the vote on the reasoned opinion and that the opinion was adopted by a majority of the four other members. It is also clear from the minutes on the file that, when the proceedings were opened, the Chairman of the Disciplinary Board confined himself to inviting the members of the Board to consider whether the facts complained of had been proved and to decide on the severity of the disciplinary measure to be imposed, that being within the normal scope of his authority. Therefore, the applicant cannot reasonably plead an infringement of Article 8 of Annex IX on the ground that the Chairman of the Disciplinary Board played an active part in the deliberations.

83 In any event, it must be emphasised that the Chairman of the Disciplinary Board must be present during its proceedings so that, *inter alia*, he can, if necessary, vote with full knowledge of the facts to resolve tied votes or procedural questions.

84 The bias that the Chairman of the Disciplinary Board is alleged to have demonstrated *vis-à-vis* the applicant during the hearing is not corroborated by any evidence. Consequently, since it has, moreover, been neither alleged nor established that the Disciplinary Board failed in its duty, as an investigative body, to act in an independent and impartial manner (see, in that regard, *F v Commission*, paragraph 16, and Case T-74/96 *Tzoumas v Commission* [1998] ECR-SCT A-129, II-343, paragraph 340), the applicant's argument must be rejected.

85 Therefore, the fourth part of the plea cannot be accepted.'

11 The Court of First Instance therefore rejected the first plea in law.

The second plea in law: the reasons given were insufficient and the Disciplinary Board infringed Article 7 of Annex IX, the rights of the defence and the principle of sound administration

12 The appellant submitted that, while purporting to set out a formal statement of reasons, the Disciplinary Board's opinion and the contested decision were actually vitiated by insufficient reasoning, inasmuch as the arguments raised by him in his defence remained unanswered. In particular, no answer was given to his claims that the second paragraph of Article 17 of the Staff Regulations does not apply to officials taking leave on personal grounds, that the appointing authority incorrectly interpreted Article 12 of the Staff Regulations and that certain statements made by Commission officials were improper and prejudiced the outcome of the proceedings.

13 The Court of First Instance held, in particular, as follows:

'92 Under Article 7 of Annex IX, the Disciplinary Board must, after consideration of the documents submitted and having regard to any statements made orally or in writing by the official concerned and by witnesses, and also to the results of any inquiry undertaken, deliver a reasoned opinion of the disciplinary measure appropriate to the facts complained of.

93 Furthermore, it is settled case-law that the statement of the reasons on which a decision adversely affecting a person is based must allow the Community Courts to exercise their power of review as to its legality and must provide the person concerned with the information necessary to enable him to decide whether or not the decision is well founded (Case C-166/95 P *Commission* v *Daffix* [1997] ECR I-983, paragraph 23; Case C-188/96 P *Commission* v *V* [1997] ECR I-6561, paragraph 26; and Case T-144/96 *Y* v *Parliament* [1998] ECR-SC I-A-405, II-1153, paragraph 21). The question whether the statement of reasons on which the measure at issue is based satisfies the requirements of the Staff Regulations must be assessed in the light not only of its wording but also of its context and all the legal rules regulating the matter concerned (*Y* v *Parliament*, cited above, paragraph 22). It should be emphasised that, although the Disciplinary Board and the appointing authority are required to state the factual and legal matters forming the legal basis for their decisions and the considerations which have led to their adoption, it is not, however, necessary that they discuss all the factual and legal points which have been raised by the person concerned during the proceedings (see, by analogy, Joined Cases 43/82 and 63/82 *VBVB and VBBB* v *Commission* [1984] ECR 19, paragraph 22).

94 In the present case, the Disciplinary Board's opinion specifically drew attention to the applicant's contention that the second paragraph of Article 17 of the Staff Regulations did not apply in his case since he had been on leave on personal grounds. The reason given by the Disciplinary Board and the appointing authority for the fact that Article 17 did apply was that "every official remains bound [by it]". The reasons for the application of Article 12 of the Staff Regulations are also stated to the requisite legal standard. The Disciplinary Board's opinion and the decision removing the applicant from his post outline the applicant's duties, draw attention to the nature of the statements made in his book and the manner in which he ensured that it would be published, and conclude that, as a whole, the applicant's conduct adversely reflected on his position. The opinion and the decision removing him from his post thus clearly establish a link between the applicant's conduct and the prohibition in Article 12 of the Staff Regulations and set out the essential reasons why the Disciplinary Board and the appointing authority considered that that article had been infringed. The question whether such an assessment is sufficient entails consideration of the merits of the case rather than consideration of the adequacy or otherwise of the statement of reasons.

95 As regards the applicant's complaint regarding the lack of response to his argument that certain statements made by members of the Commission jeopardised the impartial nature of the proceedings against him, the documents before the Court show that he confined that argument to a submission to the Disciplinary Board that "this situation call ed] for an exceptional degree of vigilance and independence [on its part]" (Annex A.1 to the application, page 17). The applicant does not allege that, in the present case, the Disciplinary Board failed in its duty as an investigative body to act in an independent and impartial way. Consequently, that complaint is not relevant.

...

97 The Court must also reject the applicant's argument that the Disciplinary Board's opinion and the decision removing him from his post contain an insufficient statement of reasons in that they state that the applicant "could not have failed to be aware that the publication of his book reflected a personal opinion that conflicted with the policy adopted by the Commission in its capacity as an institution of the European Union responsible for pursuing a major objective and a fundamental policy choice laid down in the Treaty on European Union, namely economic and monetary union". The dispute concerned an obvious and well-known difference of opinion between the applicant and the Commission regarding the Union's monetary policy (order in *Connolly* v *Commission*, cited above, paragraph 36) and the book in question, as is clear from the documents before the Court, is the patent expression of that difference of opinion, the applicant stating in particular that "[his] central thesis is that ERM [the Exchange Rate Mechanism] and EMU are not only inefficient but also undemocratic a danger not only to our wealth but to our four freedoms and, ultimately, our peace" (page 12 of the book).

98 It should be added that the opinion and the decision removing the applicant from his post constituted the culmination of the disciplinary proceedings, the

details of which were sufficiently familiar to the applicant (*Daffix v Commission*, paragraph 34). As is clear from the Disciplinary Board's opinion, the applicant had himself explained at the hearing on 5 December 1995 that for several years he had been describing in documents prepared in the course of his duties as Head of Unit II.D.3 "contradictions which he had identified in the Commission's policies on economic and monetary matters" and that "since his critiques and proposals were blocked by his superiors, he had decided, given the vital importance of the matter at issue and the danger that the Commission's policy entailed for the future of the Union, to make them public". Although in his reply the applicant took exception to those statements in the Disciplinary Board's opinion, it is none the less the case that they are clearly confirmed by the minutes of the hearing, the contents of which he does not dispute (see, specifically, pages 4 to 7 of the minutes of the hearing).

99 In view of those factors, the statement of reasons in the Disciplinary Board's opinion and in the decision removing the applicant from his post cannot, consequently, be regarded as insufficient in that regard.

...

101 Finally, taking account of the factors set out above, there can be no grounds for alleging breach of the principle of sound administration or of the rights of the defence on the basis that the Disciplinary Board conducted its proceedings on the same day as the applicant was heard, since that fact rather tends to show that, on the contrary, the Board acted diligently. It must also be observed that the Disciplinary Board's opinion was finally adopted two days after that hearing.

102 It follows that the plea must be rejected."

The third plea in law: infringement of Article 11 of the Staff Regulations

11 The appellant submitted that the purpose of Article 11 of the Staff Regulations is not to prohibit officials from receiving royalties from the publication of their work but to ensure their independence by prohibiting them from taking instructions from persons outside their institution. Moreover, in receiving royalties, the appellant did not take instructions from any person outside the Commission.

13 The Court of First Instance held as follows:

> '108 In that regard, it is clear both from the applicant's statements to the Disciplinary Board and from the deposition of his publisher submitted by the applicant at that time that royalties on the sales of his book were actually paid to him by his publisher. Therefore, the applicant's argument that there was no infringement of Article 11 of the Staff Regulations on the basis that receipt of those royalties did not result in any person outside his institution exercising influence over him cannot be accepted. Such an argument takes no account of the objective conditions in which the prohibition laid down by the second paragraph of Article 11 of the Staff Regulations operates, namely acceptance of payment of any kind from any person outside the institution, without the permission of the appointing authority. The Court finds that those conditions were met in the present case.
>
> 109 The applicant cannot reasonably maintain that that interpretation of the second paragraph of Article 11 of the Staff Regulations entails a breach of the right to property as laid down in Article 1 of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950 (hereinafter "the ECHR").

110 First, it should be observed that in the present case there has been no infringement of the right to property, since the Commission has not confiscated any sums received by the applicant by way of remuneration for his book.

111 Furthermore, according to the case-law, the exercise of fundamental rights, such as the right to property, may be subject to restrictions, provided that the restrictions correspond to objectives of general interest pursued by the Community and do not constitute a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed (see Case 265/87 *Schräder v Hauptzollamt Gronau* [1989] ECR 2237, paragraph 15 and the case-law cited therein). The rules laid down by Article 11 of the Staff Regulations, under which officials must conduct themselves solely with the interests of the Communities in mind, are a response to the legitimate concern to ensure that officials are not only independent but also loyal *vis-à-vis* their institution (see, in that regard, Case T-273/94 *N v Commission* [1997] ECR-SC I-A-97, II-289, paragraphs 128 and 129), an objective whose pursuit justifies the slight inconvenience of obtaining the appointing authority's permission to receive sums from sources outside the institution to which the official belongs.

..

113 There is no evidence at all of the practice which allegedly existed within the Commission of allowing royalties to be received for services provided by officials on leave on personal grounds. Furthermore, that argument is of no relevance in the absence of any contention that the practice concerned applied to works published without the prior permission provided for in Article 17 of the Staff Regulations. The applicant is not maintaining therefore that he had received any clear assurances which might have given him real grounds for expecting that he would not be required to apply for permission under Article 11 of the Staff Regulations.

114 Accordingly, the plea must be rejected.'

The fourth plea in law infringement of Article 12 of the Staff Regulations

16 The appellant submitted that the complaint that he had infringed Article 12 of the Staff Regulations was unlawful since it was in breach of the principle of freedom of expression laid down in Article 10 of the ECHR, that the book at issue was a work of economic analysis and was not contrary to the interests of the Community, that the Commission misrepresents the scope of the duty of loyalty and that the alleged personal attacks in the book are merely instances of 'lightness of style' in the context of an economic analysis.

17 So far as this plea in law is concerned, the Court of First Instance held as follows:

'124 According to settled case-law, [the first paragraph of Article 12 of the Staff Regulations] is designed, primarily, to ensure that Community officials, in their conduct, present a dignified image which is in keeping with the particularly correct and respectable behaviour one is entitled to expect from members of an international civil service (Case T-146/94 *Williams v Court of Auditors* [1996] ECR-SC I-A-103, II-329, paragraph 65; hereinafter "*Williams II*"; *N v Commission*, paragraph 127, and Case T-183/96 *E v ESC* [1998] ECR-SC I-A-67, II-159, paragraph 39). It follows, in particular, that where insulting remarks are made publicly by an official, which are detrimental to the honour of the persons to whom they refer, that in itself constitutes a reflection on the official's position for the purposes of the first paragraph of Article 12 of the Staff Regulations (order of 21 January 1997 in Case C-156/96 P *Williams v Court of Auditors* [1997] ECR I-239, paragraph 21; Case T-146/89 *Williams v Court of Auditors* [1991] ECR II-1293, paragraphs 76 and 80 (hereinafter "*Williams I*"), and *Williams II*, paragraph 66).

125 In the present case, the documents before the Court and the extracts which the Commission has cited show that the book at issue contains numerous aggressive, derogatory and frequently insulting statements, which are detrimental to the honour of the persons and institutions to which they refer and which have been extremely well publicised, particularly in the press. Contrary to the appellant's contention, the statements cited by the Commission, and referred to in the appointing authority's report to the Disciplinary Board, cannot be categorised as mere instances of "lightness of style" but must be regarded as, in themselves, reflecting on the official's position.

126 The argument that ultimately neither the Disciplinary Board nor the appointing authority relied on the abovementioned complaint when giving reasons for the dismissal is unfounded. Both of them specifically stated in the opinion and in the decision removing Mr Connolly from his post, that "Mr Connolly's behaviour, taken as a whole, has reflected on his position". The fact that extracts from the book are not expressly cited in the decision removing the applicant from his post (as they were in the appointing authority's report to the Disciplinary Board) cannot therefore be interpreted as meaning that the complaint concerning an infringement of the first paragraph of Article 12 of the Staff Regulations had been dropped. That is particularly so since the decision removing the applicant from his post constitutes the culmination of disciplinary proceedings, with whose details the applicant was sufficiently familiar and during which, as is clear from the minutes in the file, the applicant had had an opportunity to give his views on the content of the statements found in his book.

127 Further, the first paragraph of Article 12 of the Staff Regulations specifically sets out, as do Articles 11 and 21, the duty of loyalty incumbent upon every official (see *N v Commission*, paragraph 129, approved on appeal by the Court of Justice's order in Case C-252/97 P *N v Commission* [1998] ECR I-4871). Contrary to the applicant's contention, it cannot be concluded from the judgment in *Williams I* that that duty arises only under Article 21 of the Staff Regulations, since the Court of First Instance drew attention in that judgment to the fact that the duty of loyalty constitutes a fundamental duty owed by every official to the institution to which he belongs and to his superiors, a duty "of which Article 21 of the Staff Regulations is a particular manifestation".

Consequently, the Court must reject the argument that the appointing authority could not legitimately invoke, *vis-à-vis* the applicant, a breach of his duty of loyalty, on the ground that the report to the Disciplinary Board did not cite an infringement of Article 21 of the Staff Regulations.

128 Similarly, the Court must reject the argument that the duty of loyalty does not involve preserving the relationship of trust between the official and his institution but involves only loyalty as regards the Treaties. The duty of loyalty requires not only that the official concerned refrains from conduct which reflects on his position and is detrimental to the respect due to the institution and its authorities (see, for example, the judgment in *Williams I*, paragraph 72, and Case T-293/94 *Vela Palacios v ESC* [1996] ECR-SC I A 297, II-893, paragraph 43), but also that he must conduct himself, particularly if he is of senior grade, in a manner that is beyond suspicion in order that the relationship of trust between that institution and himself may at all times be maintained (*N v Commission*, paragraph 129). In the present case, it should be observed that the book at issue, in addition to including statements which in themselves reflected on his position, publicly expressed, as the appointing authority has pointed out, the applicant's fundamental opposition to the Commission's policy, which it was his responsibility to implement, namely bringing about economic and monetary union, an objective which is, moreover, laid down in the Treaty.

129 In that context, it is not reasonable for the applicant to contend that there has been a breach of the principle of freedom of expression. It is clear from the case-law on the subject that, although freedom of expression constitutes a fundamental right which Community officials also enjoy (Case C-100/88 *Oyowe and Traore v Commission* [1989] ECR 4285, paragraph 16), it is nevertheless the case that Article 12 of the Staff Regulations, as construed above, does not constitute a bar to the freedom of expression of those officials but imposes reasonable limits on the exercise of that right in the interest of the service (*E v ESC*, paragraph 41).

130 Finally, it must be emphasised that that interpretation of the first paragraph of Article 12 of the Staff Regulations cannot be challenged on the ground that, in the present case, publication of the book at issue

occurred during a period of leave on personal grounds. In that regard, it is clear from Article 35 of the Staff Regulations that leave on personal grounds constitutes one of the administrative statuses which an official may be assigned, with the result that, during such a period, the person concerned remains bound by the obligations borne by every official, in the absence of express provision to the contrary. Since Article 12 of the Staff Regulations applies to all officials, without any distinction based on their status, the fact that the applicant was on such leave cannot release him from his obligations under that article. That is particularly so since an official's concern for the respect due to his position is not confined to the particular time at which he carries out a specific task but is expected from him under all circumstances (*Williams II*, paragraph 68). The same is true of the duty of loyalty which, according to the case-law, applies not only in the performance of specific tasks but extends to the whole relationship between the official and the institution ; *Williams I*, paragraph 72 and *E* v *ESC*, paragraph 47).

131 Accordingly, the appointing authority was fully entitled to take the view that the applicant's behaviour had reflected on his position and involved an irremediable breach of the trust which the Commission is entitled to expect from its officials.

132 It follows that the plea must be rejected.'

The fifth plea in law: infringement of Article 17 of the Staff Regulations

133 The appellant submitted, *inter alia*, that the interpretation of the second paragraph of Article 17 of the Staff Regulations on which the Disciplinary Board's opinion and the contested decision are based is contrary to the principle of freedom of expression laid down in Article 10 of the ECHR, in that it leads, inherently, to the prohibition of any publication. Constraints on freedom of expression are permissible only in the exceptional cases listed in Article 10(2) of the ECHR. Furthermore, Article 17 of the Staff Regulations does not apply to

officials who are on leave on personal grounds and the appellant was, in any event, justified in believing that to be the case, having regard to the practice followed by the Commission, at least in DG II.

19 The Court of First Instance rejected this plea for the following reasons:

> '147 In the present case, it is not disputed that the applicant went ahead with publication of his book without applying for the prior permission required by the provision cited above. However, the applicant, without expressly raising an objection of illegality to the effect that the second paragraph of Article 17 of the Staff Regulations as a whole is unlawful, submits that the Commission's interpretation of the provision is contrary to the principle of freedom of expression.
>
> 148 In that regard, it must be recalled that the right to freedom of expression laid down in Article 10 of the ECHR constitutes, as has already been made clear, a fundamental right, the observance of which is guaranteed by the Community Courts and which Community officials also enjoy (*Oyowe and Traore v Commission*, paragraph 16, and *L v ESC*, paragraph 41). None the less, it is also clear from settled case law that fundamental rights do not constitute an unfettered prerogative but may be subject to restrictions, provided that the restrictions in fact correspond to objectives of general public interest pursued by the Community and do not constitute, with regard to the objectives pursued, a disproportionate and intolerable interference which infringes upon the very substance of the rights protected (see *Schräder v Hauptzollamt Gronau*, paragraph 15; Case C-404/92 P *X v Commission* [1994] ECR I-4737, paragraph 18; Case T-176/94 *K v Commission* [1995] ECR-SC I-A-203, II-621, paragraph 33; and *N v Commission*, paragraph 73).

149 In the light of those principles and the case-law on Article 12 of the Staff Regulations (see paragraph 129 above and *F* v *ESC*, paragraph 41), the second paragraph of Article 17 of the Staff Regulations, as interpreted by the decision removing the applicant from his post, cannot be regarded as imposing an unwarranted restriction on the freedom of expression of officials.

150 First, it must be emphasised that the requirement that permission be obtained prior to publication corresponds to the legitimate aim that material dealing with the work of the Communities should not undermine their interests and, in particular, as in the present case, the reputation and image of one of the institutions.

151 Second, the second paragraph of Article 17 of the Staff Regulations does not constitute a disproportionate measure in relation to the public-interest objective which the article concerned seeks to protect.

152 In that connection, it should be observed at the outset that, contrary to the applicant's contention, it cannot be inferred from the second paragraph of Article 17 of the Staff Regulations that the rules it lays down in respect of prior permission thereby enable the institution concerned to exercise unlimited censorship. First, under that provision, prior permission is required only when the material that the official wishes to publish, or to have published, "[deals] with the work of the Communities". Second, it is clear from that provision that there is no absolute prohibition on publication, a measure which, in itself, would be detrimental to the very substance of the right to freedom of expression. On the contrary, the last sentence of the second paragraph of Article 17 of the Staff Regulations sets out clearly the principles governing the grant of permission, specifically providing that permission may be refused only where the publication in point is liable to prejudice the interests of the Communities. Moreover, such a decision may be contested under Articles 90 and 91 of the Staff Regulations, so that an official who takes the view that he was refused permission in breach of the Staff Regulations is able to have

recourse to the legal remedies available to him with a view to securing review by the Community Courts of the assessment made by the institution concerned.

153 It must also be emphasised that the second paragraph of Article 17 of the Staff Regulations is a preventive measure designed on the one hand, to ensure that the Communities' interests are not jeopardised, and, on the other, as the Commission has rightly pointed out, to make it unnecessary for the institution concerned, after publication of material prejudicing the Communities' interests, to take disciplinary measures against an official who has exercised his right of expression in a way that is incompatible with his duties.

154 In the present case, the appointing authority maintained, in its decision removing the applicant from his post, that he had failed to comply with that provision on the grounds that, first, he had not requested permission to publish his book, second, he could not have failed to be aware that he would be refused permission on the same grounds as those on which permission had previously been refused in respect of articles of similar content, and, finally, his conduct had seriously prejudiced the Communities' interests and had damaged the institution's image and reputation.

155 In the light of all those considerations, therefore, it cannot be inferred from the decision removing the applicant from his post that the finding that he had infringed the second paragraph of Article 17 of the Staff Regulations would have been made even if the Communities' interests had not been prejudiced. Accordingly there is nothing to indicate that the scope attributed by the appointing authority to that provision goes further than the aim pursued and is therefore contrary to the principle of freedom of expression.

156 In those circumstances, the plea alleging breach of the right to freedom of expression must be rejected.

157 The argument that the second paragraph of Article 17 of the Staff Regulations does not apply to officials who are on leave on personal grounds is also unfounded. As pointed out above (paragraph 130), it follows from Article 35 of the Staff Regulations that an official on such leave retains his status as an official throughout the period of leave and therefore remains bound by his obligations under the regulations in the absence of express provision to the contrary. The second paragraph of Article 17 of the Staff Regulations applies to all officials and does not draw any distinction based on the status of the person concerned. Consequently, the fact that the applicant was on leave on personal grounds when his book was published does not release him from his obligation under the second paragraph of Article 17 of the Staff Regulations to request permission from the appointing authority prior to publication.

158 That interpretation is not undermined by the fact that, unlike the second paragraph of Article 17 of the Staff Regulations, the first paragraph thereof expressly provides that an official continues to be bound by his duty of confidentiality after leaving the service. An official on leave on personal grounds is not comparable to an official whose service has terminated, as provided in Article 47 of the Staff Regulations, and who, therefore, does not fall within any of the administrative statuses listed in Article 35 of the Staff Regulations.

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160 Accordingly, the Disciplinary Board and the appointing authority were right to find that the applicant had infringed the second paragraph of Article 17 of the Staff Regulations.

161 Finally, the applicant's allegation that a general practice existed in the Commission, by virtue of which officials on leave on personal grounds were not required to request prior permission for publication, is in no way

substantiated by the statement cited by him. In that statement, the former Director-General of DG II confines himself to saying that Mr Connolly had taken unpaid leave of one year in 1985 in order to work for a private financial institution and, during that period, he had not considered it necessary to approve the texts prepared by Mr Connolly for that institution or even to comment on them. It follows that there is no basis for the argument.

162 Consequently, the plea must be rejected.'

The sixth plea in law: manifest error of assessment and breach of the principle of proportionality

20 The appellant claimed that the contested decision was vitiated by a manifest error of assessment as to the facts and that it was in breach of the principle of proportionality, in that it failed to take account of various mitigating circumstances.

21 The Court of First Instance held as follows:

'165 It is settled case-law that once the truth of the allegations against the official has been established, the choice of appropriate disciplinary measure is a matter for the appointing authority and the Community Courts may not substitute their own assessment for that of the authority, save in cases of manifest error or a misuse of powers (Case 46/72 *De Greef v Commission* [1973] ECR 543, paragraph 45; *F v Commission*, paragraph 34; *Williams I*, paragraph 83; and *D v Commission*, paragraph 96). It must also be borne in mind that the determination of the penalty to be imposed is based on a comprehensive appraisal by the appointing authority of all the particular facts and circumstances peculiar to each

individual case, since Articles 86 to 89 of the Staff Regulations do not specify any fixed relationship between the measures provided for and the various sorts of infringements and do not state the extent to which the existence of aggravating or mitigating circumstances should affect the choice of penalty (Case 403/85 *F* v *Commission* [1987] ECR 645, paragraph 26; *Williams I*, paragraph 83; and *V* v *Parliament*, paragraph 34).

166 In the present case, it must be first be pointed out that the truth of the allegations against the applicant has been established.

167 Second, the penalty imposed cannot be regarded as either disproportionate or as resulting from a manifest error of assessment. Even though it is not disputed that the applicant had a good service record, the appointing authority was nevertheless fully entitled to find that, having regard to the gravity of the facts established and the applicant's grade and responsibilities, such a factor was not capable of mitigating the penalty to be imposed.

168 Furthermore, the applicant's argument that account should have been taken of his good faith regarding what he believed to be the scope of the duties of an official on leave on personal grounds cannot be accepted. It is clear from the case-law that officials are deemed to know the Staff Regulations (Case T-12/94 *Daffix* v *Commission* [1997] ECR-SC I-A-453, II-1197, paragraph 116; Joined Cases T-116/96, T-212/96 and T-215/96 *Telchini and Others* v *Commission* [1998] ECR-SC I-A-327, II-947, paragraph 59), with the result that their alleged ignorance of their obligations cannot constitute good faith. That argument has even less force in the present case since the applicant has admitted that his colleagues knew of his intention to work on the book at issue during his leave on personal grounds, whereas, in his request to the appointing authority under Article 40 of the Staff Regulations, he had given reasons unconnected with his book. Given that such statements are contrary to the honesty and trust which should govern relations between the administration and officials and are incompatible with the integrity which each

official is required to show (see, to that effect, Joined Cases 175/86 and 209/86 *M* v *Council* [1988] ECR 1891, paragraph 21), the appointing authority was entitled to treat the applicant's argument concerning his alleged good faith as unfounded.

169 Consequently, the plea must be rejected.'

The seventh plea in law: misuse of powers

21 Finally, the appellant asserted that there was a body of evidence establishing misuse of powers.

22 In rejecting this plea, the Court of First Instance gave the following grounds:

'171 According to the case-law, a misuse of powers consists in an administrative authority using its powers for a purpose other than that for which they were conferred on it. Thus, a decision may amount to a misuse of powers only if it appears, on the basis of objective, relevant and consistent indicia, to have been taken for purposes other than those stated (*Williams* I, paragraphs 87 and 88).

172 As regards the statements made by certain members of the Commission before commencement of the disciplinary proceedings, it need merely be observed that... those statements constituted no more than a provisional

assessment by the relevant members of the Commission and could not, in the circumstances of the case, adversely affect the proper conduct of the disciplinary proceedings.

173 Nor can the applicant's argument that the Commission should have warned him of the risks that he was running by publishing his book be accepted. The Commission rightly points out that it cannot be held liable for initiatives which the applicant had taken care to conceal from it when he requested leave on personal grounds. Furthermore, the arguments alleging that there were irregularities in the disciplinary proceedings and that the applicant acted in good faith must also be rejected for the reasons set out in connection with the first and sixth pleas.

174 As to the argument alleging that the Commission changed the general rules for calculating salary reductions in cases of suspension, it need merely be pointed out that the change was not specifically linked to the applicant's removal from his post and cannot therefore constitute proof of the alleged misuse of powers.

175 Accordingly, it has not been established that, when imposing the disciplinary measure, the appointing authority pursued any aim other than that of safeguarding the internal order of the Community civil service. The seventh plea must therefore be rejected."

176 The Court of First Instance therefore rejected the pleas for annulment and, consequently, the claim for damages.

177 Accordingly, the Court of First Instance dismissed the application and ordered each of the parties to bear its own costs.

The appeal

25 Mr Connolly claims that the Court of Justice should:

— set aside the contested judgment;

annul so far as necessary the opinion of the Disciplinary Board;

— annul the contested decision;

— annul the decision of 12 July 1996 rejecting his administrative complaint;

order the Commission to pay him BEF 7 500 000 in respect of material damage and BEF 1 500 000 in respect of non-material damage;

— order the Commission to pay the costs both of the proceedings before the Court of First Instance and of the present proceedings.

26 The Commission contends that the Court of Justice should:

— dismiss the appeal as partially inadmissible and, in any event, as entirely unfounded;

— dismiss the claim for damages as inadmissible and unfounded;

— order Mr Connolly to pay the costs in their entirety.

28 In his appeal the appellant puts forward 13 grounds of appeal.

The first ground of appeal

29 By his first ground of appeal, Mr Connolly complains that the Court of First Instance failed to take account of the fact that Articles 12 and 17 of the Staff Regulations establish a system of prior censorship which is, in principle, contrary to Article 10 of the ECHR as interpreted by the European Court of Human Rights (hereinafter "the Court of Human Rights").

30 Furthermore, that system does not incorporate the substantive and procedural conditions required by Article 10 of the ECHR whenever a restriction is imposed on freedom of expression as safeguarded by that provision. In particular, it fails to comply with the requirement that any restriction must pursue a legitimate aim, must be prescribed by a legislative provision which makes the restriction foreseeable, must be necessary and appropriate to the aim pursued and must be amenable to effective judicial review.

31 The appellant also complains that the Court of First Instance neither balanced the interests involved nor ascertained whether the contested decision was actually justified by a pressing social need. In that regard, the appellant submits that if that decision was taken in order to safeguard the interests of the institution and the people affected by the book at issue, that, to be effective, it should have been accompanied by measures designed to prevent distribution of the book. Such measures were not, however, adopted by the Commission.

32 The Commission contends, as a preliminary point, that the first ground of appeal should be rejected as inadmissible on the ground that it is concerned with the substantive legality of the rules concerning permission laid down by Article 17 of the Staff Regulations rather than with the Court of First Instance's interpretation thereof. At no time during the proceedings at first instance did the appellant specifically raise an objection of illegality under Article 241 EC.

33 As to the substance, the Commission contends that Article 17 contains all the safeguards needed to meet the requirements of Article 10 of the ECHR and that, as the Court of First Instance held in paragraphs 148 to 154 of the contested judgment, it is confined to imposing reasonable limits on freedom of publication in cases where the interests of the Community might be adversely affected.

The admissibility of the ground of appeal

34 It is true that, in his first ground of appeal, the appellant appears to be challenging, by reference to Article 10 of the ECHR, the substantive legality of the rules concerning permission laid down by Article 17 of the Staff Regulations, even though before the Court of First Instance, as indicated in paragraph 147 of the contested judgment, he only contested the Commission's 'interpretation' of the second paragraph of Article 17 of the Staff Regulations as being contrary to freedom of expression.

55 Nevertheless, before the Court of First Instance, the appellant, by reference to the requirements of Article 10 of the ECHR, challenged the way in which the second paragraph of Article 17 of the Staff Regulations was applied in his case. Before this Court, he is criticising the reasoning of the contested judgment to justify rejection of his plea alleging failure to observe the principle of freedom of expression.

56 The first ground of appeal must therefore be held to be admissible.

Substance

57 First, according to settled case law, fundamental rights form an integral part of the general principles of law, whose observance the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international 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, in particular, Case C-260/89 *ERT* [1991] ECR I-2925, paragraph 41).

58 Those principles have, moreover, been restated in Article 6(2) of the Treaty on European Union, which provides: 'The 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.'

59 As the Court of Human Rights has held, 'Freedom of expression constitutes one of the essential foundations of [a democratic society], one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of

Article 10 [of the ECHR], it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb; such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society" (Eur. Court H. R. Handyside v United Kingdom judgment of 7 December 1976, Series A no. 24, § 49; Müller and Others judgment of 24 May 1988, Series A no. 133, § 33; and Vogt v Germany judgment of 26 September 1995, Series A no. 323, § 52).

40 Freedom of expression may be subject to the limitations set out in Article 10(2) of the ECHR, in terms of which the exercise of that freedom, '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, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary'.

41 Those limitations must, however, be interpreted restrictively. According to the Court of Human Rights, the adjective 'necessary' involves, for the purposes of Article 10(2), a 'pressing social need' and, although '[t]he contracting States have a certain margin of appreciation in assessing whether such a need exists', the interference must be 'proportionate to the legitimate aim pursued' and 'the reasons adduced by the national authorities to justify it' must be 'relevant and sufficient' (see, in particular, Vogt v Germany, § 52; and Wille v Liechtenstein judgment of 28 October 1999, no 28396/95, § 61 to § 63). Furthermore, any prior restriction requires particular consideration (see Wingrove v United Kingdom judgment of 25 November 1996, *Reports of Judgments and Decisions* 1996-V, p. 1957, § 58 and § 60).

42 Furthermore, the restrictions must be prescribed by legislative provisions which are worded with sufficient precision to enable interested parties to regulate their

conduct, taking, if need be, appropriate advice (Eur. Court H. R. Sunday Times v United Kingdom judgment of 26 April 1979, Series A no. 30, § 49).

41 As the Court has ruled, officials and other employees of the European Communities enjoy the right of freedom of expression (see *Oyowe and Traore v Commission*, paragraph 16), even in areas falling within the scope of the activities of the Community institutions. That freedom extends to the expression, orally or in writing, of opinions that dissent from or conflict with those held by the employing institution.

42 However, it is also legitimate in a democratic society to subject public servants, on account of their status, to obligations such as those contained in Articles 11 and 12 of the Staff Regulations. Such obligations are intended primarily to preserve the relationship of trust which must exist between the institution and its officials or other employees.

43 It is settled that the scope of those obligations must vary according to the nature of the duties performed by the person concerned or his place in the hierarchy (see, to that effect, Wille v Liechtenstein, § 63, and the opinion of the Commission of Human Rights in its report of 11 May 1984 in Glasenapp v Germany, Series A no. 104, § 124).

44 In terms of Article 10(2) of the ECHR, specific restrictions on the exercise of the right of freedom of expression can, in principle, be justified by the legitimate aim of protecting the rights of others. The rights at issue here are those of the institutions that are charged with the responsibility of carrying out tasks in the public interest. Citizens must be able to rely on their doing so effectively.

45 That is the aim of the regulations setting out the duties and responsibilities of the European public service. So an official may not, by oral or written expression, act

in breach of his obligations under the regulations, particularly Articles 11, 12 and 17, towards the institution that he is supposed to serve. That would destroy the relationship of trust between himself and that institution and make it thereafter more difficult, if not impossible, for the work of the institution to be carried out in cooperation with that official.

48 In exercising their power of review, the Community Courts must decide, having regard to all the circumstances of the case, whether a fair balance has been struck between the individual's fundamental right to freedom of expression and the legitimate concern of the institution to ensure that its officials and agents observe the duties and responsibilities implicit in the performance of their tasks.

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49 As the Court of Human Rights has held in that regard, it must '[be borne in mind] that whenever civil servants' right to freedom of expression is in issue the "duties and responsibilities" referred to in Article 10(2) assume a special significance, which justifies leaving to the national authorities a certain margin of appreciation in determining whether the impugned interference is proportionate to the above aim' (see Eur. Court H. R. Vogt v Germany, cited above; Ahmed and Others v United Kingdom judgment of 2 September 1998, *Reports of Judgments and Decisions* 1998-VI, p. 2378, § 56; and Wille v Liechtenstein, cited above, § 62).

50 The second paragraph of Article 17 of the Staff Regulations must be interpreted in the light of those general considerations, as was done by the Court of First Instance in paragraphs 148 to 155 of the contested judgment.

51 The second paragraph of Article 17 requires permission for publication of any matter dealing with the work of the Communities. Permission may be refused only where the proposed publication is liable 'to prejudice the interests of the Communities'. That eventuality, referred to in a Council regulation in restrictive terms, is a matter that falls within the scope of 'the protection of the rights of others', which, according to Article 10(2) of the ECHR as interpreted by the Court of Human Rights, is such as to justify restricting freedom of expression.

Consequently, the appellant's allegations that the second paragraph of Article 17 of the Staff Regulations does not pursue a legitimate aim and that the restriction of freedom of expression is not prescribed by a legislative provision must be rejected.

v The fact that the restriction at issue takes the form of prior permission cannot render it contrary, as such, to the fundamental right of freedom of expression, as the Court of First Instance held in paragraph 152 of the contested judgment.

vi The second paragraph of Article 17 of the Staff Regulations clearly provides that, in principle, permission is to be granted, refusal being possible only in exceptional cases. Indeed, in so far as that provision enables institutions to refuse permission to publish, and thus potentially interfere to a serious extent with freedom of expression, one of the fundamental pillars of a democratic society, it must be interpreted restrictively and applied in strict compliance with the requirements mentioned in paragraph 41 above. Thus, permission to publish may be refused only where publication is liable to cause serious harm to the Communities' interests.

vii Furthermore, as their scope is restricted to publications dealing with the work of the Communities, the rules are designed solely to allow the institution to keep itself informed of the views expressed in writing by its officials or other employees about its work so as to satisfy itself that they are carrying out their duties and conducting themselves with the interests of the Communities in mind and not in a way that would adversely reflect on their position.

viii Remedies against a decision refusing permission are available under Articles 90 and 91 of the Staff Regulations. There is thus no basis for the appellant to claim, as he does, that the rules in Article 17 of the Staff Regulations are not amenable to effective judicial review. Review of that kind enables the Community Courts to ascertain whether the appointing authority has exercised its power under the

second paragraph of Article 17 of the Staff Regulations in strict compliance with the limitations to which any interference with the right to freedom of expression is subject.

56 Such rules reflect the relationship of trust which must exist between employers and employees, particularly when they discharge high-level responsibilities in the public service. The way in which the rules are applied can be assessed solely in the light of all the relevant circumstances and the implications thereof for the performance of public duties. In that respect, the rules meet the criteria set out in paragraph 41 above for the acceptability of interference with the right to freedom of expression.

57 It is also clear from the foregoing that, when applying the second paragraph of Article 17 of the Staff Regulations, the appointing authority must balance the various interests at stake and is in a position to do so by taking account, in particular, of the gravity of the potential prejudice to the interests of the Communities.

58 In the present case, the Court of First Instance found, in paragraph 154 of the contested judgment, that 'the appointing authority maintained, in its decision removing the applicant from his post, that he had failed to comply with [the second paragraph of Article 17 of the Staff Regulations] on the grounds that, first, he had not requested permission to publish his book, second, he could not have failed to be aware that he would be refused permission on the same grounds as those on which permission had previously been refused in respect of articles of similar content, and, finally, his conduct had seriously prejudiced the Communities' interests and damaged the institution's image and reputation.'

59 In relation to the latter infringement, the Court of First Instance observed first, in paragraph 125 of the contested judgment, that 'the book at issue contains numerous aggressive, derogatory and frequently insulting statements, which are detrimental to the honour of the persons and institutions to which they refer and which have been extremely well publicised, particularly in the press.' The Court

of First Instance was thus entitled to reach the conclusion, on the basis of an assessment which cannot be challenged on appeal, that those statements constituted an infringement of Article 12 of the Staff Regulations.

60 The Court of First Instance then referred, in paragraph 128 of the contested judgment, not only to Mr Connolly's high-ranking grade but also to the fact that the book at issue 'publicly expressed... the applicant's fundamental opposition to the Commission's policy, which it was his responsibility to implement, namely bringing about economic and monetary union, an objective which is, moreover, laid down in the Treaty'.

61 Finally, the Court of First Instance made it clear, in paragraph 155 of the contested judgment, that it had not been established 'that the finding that he had infringed the second paragraph of Article 17 of the Staff Regulations would have been made even if the Communities' interests had not been prejudiced'.

62 The foregoing observations of the Court of First Instance, based on the statement of reasons in the preamble to the contested decision (see, in particular, the fifth, sixth, ninth, tenth, twelfth and fifteenth recitals to that decision), make it clear that Mr Connolly was dismissed not merely because he had failed to apply for prior permission, contrary to the requirements of the second paragraph of Article 17 of the Staff Regulations, or because he had expressed a dissentient opinion, but because he had published, without permission, material in which he had severely criticised, and even insulted, members of the Commission and other superiors and had challenged fundamental aspects of Community policies which had been written into the Treaty by the Member States and to whose implementation the Commission had specifically assigned him the responsibility of contributing in good faith. In those circumstances, he committed 'an irremediable breach of the trust which the Commission is entitled to expect from its officials' and, as a result, made 'it impossible for any employment relationship to be maintained with the institution' (see the 15th recital to the decision removing Mr Connolly from his post).

63 As to the measures intended to prevent distribution of the book, which, the appellant claims, the Commission should have adopted in order to protect its

interests effectively, suffice it to say that the adoption of such measures would not have restored the relationship of trust between the appellant and the institution and would have made no difference to the fact that it had become impossible for him to continue to have any sort of employment relationship with the institution.

64 It follows that the Court of First Instance was entitled to conclude, as it did in paragraph 156 of the contested judgment, that the allegation of breach of the right to freedom of expression, resulting from the application thereto of the second paragraph of Article 17 of the Staff Regulations, was unfounded.

65 The first ground of appeal must therefore be rejected.

The second ground of appeal

66 By his second ground of appeal, the appellant claims that the Court of First Instance (in paragraph 157 of the contested judgment) failed to apply the second paragraph of Article 17 and Article 38 of the Staff Regulations correctly by holding that officials on leave on personal grounds were also required to obtain permission prior to publishing material. It is the appellant's contention that, on the contrary, the fact of being on leave on personal grounds releases the official from the requirement of complying with the second paragraph of Article 17 of the Staff Regulations.

67 The appellant also complains that the Court of First Instance did not give reasons for rejecting his offer of evidence as to the practice followed in DG II at the Commission and thus infringed the principle of legitimate expectations.

68 In that regard, paragraph 161 of the contested judgment indicates that, to establish the existence of a general practice within the Commission, by virtue of which officials on leave on personal grounds were not required to request prior permission, the appellant relied merely on the fact that in 1985 he had been granted one year's leave in order to work for a private financial institution and that the former Director-General of DG II had not deemed it necessary to approve or comment on the texts prepared by him for that institution. It cannot be concluded from that fact alone that the Court of First Instance has in any way distorted the evidence adduced by the appellant.

69 Moreover, it is patently clear from the wording of Article 35 of the Staff Regulations that an official on leave on personal grounds does not lose his status as an official during the period of leave. He therefore remains subject to the obligations incumbent upon every official, unless express provision is made to the contrary.

70 Consequently, the second ground of appeal must be rejected as manifestly unfounded.

The third ground of appeal

71 By his third ground of appeal, the appellant complains that the Court of First Instance failed to apply the second paragraph of Article 11 of the Staff Regulations correctly in that it equated royalties with remuneration for the purposes of that provision.

72 In the first part of this ground of appeal, the appellant maintains that that interpretation is wrong since royalties do not constitute consideration for services rendered and do not undermine an official's independence.

70 He asserts in the second part of this ground of appeal that the Court of First Instance's interpretation entails a breach of the right to property laid down by Article 1 of the First Protocol to the ECHR.

71 Finally, by the third part of this ground of appeal, the appellant complains that in paragraph 113 of the contested judgment the Court of First Instance misapplied Article 11 in making its application subordinate to the rules on prior permission laid down in Article 17 of the Staff Regulations. He submits that Article 11 applies independently of Article 17.

72 So far as the first two parts of this ground of appeal are concerned, the appellant confines himself to reproducing the arguments and submissions made before the Court of First Instance without developing any specific argument that identifies the error of law that is said to vitiate the contested judgment.

73 Since the first two parts of the third ground of appeal in reality seek no more than a re-examination of the submissions made before the Court of First Instance, which under Article 51 of the EC Statute of the Court of Justice the Court does not have jurisdiction to undertake, they must be rejected as inadmissible (see Case C-352/98 P *Bergaderm and Goupil* v *Commission* [2000] ECR I-5291, paragraph 35).

74 The third part of this ground of appeal, as the Advocate General observed in point 32 of his Opinion, concerns reasoning which the Court of First Instance included only for the sake of completeness in the second sentence of paragraph 113 of the contested judgment. The Court of First Instance ruled principally that the appellant had not proved the existence of the alleged practice of the

Commission to permit officials on leave on personal grounds to receive royalties. That reasoning was a sufficient answer in law to the appellant's argument. The complaint concerning the second sentence of paragraph 113 of the contested judgment must, therefore, be held on any view to be ineffectual.

Consequently, the third ground of appeal must be rejected in its entirety as manifestly inadmissible.

The fourth ground of appeal

The fourth ground of appeal comprises three parts.

In the first part, the appellant complains that in paragraphs 125 and 126 of the contested judgment the Court of First Instance itself continued the investigative phase of the disciplinary proceedings and substituted its assessment of the facts for that of the disciplinary authority by accepting outright a number of the complaints concerning the contents of the book which had been made by the Commission during the disciplinary procedure, although neither the Disciplinary Board's opinion nor the contested decision included an express statement of reasons regarding the allegedly insulting nature of the book. Furthermore, the contested judgment merely reproduced those complaints without verifying whether they were well founded.

In paragraph 126 of the contested judgment, the Court of First Instance rejected the appellant's argument that ultimately neither the Disciplinary Board nor the appointing authority relied on the allegations that the book at issue was aggressive, derogatory and insulting. According to the Court of First Instance both bodies 'specifically stated in the opinion and in the decision removing Mr

Connolly from his post, that "Mr Connolly's behaviour, taken as a whole, has reflected on his position"'. That statement must be read in the light of the appointing authority's report to the Disciplinary Board which, as the Advocate General observed in point 35 of his Opinion, includes an appraisal, in essence identical to that made by the Court of First Instance in paragraph 125 of the contested judgment, of the aggressive, derogatory, even insulting, nature of certain passages of the book (see, in particular, paragraphs 25 and 26 of the appointing authority's report).

82 The appellant is therefore mistaken when he claims that the Court of First Instance substituted its own assessment for that of the appointing authority by formulating fresh allegations against him.

83 Furthermore, provided the evidence has not been misconstrued and the general principles of law and the rules of procedure in relation to the burden of proof and the taking of evidence have been observed, findings of fact are not, in principle, subject to review by the Court of Justice in an appeal (see Case C-7/95 P *Deere* v *Commission* [1998] ECR I-3111, paragraph 22).

84 The first part of the fourth ground of appeal must therefore be rejected.

85 By the second part of this ground of appeal, Mr Connolly complains that the Court of First Instance found in paragraph 128 of the contested judgment that the book in question publicly expressed 'his fundamental opposition to the Commission's policy, which it was his responsibility to implement' with the result that the relationship of trust between the appellant and his institution was destroyed.

86 According to the appellant, that charge was not made against him in the disciplinary proceedings. Furthermore, if any expression of dissent from the

policy of a Community institution on the part of one of its officials were regarded as a breach of the duty of loyalty, freedom of expression as laid down in Article 10 of the ECHR would become meaningless. Besides, Mr Connolly's responsibility was not to implement Commission policy but, as stated in the Disciplinary Board's opinion, was 'monitoring monetary policy in the Member States and analysing progress towards economic and monetary union'.

87 As to that, it is sufficient to note that the finding of the Court of First Instance of which the appellant complains is also, as the Commission rightly points out, to be found, in essence, in the eighth recital to the opinion of the Disciplinary Board and in the tenth recital to the contested decision. Assessment of the nature of Mr Connolly's duties is a question of fact on which the Court of Justice cannot rule in an appeal.

88 The alleged breach of the principle of freedom of expression and the restrictions which may exceptionally be imposed on it are dealt with at paragraphs 37 to 64 of the present judgment, relating to the first ground of appeal.

89 The second part of the fourth ground of appeal must therefore also be rejected.

90 By the third part of this ground of appeal, the appellant asserts that in paragraph 126 of the contested judgment the Court of First Instance was wrong to hold that the Disciplinary Board and the appointing authority had not abandoned their complaint relating to an infringement of Article 12 of the Staff Regulations, since the Commission has acknowledged, in its defence, that it had decided not to proceed with the allegation of breach of confidentiality.

91 Irrespective of the arguments relied on by the Commission in this appeal — and it disputes the appellant's interpretation thereof — it is clear from the grounds

set out by the Court of First Instance in paragraph 126 of the contested judgment and approved in paragraph 81 of the present judgment, that neither the Disciplinary Board nor the appointing authority abandoned the allegation of infringement of Article 12 of the Staff Regulations.

94 Therefore, the third part of this ground of appeal cannot be upheld.

95 Consequently, the fourth ground of appeal must be dismissed as being partly inadmissible and partly unfounded.

The fifth ground of appeal

96 By his fifth ground of appeal, the appellant complains that in paragraph 41 of the contested judgment the Court of First Instance held that the appointing authority's report included 'the contents of the book among the facts complained of' in that they expounded economic theories which were at odds with the policy adopted by the Commission and that the Court thus failed to give the requisite credence to the appointing authority's report, paragraph 25 of which referred solely to 'derogatory and unsubstantiated attacks'.

97 The appellant's claim that the Court of First Instance was confused cannot be upheld since in paragraph 44, having cited certain passages from the appointing authority's report for the Disciplinary Board, it confined itself to stating that the very contents of the book at issue, in particular its polemical nature, were among the facts alleged against the appellant.

98 The fifth ground of appeal is therefore completely unfounded.

The sixth ground of appeal

9 The sixth ground of appeal comprises two parts.

10 By the first part, the appellant accuses the Court of First Instance of having, in paragraphs 97 and 98 of the contested judgment, failed to give due credence to the documents in the case by dealing with a complaint which had not been established in the course of the disciplinary proceedings, namely that a difference of opinion had been expressed between Mr Connolly and the Commission regarding the introduction of economic and monetary union, and by relying for that purpose on a quotation from the book at issue — in this instance, page 12 — which does not appear in the documents in the case.

11 It must be pointed out, as the Court of First Instance did in paragraphs 97 and 98 of the contested judgment, that the appellant's disagreement with the Commission's policy was obvious, as evidenced by the passage cited from the book, which was manifestly part of the case-file, and that the appellant himself gave an explanation of it before the Disciplinary Board (see the minutes of the hearing on 5 December 1995, pages 4 to 7).

12 In any event purely factual appraisals of that kind are not subject to review by the Court of Justice in an appeal.

13 In the second part of the fifth ground of appeal, the appellant maintains that in paragraph 98 of the contested judgment the Court of First Instance wrongly attributed to him certain statements which he had not made, to the effect that: 'since his critiques and proposals were blocked by his superiors, he had decided, given the vital importance of the matter at issue and the danger that the Commission's policy entailed for the future of the Union, to make them public'.

102 The material accuracy of that statement, which is taken verbatim from the Disciplinary Board's opinion on which the Court of First Instance's assessment is based, cannot be challenged solely on the basis of a mere affirmation unsupported by precise and coherent evidence to the contrary. As the Court of First Instance observed in paragraph 98 of the contested judgment, that statement is, furthermore, confirmed by the minutes of the hearing on 5 December 1995 (pages 4 to 7), the contents of which were not disputed by the appellant.

103 Consequently, the sixth ground of appeal must be rejected as partially inadmissible and partially unfounded.

The seventh ground of appeal

104 By his seventh ground of appeal, Mr Connolly disputes the Court of First Instance's finding in paragraph 47 of the contested judgment that, at his final hearing before the appointing authority on 9 January 1996, he neither claimed that the Disciplinary Board's opinion was founded on complaints which ought to be regarded as new facts nor applied, as he was entitled to do under Article 11 of Annex IX, for the disciplinary proceedings to be reopened. According to the appellant, it is clear from the minutes of the hearing that in the course of it his adviser provided the appointing authority with the submissions lodged with the Disciplinary Board, in which he applied for the proceedings to be stayed and for the case to be referred back to the appointing authority for a rehearing in the event of the Board seeking to rely on a material breach of Article 12 of the Staff Regulations.

105 Irrespective of whether this ground of appeal is admissible, the appellant's argument does not, in any event, prove that paragraph 47 of the contested judgment is vitiated by an error of assessment. That paragraph merely states that at the hearing on 9 January 1996 the appellant neither contended that the opinion of the Disciplinary Board was founded on new complaints nor applied for the disciplinary proceedings to be reopened. The Court of First Instance's

finding cannot be challenged on the basis that the appellant produced at that hearing the submissions lodged with the Disciplinary Board, in which he generally reserved his position in the event of new complaints being put forward in the future.

106 The seventh ground of appeal must therefore be rejected.

The eighth ground of appeal

107 By his eighth ground of appeal, the appellant claims that in paragraph 48 of the contested judgment the Court of First Instance failed to respond adequately to his plea alleging that the second paragraph of Article 87 of the Staff Regulations had not been complied with in that he had not previously been heard in relation to two matters, namely the article published by *The Times* newspaper on 6 September 1995 and the interview given to a television journalist on 26 September 1995.

108 In that regard, it is clear from paragraph 48 of the contested judgment that the Court of First Instance addressed the 'argument that the report submitted to the Disciplinary Board did not refer to the fact that he had published an article on 6 September 1995 for the purpose of promoting his book or that he had taken part in a television broadcast on 26 September 1995'. Furthermore, as regards the arguments put forward in support of the eighth ground of appeal, it need merely be pointed out that paragraph 19 of the report to the Board specifically refers to the facts on which the appellant relies.

109 Even if the appellant's plea at first instance, whose terms were indeed not particularly clear, be taken as meaning that, contrary to the requirements of the second paragraph of Article 87 of the Staff Regulations, he had not been heard on the two matters in question before the report for the Disciplinary Board was

drawn up, suffice it to note that in paragraph 9 of the contested judgment the Court of First Instance stated that, by letter of 13 September 1995, the appointing authority invited the appellant to attend a hearing on the facts at issue in the light of his obligations under Articles 11, 12 and 17 of the Staff Regulations and that at the hearing on 26 September 1995 he refused to answer any of the questions put to him and filed a written statement, the contents of which are summarised in paragraph 10 of the contested judgment. It was only after that second hearing, that is to say on 4 October 1995, that the appointing authority decided to refer the matter to the Disciplinary Board under Article 1 of Annex IX.

110 The eighth ground of appeal must therefore be rejected as manifestly unfounded.

The ninth ground of appeal

111 By his ninth ground of appeal, the appellant criticises the Court of First Instance for stating in paragraph 74 of the contested judgment that it was permissible for the rapporteur to present his report orally to other members of the Disciplinary Board and that at several points (in paragraphs 71, 84, 95 and 101 of the contested judgment) the Court objected that the appellant had not provided any proof to support his allegation that the Disciplinary Board and its Chairman had performed their task in a superficial and biased manner, despite the offers of proof in both his application and reply.

112 As regards the fact that the Disciplinary Board did not produce a report, the Court must reiterate the finding made by the Court of First Instance in paragraph 74 of the contested judgment that 'Article 3 of Annex IX is confined to laying down the rapporteur's duties and does not prescribe any specific formalities concerning the way in which they should be performed, such as whether a written report should be produced or whether such a report should be disclosed to the parties.' The Court of First Instance was therefore correct to infer that 'there is no reason why the rapporteur should not present his report orally to the other members of the Disciplinary Board'.

113 As to the allegation that the Court of First Instance failed to comply with the rules relating to the burden of proof and the taking of evidence, an allegation intended in the present case to establish a lack of independence and impartiality on the part of the Disciplinary Board, it must be pointed out that, as a general rule, in order to satisfy the Court as to a party's claims or, at the very least, as to the need for the Court itself to take evidence, it is not sufficient merely to refer to certain facts in support of the claim. There must also be adduced sufficiently precise, objective and consistent indicia of their truth or probability.

114 The Court of First Instance's appraisal of the evidence produced to it does not constitute, save where the sense of the evidence has been distorted — and no such distortion has been proved by Mr Connolly in this case — a point of law which is subject, as such, to review by the Court of Justice (Case C-362/95 P *Blackspur DIY and Others* v *Council and Commission* [1997] ECR I-4775, paragraph 29).

115 Consequently, the ninth ground of appeal must be rejected.

The tenth ground of appeal

116 By his tenth ground of appeal the appellant claims that the Court of First Instance, first, refused in paragraph 174 of the contested judgment to grant his application for production of a memorandum dated 28 July 1995 on the calculation of salary reductions in cases of suspension although that memorandum would have helped him to establish that the Commission had misused its powers and, second, held that the memorandum did not 'specifically' concern Mr Connolly's dismissal, even though neither of the parties had produced the memorandum in the proceedings. The Court of First Instance infringed the rights of the defence and unlawfully made use of a fact of which it had 'special knowledge'.

117 In the absence of objective, relevant and consistent indicia, which it is for the Court of First Instance alone to assess, that Court was entitled to refuse the application for production of the Commission's memorandum altering the general rules for calculating salary reductions in cases in which officials are suspended, which, by reason of its very subject-matter, did not concern either dismissals in general or the appellant's particular situation following the measure removing him from his post.

118 The tenth ground of appeal must therefore be rejected as manifestly unfounded.

The eleventh ground of appeal

119 By his eleventh ground of appeal, the appellant disputes paragraphs 172 to 175 of the contested judgment on the ground that the Court of First Instance failed to answer various arguments capable of establishing that the disciplinary proceedings were vitiated by a misuse of powers. The arguments relied on concerned 'parallel proceedings', 'the failure to reply to the question concerning the exact scope of the disciplinary proceedings in relation to Articles 11, 12 and 17 of the Staff Regulations', 'the absence of a logical connection between the premisses and the conclusions drawn in relation to the disciplinary proceedings', the fact that 'the Commission maintained in its pleadings that the Disciplinary Board was not even obliged to read the contested book' and 'the deliberate and provocative appointment of the Secretary General as Chairman of the Disciplinary Board'.

120 In that regard, it is clear from paragraphs 171 to 175 of the contested judgment that the Court of First Instance did not regard the appellant's arguments as 'objective, relevant and consistent indicia' capable of supporting his argument that the disciplinary measure imposed on him pursued an aim other than that of

safeguarding the internal order of the Community public service. The grounds set out in the contested judgment must, in light of the circumstances of the case, be regarded as a proper response to the appellant's arguments and, therefore, as being sufficient to enable the Court of Justice to exercise its power of review.

121 As the Advocate General observed in point 61 of his Opinion, although the Court of First Instance is required to give reasons for its decisions, it is not obliged to respond in detail to every single argument advanced by the appellant, particularly if the argument was not sufficiently clear and precise and was not adequately supported by evidence. In that regard, the appellant has not proved, or even asserted, that the arguments referred to in paragraph 119 of this judgment meet those requirements or that they were supported by evidence which was distorted by the Court of First Instance, or that in its assessment of that evidence the Court of First Instance contravened the rules of procedure or general legal principles concerning the burden of proof or the taking of evidence.

122 In those circumstances, the eleventh ground of appeal must be rejected.

The twelfth ground of appeal

123 By his twelfth ground of appeal, the appellant asserts that the reasoning in paragraph 155 of the contested judgment is logically flawed in that the Court of First Instance inferred a previously unknown fact from one that was uncertain, whereas a properly drawn presumption involves an unknown fact being inferred from one that is certain. Furthermore, a negative inference, ('it cannot be inferred from...'), cannot serve as a basis for sound reasoning.

124 This ground of appeal cannot be upheld since it is based on an inaccurate reading, taken out of context, of the abovementioned paragraph of the contested judgment.

125 As the Advocate General has correctly pointed out in point 64 of his Opinion, paragraph 155 of the contested judgment answers the appellant's objection that the system of prior permission in the second paragraph of Article 17 of the Staff Regulations entailed unlimited censorship contrary to Article 10 of the ECHR. The Court of First Instance began by stating in paragraph 152 that permission is refused only exceptionally and that refusal may be justified only where the publication concerned is likely to prejudice the interests of the Communities, and went on to say (paragraph 154) that the contested decision was based, amongst other things, on the fact that the appellant's behaviour caused serious prejudice to the interests of the Communities, and damaged the reputation and image of the Commission. It concluded (paragraph 155) that there was nothing to suggest that the appellant would have been found to have infringed the second paragraph of Article 17 if the Communities' interests had not been prejudiced, for which reason there can be no basis for speaking of 'unlimited censorship'.

126 The twelfth ground of appeal must therefore be rejected as manifestly unfounded.

The thirteenth ground of appeal

127 By his thirteenth ground of appeal, the appellant submits that it is apparent from a review of his other grounds of appeal that the charges against him have not been proved, with the result that the Court of First Instance's assessment of the proportionality of the disciplinary measure is invalid, since it is based on the premiss in paragraph 166 of the contested judgment that 'the truth of the allegations against the applicant has been established'.

128 Since none of the other grounds of appeal put forward by the appellant can be upheld, the thirteenth ground of appeal must also be rejected as unfounded.

129 As the pleas for annulment of the disputed decision were held to be either inadmissible or unfounded, the Court of First Instance, in paragraphs 178 and 179 of the contested judgment, properly rejected the appellant's claim for compensation for the material and non-material damage allegedly suffered by him, since that claim was closely linked with the earlier pleas. The appellant has not put forward any argument capable of undermining that reasoning and accordingly his claim for damages before the Court of Justice is manifestly inadmissible.

130 The appeal must therefore be dismissed in its entirety.

Costs

131 Under Article 69(2) of the Rules of Procedure, which is applicable to appeal proceedings pursuant to Article 118 thereof, the unsuccessful party is to be ordered to pay the costs, if they have been applied for in the successful party's pleadings. Under Article 70 of those Rules, in proceedings between the Communities and their servants, institutions are to bear their own costs. However, by virtue of the second paragraph of Article 122 of the Rules of Procedure, Article 70 does not apply to appeals brought by officials or other servants of an institution against the latter. Since the appellant has been unsuccessful in his appeal, he must therefore be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. Dismisses the appeal;

2. Orders Mr Connolly to pay the costs.

Rodríguez Iglesias	Gulmann	La Pergola
Wathelet	Skouris	Edward
Puissochet	Jann	Sevón
Schintgen	Colneric	

Delivered in open court in Luxembourg on 6 March 2001.

R. Grass	G.C. Rodríguez Iglesias
Registrar	President

JUDGMENT OF THE COURT

13 December 2001 *

In Case C-340/00 P,

Commission of the European Communities, represented by J. Currall, acting as Agent, and D. Waelbroeck, avocat, with an address for service in Luxembourg,

appellant,

APPEAL against the judgment of the Court of First Instance of the European Communities (Fourth Chamber) of 14 July 2000 in Case T-82/99 *Cwik v Commission* [2000] ECR-SC I-A-155 and II-713, seeking to have that judgment set aside,

the other party to the proceedings being:

Michael Cwik, an official of the Commission of the European Communities, residing in Brussels (Belgium), represented by N. Lhoëst, avocat, with an address for service in Luxembourg,

applicant at first instance,

* Language of the case: French.

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, P. Jann, F. Macken, N. Colneric and S. von Bahr (Presidents of Chambers), A. La Pergola, J.-P. Puissochet, L. Sevón, M. Wathelet (Rapporteur), R. Schintgen and V. Skouris, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: L. Hewlett, Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 3 July 2001,

after hearing the Opinion of the Advocate General at the sitting on 13 September 2001,

gives the following

Judgment

1 By application lodged at the Registry of the Court of Justice on 15 September 2000, the Commission brought an appeal, pursuant to Article 49 of the EC Statute of the Court of Justice and the corresponding provisions of the ECSC and

Euratom Statutes of the Court of Justice, against the judgment of the Court of First Instance of 14 July 2000 in Case T-82/99 *Cwik v Commission* [2000] ECR-SC I-A-155 and II-713 ('the judgment under appeal'), in which the Court of First Instance annulled the Commission's decision of 10 July 1998 refusing Mr Cwik permission to publish the text of a lecture that he had given on 30 October 1997 ('the contested decision')

Legal framework

2 The second paragraph of Article 17 of the Staff Regulations of Officials of the European Communities ('the Staff Regulations') provides:

'An official shall not, whether alone or together with others, publish or cause to be published without the permission of the appointing authority, any matter dealing with the work of the Communities. Permission shall be refused only where the proposed publication is liable to prejudice the interests of the Communities.'

Background

1 The facts giving rise to the dispute are set out in the judgment under appeal as follows:

'3 The applicant, an economist by training, began working for the Commission in 1970. At the time when proceedings were commenced, he was attached to

Unit 5 "Information, publications and economic documentation", directly attached to the Deputy Director-General responsible for Directorates B, C and E in the Directorate-General for Economic and Financial Affairs (DG II). His role was to receive visiting groups and give lectures on the euro, economic and monetary union and on all the activities and programmes for which the Directorate-General was responsible.

4 By letter of 12 March 1997, the applicant was invited by the provincial government of Cordoba (Spain) to give a lecture at the Fifth International Congress on Economic Culture.

5 On 20 October 1997, the applicant applied to his immediate superior, Mr Ravasio, for permission to give his lecture on 30 October 1997. The application stated that the lecture would be entitled "The need for economic fine-tuning at the local and regional level in the monetary union of the European Union". He included an outline and a detailed plan of his lecture with an annex.

6 On 26 October 1997, Mr Ravasio granted Mr Cwik permission, stating, however:

"This doesn't have much to do with economics. More classic presentation please. Pay attention to the risks of 'fine-tuning'".

7 On 27 October 1997, the applicant was given a mission order without costs for a trip to Cordoba between 29 October and 2 November 1997, and he delivered his lecture on 30 October 1997.

8 In February 1998, the organisers of the congress asked him to send them the text of his lecture so that it might be published with those of the other speakers.

9 The applicant then prepared the text and, in accordance with the second paragraph of Article 17 of the Staff Regulations, applied for permission to publish it from Mr Ravasio in his capacity as the appointing authority.

10 Mr Ravasio consulted Mr Ostberg, an economist seconded to DG II by the Swedish Central Bank, as to whether such publication was appropriate.

11 Mr Östberg produced an extremely critical opinion of the text at issue but, before handing his opinion over to Mr Ravasio, he submitted it to his immediate superiors, Mr Kroger, the head of Unit 3 "Monetary Union: Exchange Rate and Domestic Monetary Policies" in Directorate D of DG II, "Monetary Matters", and Mr H. Carré, the head of that Directorate. The former initialled the opinion without making any comment and the latter wrote that "publication of the text at issue would be inappropriate". For his part, Mr Ravasio also consulted Mr Schutz, head of the unit "Budget Resources; Economic Information and Documentation: Relations with the European Parliament, the Economic and Social Committee and the Committee of the Regions", who was directly attached to the Director-General of DG II and who initialled the text at issue without making any comment on it.

12 In view of those circumstances, Mr Ravasio told the applicant on 20 April 1998 that "publication [was] inappropriate".

13 On 5 June 1998, the applicant submitted a further version of the text to Mr Ravasio for approval. It had been amended on the basis of the criticisms made by Mr Ostberg. Mr Ravasio asked Mr Schmidt, Director of Directorate B of DG II "Economic Service", who was responsible *inter alia* for evaluating the economic impact of Community policies, to let him have his opinion on the reworked text. Mr Schmidt made certain criticisms and concluded:

"DG II has so far had a very prudent, almost negative, position towards the usefulness of discretionary fiscal policy. This article seems to advocate its full use referring to fine-tuning."

14 The applicant, on his own initiative, sent the second version of the text to Mr Ostberg, asking him whether he continued to stand by the criticisms he had made in respect of the earlier version, but Mr Ostberg refused to review the text on the ground that he could not express an opinion without having received specific instructions to do so from Mr Ravasio.

15 By letter of 10 July 1998, Mr Ravasio informed the applicant that he was refusing to grant permission to publish the text at issue on the ground that "it

put forward a point of view which is not that of the Commission, even though the latter has not adopted an official policy on the matter". He added:

"I recognise the importance of engaging in internal discussions reflecting the variety of economic policy options. However, when we go outside the institution, it would be better to present a united front...

I am afraid that the interests of the Community could be prejudiced where the Commission and its officials put forward different points of view. In addition, those of my colleagues who have read your article have expressed some doubts as to its quality. For those reasons, I am refusing permission for its publication."

16 On 25 August 1998, the applicant lodged a complaint under Article 90(2) of the Staff Regulations in respect of the decision.

17 That complaint was rejected by decision of 5 January 1999.

18 In its decision rejecting the complaint, the Commission made the following points in particular:

"... possible conflicts of interest between an official and his institution over a publication are not confined to cases in which the official publicly dissents from a policy of the institution, since the latter may have an interest in preserving some room for manoeuvre before it adopts a definitive view. Obviously, the fact that the complainant expressed a clear view in writing on the question [as to whether economic and monetary union called for territorial differentiation as regards

fiscal and wage policies ("fine-tuning")] may have the effect, precisely, of restricting that room for manœuvre. Even if he were to make clear that his view is purely a personal one, the reader might nevertheless, in spite of that *caveat*, associate the view of an official working in that sector with that of his institution, precisely because the latter does not have a view.

Under no circumstances is a one-page summary comparable to an article of over 20 pages. Permission given on the basis of the former can certainly not entail permission for the latter. That principle is all the more relevant in the present case, where there are significant discrepancies between the summary of the lecture and the text of the article.'

5 On 12 April 1999, Mr Cwik brought proceedings before the Court of First Instance for annulment of the decision rejecting his complaint.

The judgment under appeal

6 In support of his appeal, Mr Cwik claimed *inter alia* that the second paragraph of Article 17 of the Staff Regulations had been wrongly interpreted and wrongly applied.

The Court of First Instance accepted that plea for the following reasons:

'56 The Court finds that in the contested decision the appointing authority confined itself to stating that the interests of the Communities could be prejudiced where the Commission and its staff publicly express different points of view. The decision does not explain why, in the present case, such a risk exists.

57 In a democratic society founded on respect for fundamental rights, the fact that an official publicly expresses a point of view different from that of the institution for which he works cannot, in itself, be regarded as liable to prejudice the interests of the Communities.

58 Clearly, the purpose of freedom of expression is precisely to enable expression to be given to opinions which differ from those held at an official level. To accept that freedom of expression could be restricted merely because the opinion at issue differs from the position adopted by the institutions would be to negate the purpose of that fundamental right.

59 Likewise, the second paragraph of Article 17 of the Staff Regulations would be rendered nugatory, since, as is apparent from its wording, it clearly lays down the principle on which permission for publication is granted, specifically providing that such permission is to be refused only where the proposed publication is liable to prejudice the interests of the Communities.

60 Consequently, the fact that there is a difference of opinion between the applicant and the Commission does not justify restricting the right to

freedom of expression, inasmuch as it has not been established that making that difference public would be liable, in the circumstances of the present case, to prejudice the interests of the Communities."

9 The Court of First Instance also held:

"66 ... it is clear from the documents before the Court that, at the material time, the Commission had already publicly and clearly expressed its view on "fine-tuning" in, *inter alia*, official documents and that, unless there were exceptional circumstances, it entertained doubts as to the usefulness of measures of that kind and about the use, even at Member State level, of discretionary budgetary policies. Furthermore, the text at issue was written by an official who did not have any management responsibilities and who was expressing a personal view. Moreover, the text concerns an area on which the Commission states that it does not have an official policy. In any event, since the text is to be published in a collection of speeches made at the congress in question, it is intended for a readership consisting of specialists who are likely to be well informed about the Commission's views.

67 In those circumstances, the Court finds manifestly unfounded the defendant's argument that publication of the text at issue might entail a significant risk of the public mistaking the applicant's opinion for that of the institution, which could restrict the Commission's room for manœuvre in the relevant area and thereby prejudice the interests of the Communities.

68 Furthermore, although the difference between a lecture and publication of the text thereof may be of some significance, that difference is not such, in the circumstances of the present case, to justify the concern that the Commission's room for manœuvre might be restricted. In that regard,... the text at issue sets out the same arguments as those put forward by the applicant in his lecture, which was even entitled "The need for local and

regional economic fine-tuning in the monetary union of the European Union". Additionally, the fact that permission for the lecture was given by the appointing authority is a further indication that there was no risk of the applicant's opinion being mistaken for that of the Commission. In those circumstances, the defendant can have no grounds for contending that it had a reasonable concern that its room for manoeuvre would be restricted by publication of the text at issue.

69 It follows that, in refusing to permit publication of the text at issue on the ground that it was liable to prejudice the interests of the Communities, the defendant made a manifest error of assessment.'

9 Consequently, the Court of First Instance annulled the decision at issue.

The appeal

10 The Commission claims that the Court should:

— declare the appeal to be admissible and well founded;

— set aside the judgment under appeal;

— dismiss, in consequence, the applicant's action or, in the alternative, refer the case back to the Court of First Instance;

— order the applicant to bear the costs.

11 Mr Cwik contends that the Court should:

— dismiss the appeal as inadmissible or, at the very least, unfounded;

— order the Commission to pay all the costs of the appeal.

12 In its appeal, the Commission relies on two pleas in law concerning (i) an error of interpretation as regards the second paragraph of Article 17 of the Staff Regulations and (ii) the failure of the judgment under appeal properly to state the grounds on which it is based.

The first ground of appeal

13 By its first ground of appeal, the Commission complains that the Court of First Instance, specifically in paragraphs 52, 56, 57 and 66 of the judgment under appeal, exceeded the bounds of its power to review the acts of the appointing authority and put an unduly restrictive construction on the second paragraph of Article 17 of the Staff Regulations.

14 The Court of First Instance failed, first, to have regard to the preventive function of that provision (recognised in Joined Cases T-34/96 et T-163/96 *Connolly* v *Commission* [1999] ECR-SC IA-87 and II-463, paragraph 153) when it ruled that the Commission had to provide factual evidence of prejudice to its interests and held that it had failed to establish, in the circumstances of the case, that the public expression of dissent between itself and the official concerned was liable to prejudice the interests of the Communities.

15 Second, the Court of First Instance did not take account of the appointing authority's discretion in respect of the technical aspects of the text of Mr Cwik's lecture and the risk of prejudice to the interests of the Communities. The Commission describes in that connection how the appointing authority consulted several specialists prior to adopting the contested decision, the economic and political climate in which economic and monetary union was being put in place and its need to reserve its official position in a very sensitive area. It claims that those factors prove that the appointing authority did not make a manifest error of assessment.

16 In its review of the way in which the second paragraph of Article 17 of the Staff Regulations had been applied, the Court of First Instance took three factors into consideration, namely the fact that Mr Cwik had no management responsibilities, the fact that the text concerned was intended for a specialist readership and the fact that at that time the institution had not, in any event, expressed a definitive opinion on the matter concerned. In doing so, the Court's appreciation of the appointing authority's discretion was clearly misconceived, since it attached to the second paragraph of Article 17 of the Staff Regulations conditions that are not found therein.

17 It should also be observed in that regard that the Court held in Case C-274/99 P *Connolly* v *Commission* [2001] ECR I-1611, paragraph 53, that the second paragraph of Article 17 of the Staff Regulations clearly provides that, in principle, permission is to be granted and may be refused only in exceptional cases.

18 In so far as the provision enables institutions to refuse permission to publish, and thus potentially interfere to a serious extent with freedom of expression, one of the fundamental pillars of a democratic society, it must be interpreted restrictively, in such a way that permission to publish is refused only where publication is liable to cause serious harm to the Communities' interests (Case C-274/99 P *Connolly* v *Commission*, paragraph 53).

19 When it applies the second paragraph of Article 17 of the Staff Regulations, the appointing authority must balance the various interests at stake, taking account, first, of the freedom that an official has to express, orally or in writing, opinions that dissent from or conflict with those held by the employing institution — that freedom arising from the fundamental right of the individual to express himself freely — and, second, of the gravity of the potential prejudice to the interests of the Communities to which publication of the relevant text might give rise (Case C-274/99 P *Connolly* v *Commission*, paragraphs 43 and 57). In that connection, only where there is a real risk of serious prejudice to the interests of the Communities, established on the basis of specific, objective evidence, may the risk be taken into consideration for the purpose of applying the second paragraph of Article 17 of the Staff Regulations.

20 In order to enable the Community courts to exercise their power of review as regards the legality of a decision refusing permission to publish and to provide the official concerned with sufficient information to enable him to understand the reasons for the decision, the official must be given such information with the decision refusing permission or, at the very latest, with the decision rejecting his complaint.

21 In this instance, the Court of First Instance held, at paragraph 69 of the judgment under appeal, that, in refusing to permit publication of the text at issue on the ground that it was liable to prejudice the interests of the Communities, the Commission had made a manifest error of assessment.

22 First, the Court of First Instance found, in paragraph 56 of the judgment under appeal, that the Commission had confined itself in the contested decision to stating that the interests of the Communities could be prejudiced where the Commission and its staff publicly express different points of view, without having given reasons why that risk existed in the instant case. By definition — as the Court points out in paragraph 58 of its judgment — freedom of expression 'enable[s] expression to be given to opinions which differ from those held at an official level'.

23 It is clear that, contrary to the Commission's submission, the Court of First Instance did not fail to have regard to the preventive function of the second paragraph of Article 17 of the Staff Regulations — whose legality vis-à-vis the fundamental right to freedom of expression was recognised by the Court of Justice in paragraphs 52 to 55 of *Connolly*. The Court of First Instance simply criticised the reasons relied on by the appointing authority to substantiate the contested decision: those reasons merely stated that there was a risk that the interests of the Communities would be prejudiced where an official's opinion was different from the view expressed by the institution employing him. As has been pointed out at paragraph 19 above, only where there is a real risk of serious prejudice to the interests of the Communities, established on the basis of specific, objective factors, can a refusal of permission to publish be warranted.

24 Second, the Court of First Instance reviewed, at paragraphs 62 to 68 of the judgment under appeal, the reasons set out in the decision rejecting the complaint which complemented the statement of reasons in the contested decision.

25 In its decision rejecting the complaint, the Commission cited its need to preserve its room for manœuvre prior to taking up a definitive stance on the question as to whether economic and monetary union called for territorial differentiation as regards wage and fiscal policies ('fine-tuning'). It claimed that its room for manœuvre would have been jeopardised by the publication in point, since there was a risk that the relevant official's opinion would be mistaken for that of the institution employing him.

25 At paragraphs 66 and 67 of the judgment under appeal, the Court of First Instance ruled that such an assessment was clearly unfounded on the basis, first, that the Commission had already publicly and clearly expressed its view on the question, second, that the text of the lecture given by Mr Cwik had been written by an official with no management responsibilities who was expressing a personal view and, finally, that the text was intended for a readership consisting of specialists who were likely to be well informed about the views held by the Commission — which, moreover, claimed that it did not have an official policy on the matter.

27 It is apparent from settled case-law that such findings, which concern purely matters of fact, cannot be reviewed by the Court of Justice in the context of an appeal, except where the clear sense of the evidence submitted to the Court of First Instance has been distorted (Case C-191/98 P *Tzoumos* v *Commission* [1999] ECR I-8223, paragraph 23; and Case C-315/99 P *Ismeri Europa* v *Court of Auditors* [2001] ECR I-5281, paragraph 481. In that regard, the Commission has neither shown, nor even contended, that the Court of First Instance's findings were inconsistent or substantively inaccurate as regards the documents before it. In any event, it must be held that the findings of fact, which the Court of First Instance alone had jurisdiction to make and which the Commission challenges, evince no manifest error of assessment.

28 As regards (i) the complaint alleging that the judgment under appeal unlawfully restricted the appointing authority's room for manoeuvre so far as the technical aspects of the text of Mr Cwik's lecture were concerned and (ii) the risk of prejudice to the interests of the Communities, particularly in a sensitive area such as economic and monetary union, it is sufficient to refer to paragraphs 22 to 25 of this judgment. It is clear from those paragraphs that the reasons which might have provided grounds for refusing to allow publication of the text of Mr Cwik's lecture were duly considered in the judgment under appeal. In that connection, a mere reference to the political and economic climate at the time of the contested decision and to the sensitive nature of the issue concerned, or even to the quality of the text of the lecture — factors which, in any event, as the Advocate General has pointed out at point 42 of his Opinion, were not mentioned either in the contested decision or in the decision rejecting the complaint — is not sufficient

to establish that there was a real risk of serious prejudice to the interests of the Communities, such as to justify restricting the fundamental right of an official to freedom of expression.

29 In view of the foregoing, the first ground of appeal must be rejected.

The second ground of appeal

30 By its second ground of appeal, the Commission complains that the Court of First Instance failed to respond to arguments of substance raised by it during the written and oral procedure before that Court and was thereby in breach of its obligation to state the grounds on which the judgment was based.

31 First, the Court of First Instance did not respond to the argument that it was appropriate for the Commission to consider the request to publish in the light of the sensitive economic and political climate in which the request was made, namely the introduction of economic and monetary union, and in which the Commission had, of its own accord, refrained from expressing a definitive view on various controversial subjects, including the one dealt with in Mr Cwik's lecture.

32 Second, the Court of First Instance gave no reason for its finding in paragraph 68 of the judgment under appeal that the fact that permission for the lecture was given by the appointing authority was a further indication that there was no risk of the applicant's opinion being mistaken for that of the Commission, although the latter had contended during the proceedings before the Court of First Instance that there was a fundamental difference between giving a speech at a congress (which is transitory) and publishing a text (which is permanent).

55 It is appropriate to point out that the argument put forward for the first time before the Court of First Instance about the political and economic climate in which the contested decision was adopted was advanced by the Commission in support of its proposition that it had a reasonable concern that the public might attribute the opinion of an official to the institution to which he was attached. However, in paragraph 66 of the judgment under appeal, the Court of First Instance specifically stated the grounds on which that proposition should be refuted and, as has already been pointed out at paragraph 27 of this judgment, those grounds are matters in respect of which it alone has jurisdiction.

56 The Court of First Instance specifically expressed the view — in paragraph 68 of the judgment under appeal — that the difference between delivering a lecture at a congress and publishing the text of the lecture is not such as to prove that there was a risk (as the decision rejecting the complaint alleged) of the opinion of the official concerned being mistaken for the view of the Commission.

57 Consequently, the second ground of appeal, concerning a failure to state the grounds, must also be rejected.

58 It follows that the appeal must be dismissed in its entirety.

Costs

59 Under Article 69(2) of the Rules of Procedure, which apply on the appeals procedure pursuant to Article 118, any unsuccessful party is to be ordered to pay the costs, if they are applied for in the successful party's pleadings. Since Mr Cwik applied for costs against the Commission and the latter has been unsuccessful, the Commission must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. Dismisses the appeal;

2. Orders the Commission of the European Communities to pay the costs.

Rodríguez Iglesias	Jann	Macken
Colneric	von Bahr	La Pergola
Puissochet	Sevón	Warhelet
Schintgen	Skouris	

Delivered in open court in Luxembourg on 13 December 2001.

R. Grass	G.C. Rodríguez Iglesias
Registrar	President

JUDGMENT OF THE COURT

12 June 2003 *

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,

* Language of the case: German.

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, J.-P. Puissochet, 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 VsIgG 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.

49 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.

50 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).

51 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).

31 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).

32 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.

35 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.

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

The questions referred for a preliminary ruling

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

43 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.

44 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.

77 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.

78 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).

81 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.

68 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.

69 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.

70 The imposition of stricter conditions concerning both the size — 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

93 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.

94 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

95 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).

Rodríguez Iglesias Puissochet Wathelet

Schintgen Gulmann Edward

Jann Skouris Macken

Colneric von Bahr

Cunha Rodrigues Rosas

Delivered in open court in Luxembourg on 12 June 2003.

R. Grass G.C. Rodríguez Iglesias

Registrar President

JUDGMENT OF THE COURT

6 November 2003 *

In Case C-101/01,

REFERENCE to the Court under Article 234 EC by the Göta hovrätt (Sweden) for a preliminary ruling in the criminal proceedings before that court against

Bodil Lindqvist,

on, inter alia, the interpretation 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),

* Language of the case: Swedish.

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THE COURT,

composed of: P. Jann, President of the First Chamber, acting for the President, C.W.A. Timmermans, C. Gulmann, J.N. Cunha Rodrigues and A. Rosas (Presidents of Chambers), D.A.O. Edward (Rapporteur), J. P. Puissochet, F. Macken and S. von Bahr, Judges,

Advocate General: A. Tizzano,
Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

— Mrs Lindqvist, by S. Larsson, advokat,

— the Swedish Government, by A. Kruse, acting as Agent,

— the Netherlands Government, by H.G. Sevenster, acting as Agent,

— the United Kingdom Government, by G. Amodeo, acting as Agent, assisted by J. Stratford, barrister,

— the Commission of the European Communities, by L. Ström and X. Lewis, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Mrs Lindqvist, represented by S. Larsson, of the Swedish Government, represented by A. Kruse and B. Hernqvist, acting as Agents, of the Netherlands Government, represented by J. van Bakel, acting as Agent, of the United Kingdom Government, represented by J. Stratford, of the Commission, represented by L. Strøm and C. Docksey, acting as Agent, and of the EFTA Surveillance Authority, represented by D. Sif Tynes, acting as Agent, at the hearing on 30 April 2002,

after hearing the Opinion of the Advocate General at the sitting on 19 September 2002,

gives the following

Judgment

1 By order of 23 February 2001, received at the Court on 1 March 2001, the Göta hovrätt (Göta Court of Appeal) referred to the Court for a preliminary ruling under Article 234 EC seven questions concerning inter alia the interpretation 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).

5 Those questions were raised in criminal proceedings before that court against Mrs Lindqvist, who was charged with breach of the Swedish legislation on the protection of personal data for publishing on her internet site personal data on a number of people working with her on a voluntary basis in a parish of the Swedish Protestant Church.

Legal background

Community legislation

6 Directive 95/46 is intended, according to the terms of Article 1(1), to protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy, with respect to the processing of personal data.

7 Article 3 of Directive 95/46 provides, regarding the scope of the directive:

"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.

2. This Directive shall not apply to the processing of personal data:

— in the course of an activity which falls outside the scope of Community law, such as those provided for by Titles V and VI of the Treaty on European Union and in any case to processing operations concerning public security, defence, State security (including the economic well-being of the State when the processing operation relates to State security matters) and the activities of the State in areas of criminal law,

— by a natural person in the course of a purely personal or household activity.'

5 Article 8 of Directive 95/46, entitled 'The processing of special categories of data', provides:

'1. Member States shall prohibit the processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and the processing of data concerning health or sex life.

2. Paragraph 1 shall not apply where:

(a) the data subject has given his explicit consent to the processing of those data, except where the laws of the Member State provide that the prohibition referred to in paragraph 1 may not be lifted by the data subject's giving his consent;

or

(b) processing is necessary for the purposes of carrying out the obligations and specific rights of the controller in the field of employment law in so far as it is authorised by national law providing for adequate safeguards;

or

(c) processing is necessary to protect the vital interests of the data subject or of another person where the data subject is physically or legally incapable of giving his consent;

or

(d) processing is carried out in the course of its legitimate activities with appropriate guarantees by a foundation, association or any other non-profit-seeking body with a political, philosophical, religious or trade-union aim and on condition that the processing relates solely to the members of the body or to persons who have regular contact with it in connection with its purposes and that the data are not disclosed to a third party without the consent of the data subjects;

or

(e) the processing relates to data which are manifestly made public by the data subject or is necessary for the establishment, exercise or defence of legal claims.

3. Paragraph 1 shall not apply where processing of the data is required for the purposes of preventive medicine, medical diagnosis, the provision of care or treatment or the management of health-care services, and where those data are processed by a health professional subject under national law or rules established by national competent bodies to the obligation of professional secrecy or by another person also subject to an equivalent obligation of secrecy.

4. Subject to the provision of suitable safeguards, Member States may, for reasons of substantial public interest, lay down exemptions in addition to those laid down in paragraph 2 either by national law or by decision of the supervisory authority.

5. Processing of data relating to offences, criminal convictions or security measures may be carried out only under the control of official authority, or if suitable specific safeguards are provided under national law, subject to derogations which may be granted by the Member State under national provisions providing suitable specific safeguards. However, a complete register of criminal convictions may be kept only under the control of official authority.

Member States may provide that data relating to administrative sanctions or judgements in civil cases shall also be processed under the control of official authority.

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6. Derogations from paragraph 1 provided for in paragraphs 4 and 5 shall be notified to the Commission.

7. Member States shall determine the conditions under which a national identification number or any other identifier of general application may be processed.'

- 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.'

- Article 13 of Directive 95/46, entitled 'Exemptions and restrictions', provides that Member States may adopt measures restricting the scope of some of the obligations imposed by the directive on the controller of the data, inter alia as regards information given to the persons concerned, where such a restriction is necessary to safeguard, for example, national security, defence, public security, an important economic or financial interest of a Member State or of the European Union, or the investigation and prosecution of criminal offences or of breaches of ethics for regulated professions

6 Article 25 of Directive 95/46, which is part of Chapter IV entitled 'Transfer of personal data to third countries', reads as follows:

'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.

[ ] [Omit]

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."

9 At the time of the adoption of Directive 95/46, the Kingdom of Sweden made the following statement on the subject of Article 9, which was entered in the Council minutes (document No 4649/95 of the Council, of 2 February 1995):

"The Kingdom of Sweden considers that artistic and literary expression refers to the means of expression rather than to the contents of the communication or its quality."

10 The European Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950 ("the ECHR"), provides, in Article 8, for a right to respect for private and family life and, in Article 10, contains provisions concerning freedom of expression.

The national legislation

11 Directive 95/46 was implemented in Swedish law by the Personuppgiftslag (SFS 1998:204) (Swedish law on personal data, 'the PUL').

The main proceedings and the questions referred

12 In addition to her job as a maintenance worker, Mrs Lindqvist worked as a catechist in the parish of Alseda (Sweden). She followed a data processing course on which she had inter alia to set up a home page on the internet. At the end of 1998, Mrs Lindqvist set up internet pages at home on her personal computer in order to allow parishioners preparing for their confirmation to obtain information they might need. At her request, the administrator of the Swedish Church's website set up a link between those pages and that site.

13 The pages in question contained information about Mrs Lindqvist and 18 colleagues in the parish, sometimes including their full names and in other cases only their first names. Mrs Lindqvist also described, in a mildly humorous manner, the jobs held by her colleagues and their hobbies. In many cases family circumstances and telephone numbers and other matters were mentioned. She also stated that one colleague had injured her foot and was on half-time on medical grounds.

11 Mrs Lindqvist had not informed her colleagues of the existence of those pages or obtained their consent, nor did she notify the Datainspektionen (supervisory authority for the protection of electronically transmitted data) of her activity. She removed the pages in question as soon as she became aware that they were not appreciated by some of her colleagues.

12 The public prosecutor brought a prosecution against Mrs Lindqvist charging her with breach of the PUL on the grounds that she had:

— processed personal data by automatic means without giving prior written notification to the Datainspektionen (Paragraph 36 of the PUL);

— processed sensitive personal data (injured foot and half-time on medical grounds) without authorisation (Paragraph 13 of the PUL);

— transferred processed personal data to a third country without authorisation (Paragraph 33 of the PUL).

13 Mrs Lindqvist accepted the facts but disputed that she was guilty of an offence. Mrs Lindqvist was fined by the Eksjö tingsrätt (District Court) (Sweden) and appealed against that sentence to the referring court.

17 The amount of the fine was SEK 4 000, which was arrived at by multiplying the sum of SEK 100, representing Mrs Lindqvist's financial position, by a factor of 40, reflecting the severity of the offence. Mrs Lindqvist was also sentenced to pay SEK 300 to a Swedish fund to assist victims of crimes.

18 As it had doubts as to the interpretation of the Community law applicable in this area, inter alia Directive 95/46, the Göta hovrätt decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

'(1) Is the mention of a person — by name or with name and telephone number — on an internet home page an action which falls within the scope of [Directive 95/46]? Does it constitute "the processing of personal data wholly or partly by automatic means" to list on a self-made internet home page a number of persons with comments and statements about their jobs and hobbies etc.?

(2) If the answer to the first question is no, can the act of setting up on an internet home page separate pages for about 15 people with links between the pages which make it possible to search by first name be considered to constitute "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" within the meaning of Article 3(1)?

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If the answer to either of those questions is yes, the hovrätt also asks the following questions:

(3) Can the act of loading information of the type described about work colleagues onto a private home page which is none the less accessible to anyone who knows its address be regarded as outside the scope of [Directive 95/46] on the ground that it is covered by one of the exceptions in Article 3(2)?

(4) Is information on a home page stating that a named colleague has injured her foot and is on half-time on medical grounds personal data concerning health which, according to Article 8(1), may not be processed?

(5) [Directive 95/46] prohibits the transfer of personal data to third countries in certain cases. If a person in Sweden uses a computer to load personal data onto a home page stored on a server in Sweden — with the result that personal data become accessible to people in third countries — does that constitute a transfer of data to a third country within the meaning of the directive? Would the answer be the same even if, as far as known, no one from the third country had in fact accessed the data or if the server in question was actually physically in a third country?

(6) Can the provisions of [Directive 95/46], in a case such as the above, be regarded as bringing about a restriction which conflicts with the general principles of freedom of expression or other freedoms and rights, which are

applicable within the EU and are enshrined in inter alia Article 10 of the European Convention on the Protection of Human Rights and Fundamental Freedoms?

Finally, the hovrätt asks the following question:

(7) Can a Member State, as regards the issues raised in the above questions, provide more extensive protection for personal data or give it a wider scope than the directive, even if none of the circumstances described in Article 13 exists?'

The first question

16 By its first question, the referring court asks whether the act of referring, on an internet page, to various persons and identifying them by name or by other means, for instance by giving their telephone number or information regarding their working conditions and hobbies, constitutes 'the processing of personal data wholly or partly by automatic means' within the meaning of Article 3(1) of Directive 95/46.

Observations submitted to the Court

25 Mrs Lindqvist submits that it is unreasonable to take the view that the mere mention by name of a person or of personal data in a document contained on an

internet page constitutes automatic processing of data. On the other hand, reference to such data in a keyword in the 'meta tags' of an internet page, which makes it possible to create an index and find that page using a search engine, might constitute such processing.

21 The Swedish Government submits that the term 'the processing of personal data wholly or partly by automatic means' in Article 3(1) of Directive 95/46, covers all processing in computer format, in other words, in binary format. Consequently, as soon as personal data are processed by computer, whether using a word processing programme or in order to put them on an internet page, they have been the subject of processing within the meaning of Directive 95/46.

22 The Netherlands Government submits that personal data are loaded onto an internet page using a computer and a server, which are essential elements of automation, so that it must be considered that such data are subject to automatic processing.

23 The Commission submits that Directive 95/46 applies to all processing of personal data referred to in Article 3 thereof, regardless of the technical means used. Accordingly, making personal data available on the internet constitutes processing wholly or partly by automatic means, provided that there are no technical limitations which restrict the processing to a purely manual operation. Thus, by its very nature, an internet page falls within the scope of Directive 95/46.

Reply of the Court

21 The term 'personal data' used in Article 3(1) of Directive 95/46 covers, according to the definition in Article 2(a) thereof, 'any information relating to an identified or identifiable natural person'. The term undoubtedly covers the name of a person in conjunction with his telephone coordinates or information about his working conditions or hobbies.

22 According to the definition in Article 2(b) of Directive 95/46, the term 'processing' of such data used in Article 3(1) covers 'any operation or set of operations which is performed upon personal data, whether or not by automatic means'. That provision gives several examples of such operations, including disclosure by transmission, dissemination or otherwise making data available. It follows that the operation of loading personal data on an internet page must be considered to be such processing.

23 It remains to be determined whether such processing is 'wholly or partly by automatic means'. In that connection, placing information on an internet page entails, under current technical and computer procedures, the operation of loading that page onto a server and the operations necessary to make that page accessible to people who are connected to the internet. Such operations are performed, at least in part, automatically.

24 The answer to the first question must therefore be that the act of referring, on an internet page, to various persons and identifying them by name or by other means, for instance by giving their telephone number or information regarding their working conditions and hobbies, constitutes 'the processing of personal data

wholly or partly by automatic means' within the meaning of Article 3(1) of Directive 95/46.

The second question

55 As the first question has been answered in the affirmative, there is no need to reply to the second question, which arises only in the event that the first question is answered in the negative.

The third question

56 By its third question, the national court essentially seeks to know whether processing of personal data such as that described in the first question is covered by one of the exceptions in Article 3(2) of Directive 95/46.

Observations submitted to the Court

57 Mrs Lindqvist submits that private individuals who make use of their freedom of expression to create internet pages in the course of a non-profit-making or leisure activity are not carrying out an economic activity and are thus not subject to Community law. If the Court were to hold otherwise, the question of the validity of Directive 95/46 would arise, as, in adopting it, the Community legislature would have exceeded the powers conferred on it by Article 100a of the EC Treaty (now, after amendment, Article 95 EC). The approximation of laws, which concerns the establishment and functioning of the common market, cannot serve

as a legal basis for Community measures regulating the right of private individuals to freedom of expression on the internet.

33 The Swedish Government submits that, when Directive 95/46 was implemented in national law, the Swedish legislature took the view that processing of personal data by a natural person which consisted in publishing those data to an indeterminate number of people, for example through the internet, could not be described as 'a purely personal or household activity' within the meaning of the second indent of Article 3(2) of Directive 95/46. However, that Government does not rule out that the exception provided for in the first indent of that paragraph might cover cases in which a natural person publishes personal data on an internet page solely in the exercise of his freedom of expression and without any connection with a professional or commercial activity.

34 According to the Netherlands Government, automatic processing of data such as that at issue in the main proceedings does not fall within any of the exceptions in Article 3(2) of Directive 95/46. As regards the exception in the second indent of that paragraph in particular, it observes that the creator of an internet page brings the data placed on it to the knowledge of a generally indeterminate group of people.

35 The Commission submits that an internet page such as that at issue in the main proceedings cannot be considered to fall outside the scope of Directive 95/46 by virtue of Article 3(2) thereof, but constitutes, given the purpose of the internet page at issue in the main proceedings, an artistic and literary creation within the meaning of Article 9 of that Directive.

36 It takes the view that the first indent of Article 3(2) of Directive 95/46 lends itself to two different interpretations. The first consists in limiting the scope of that

provision to the areas cited as examples, in other words, to activities which essentially fall within what are generally called the second and third pillars. The other interpretation consists in excluding from the scope of Directive 95/46 the exercise of any activity which is not covered by Community law.

35 The Commission argues that Community law is not limited to economic activities connected with the four fundamental freedoms. Referring to the legal basis of Directive 95/46, to its objective, to Article 6 EU, to the Charter of fundamental rights of the European Union proclaimed in Nice on 18 December 2000 (OJ 2000 C 364, p. 1), and to the Council of Europe Convention of 28 January 1981 for the protection of individuals with regard to automatic processing of personal data, it concludes that that directive is intended to regulate the free movement of personal data in the exercise not only of an economic activity, but also of social activity in the course of the integration and functioning of the common market.

36 It adds that to exclude generally from the scope of Directive 95/46 internet pages which contain no element of commerce or of provision of services might entail serious problems of demarcation. A large number of internet pages containing personal data intended to disparage certain persons with a particular end in view might then be excluded from the scope of that directive.

Reply of the Court

37 Article 3(2) of Directive 95/46 provides for two exceptions to its scope.

43 The first exception concerns the processing of personal data in the course of an activity which falls outside the scope of Community law, such as those provided for by Titles V and VI of the Treaty on European Union, and in any case processing operations concerning public security, defence, State security (including the economic well-being of the State when the processing operation relates to State security matters) and the activities of the State in areas of criminal law.

44 As the activities of Mrs Lindqvist which are at issue in the main proceedings are essentially not economic but charitable and religious, it is necessary to consider whether they constitute 'the processing of personal data in the course of an activity which falls outside the scope of Community law' within the meaning of the first indent of Article 3(2) of Directive 95/46.

45 The Court has held, on the subject of Directive 95/46, which is based on Article 100a of the Treaty, that recourse to that legal basis does not presuppose the existence of an actual link with free movement between Member States in every situation referred to by the measure founded on that basis (see Joined Cases C-465/00, C-138/01 and C-139/01 *Österreichischer Rundfunk and Others* [2003] ECR I-4989, paragraph 41, and the case-law cited therein).

46 A contrary interpretation could make the limits of the field of application of the directive particularly unsure and uncertain, which would be contrary to its essential objective of approximating the laws, regulations and administrative provisions of the Member States in order to eliminate obstacles to the functioning of the internal market deriving precisely from disparities between national legislations (*Österreichischer Rundfunk and Others*, cited above, paragraph 42).

> Against that background, it would not be appropriate to interpret the expression 'activity which falls outside the scope of Community law' as having a scope which would require it to be determined in each individual case whether the specific activity at issue directly affected freedom of movement between Member States.

> The activities mentioned by way of example in the first indent of Article 3(2) of Directive 95/46 (in other words, the activities provided for by Titles V and VI of the Treaty on European Union and processing operations concerning public security, defence, State security and activities in areas of criminal law) are, in any event, activities of the State or of State authorities and unrelated to the fields of activity of individuals.

> It must therefore be considered that the activities mentioned by way of example in the first indent of Article 3(2) of Directive 95/46 are intended to define the scope of the exception provided for there, with the result that that exception applies only to the activities which are expressly listed there or which can be classified in the same category (*ejusdem generis*).

> Charitable or religious activities such as those carried out by Mrs Lindqvist cannot be considered equivalent to the activities listed in the first indent of Article 3(2) of Directive 95/46 and are thus not covered by that exception.

> As regards the exception provided for in the second indent of Article 3(2) of Directive 95/46, the 12th recital in the preamble to that directive, which concerns that exception, cites, as examples of the processing of data carried out by a natural person in the exercise of activities which are exclusively personal or domestic, correspondence and the holding of records of addresses.

47 That exception must therefore be interpreted as relating only to activities which are carried out in the course of private or family life of individuals, which is clearly not the case with the processing of personal data consisting in publication on the internet so that those data are made accessible to an indefinite number of people.

48 The answer to the third question must therefore be that processing of personal data such as that described in the reply to the first question is not covered by any of the exceptions in Article 3(2) of Directive 95/46.

The fourth question

49 By its fourth question, the referring court seeks to know whether reference to the fact that an individual has injured her foot and is on half-time on medical grounds constitutes personal data concerning health within the meaning of Article 8(1) of Directive 95/46.

50 In the light of the purpose of the directive, the expression 'data concerning health' used in Article 8(1) thereof must be given a wide interpretation so as to include information concerning all aspects, both physical and mental, of the health of an individual.

51 The answer to the fourth question must therefore be that reference to the fact that an individual has injured her foot and is on half-time on medical grounds

constitutes personal data concerning health within the meaning of Article 8(1) of Directive 95/46.

The fifth question

52 By its fifth question the referring court seeks essentially to know whether there is any 'transfer [of data] to a third country' within the meaning of Article 25 of Directive 95/46 where an individual in a Member State loads personal data onto an internet page which is stored on an internet site on which the page can be consulted and which is hosted by a natural or legal person ('the hosting provider') who is established in that State or in another Member State, thereby making those data accessible to anyone who connects to the internet, including people in a third country. The referring court also asks whether the reply to that question would be the same if no one from the third country had in fact accessed the data or if the server where the page was stored was physically in a third country.

Observations submitted to the Court

53 The Commission and the Swedish Government consider that the loading, using a computer, of personal data onto an internet page, so that they become accessible to nationals of third countries, constitutes a transfer of data to third countries within the meaning of Directive 95/46. The answer would be the same if no one from the third country had in fact accessed the data or if the server where it was stored was physically in a third country.

51 The Netherlands Government points out that the term 'transfer' is not defined by Directive 95/46. It takes the view, first, that that term must be understood to refer to the act of intentionally transferring personal data from the territory of a Member State to a third country and, second, that no distinction can be made between the different ways in which data are made accessible to third parties. It concludes that loading personal data onto an internet page using a computer cannot be considered to be a transfer of personal data to a third country within the meaning of Article 25 of Directive 95/46.

52 The United Kingdom Government submits that Article 25 of Directive 95/46 concerns the transfer of data to third countries and not their accessibility from third countries. The term 'transfer' connotes the transmission of personal data from one place and person to another place and person. It is only in the event of such a transfer that Article 25 of Directive 95/46 requires Member States to ensure an adequate level of protection of personal data in a third country.

Reply of the Court

53 Directive 95/46 does not define the expression 'transfer to a third country' in Article 25 or any other provision, including Article 2.

54 In order to determine whether loading personal data onto an internet page constitutes a 'transfer' of those data to a third country within the meaning of Article 25 of Directive 95/46 merely because it makes them accessible to people in

a third country, it is necessary to take account both of the technical nature of the operations thus carried out and of the purpose and structure of Chapter IV of that directive where Article 25 appears.

59 Information on the internet can be consulted by an indefinite number of people living in many places at almost any time. The ubiquitous nature of that information is a result inter alia of the fact that the technical means used in connection with the internet are relatively simple and becoming less and less expensive.

60 Under the procedures for use of the internet available to individuals like Mrs Lindqvist during the 1990s, the author of a page intended for publication on the internet transmits the data making up that page to his hosting provider. That provider manages the computer infrastructure needed to store those data and connect the server hosting the site to the internet. That allows the subsequent transmission of those data to anyone who connects to the internet and seeks access to it. The computers which constitute that infrastructure may be located, and indeed often are located, in one or more countries other than that where the hosting provider is established, without its clients being aware or being in a position to be aware of it.

61 It appears from the court file that, in order to obtain the information appearing on the internet pages on which Mrs Lindqvist had included information about her colleagues, an internet user would not only have to connect to the internet but also personally carry out the necessary actions to consult those pages. In other words, Mrs Lindqvist's internet pages did not contain the technical means to send that information automatically to people who did not intentionally seek access to those pages.

61 It follows that, in circumstances such as those in the case in the main proceedings, personal data which appear on the computer of a person in a third country, coming from a person who has loaded them onto an internet site, were not directly transferred between those two people but through the computer infrastructure of the hosting provider where the page is stored.

62 It is in that light that it must be examined whether the Community legislature intended, for the purposes of the application of Chapter IV of Directive 95/46, to include within the expression 'transfer [of data] to a third country' within the meaning of Article 25 of that directive activities such as those carried out by Mrs Lindqvist. It must be stressed that the fifth question asked by the referring court concerns only those activities and not those carried out by the hosting providers.

63 Chapter IV of Directive 95/46, in which Article 25 appears, sets up a special regime, with specific rules, intended to allow the Member States to monitor transfers of personal data to third countries. That Chapter sets up a complementary regime to the general regime set up by Chapter II of that directive concerning the lawfulness of processing of personal data.

64 The objective of Chapter IV is defined in the 56th to 60th recitals in the preamble to Directive 95/46, which state inter alia that, although the protection of individuals guaranteed in the Community by that 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 such protection must be assessed in the light of all the circumstances surrounding the transfer operation or set of transfer operations. Where a third country does not ensure an adequate level of protection the transfer of personal data to that country must be prohibited.

65 For its part, Article 25 of Directive 95/46 imposes a series of obligations on Member States and on the Commission for the purposes of monitoring transfers of personal data to third countries in the light of the level of protection afforded to such data in each of those countries.

66 In particular, Article 25(4) of Directive 95/46 provides that, where the Commission finds that a third country does not ensure an adequate level of protection, Member States are to take the measures necessary to prevent any transfer of personal data to the third country in question.

67 Chapter IV of Directive 95/46 contains no provision concerning use of the internet. In particular, it does not lay down criteria for deciding whether operations carried out by hosting providers should be deemed to occur in the place of establishment of the service or at its business address or in the place where the computer or computers constituting the service's infrastructure are located.

68 Given, first, the state of development of the internet at the time Directive 95/46 was drawn up and, second, the absence, in Chapter IV, of criteria applicable to use of the internet, one cannot presume that the Community legislature intended the expression 'transfer [of data] to a third country' to cover the loading, by an individual in Mrs Lindqvist's position, of data onto an internet page, even if those data are thereby made accessible to persons in third countries with the technical means to access them.

68 If Article 25 of Directive 95/46 were interpreted to mean that there is 'transfer [of data] to a third country' every time that personal data are loaded onto an internet page, that transfer would necessarily be a transfer to all the third countries where there are the technical means needed to access the internet. The special regime provided for by Chapter IV of the directive would thus necessarily become a regime of general application, as regards operations on the internet. Thus, if the Commission found, pursuant to Article 25(4) of Directive 95/46, that even one third country did not ensure adequate protection, the Member States would be obliged to prevent any personal data being placed on the internet.

69 Accordingly, it must be concluded that Article 25 of Directive 95/46 is to be interpreted as meaning that operations such as those carried out by Mrs Lindqvist do not as such constitute a 'transfer [of data] to a third country'. It is thus unnecessary to investigate whether an individual from a third country has accessed the internet page concerned or whether the server of that hosting service is physically in a third country.

70 The reply to the fifth question must therefore be that there is no 'transfer [of data] to a third country' within the meaning of Article 25 of Directive 95/46 where an individual in a Member State loads personal data onto an internet page which is stored with his hosting provider which is established in that State or in another Member State, thereby making those data accessible to anyone who connects to the internet, including people in a third country.

The sixth question

71 By its sixth question the referring court seeks to know whether the provisions of Directive 95/46, in a case such as that in the main proceedings, bring about a

restriction which conflicts with the general principles of freedom of expression or other freedoms and rights, which are applicable within the European Union and are enshrined in inter alia Article 10 of the ECHR.

Observations submitted to the Court

71 Citing inter alia Case C-274/99 P *Connolly* v *Commission* [2001] ECR I-1611, Mrs Lindqvist submits that Directive 95/46 and the PUL, in so far as they lay down requirements of prior consent and prior notification of a supervisory authority and a principle of prohibiting processing of personal data of a sensitive nature, are contrary to the general principle of freedom of expression enshrined in Community law. More particularly, she argues that the definition of 'processing of personal data wholly or partly by automatic means' does not fulfil the criteria of predictability and accuracy.

72 She argues further that merely mentioning a natural person by name, revealing their telephone details and working conditions and giving information about their state of health and hobbies, information which is in the public domain, well-known or trivial, does not constitute a significant breach of the right to respect for private life. Mrs Lindqvist considers that, in any event, the constraints imposed by Directive 95/46 are disproportionate to the objective of protecting the reputation and private life of others.

73 The Swedish Government considers that Directive 95/46 allows the interests at stake to be weighed against each other and freedom of expression and protection of private life to be thereby safeguarded. It adds that only the national court can

assess, in the light of the facts of each individual case, whether the restriction on the exercise of the right to freedom of expression entailed by the application of the rules on the protection of the rights of others is proportionate.

76 The Netherlands Government points out that both freedom of expression and the right to respect for private life are among the general principles of law for which the Court ensures respect and that the ECHR does not establish any hierarchy between the various fundamental rights. It therefore considers that the national court must endeavour to balance the various fundamental rights at issue by taking account of the circumstances of the individual case.

77 The United Kingdom Government points out that its proposed reply to the fifth question, set out in paragraph 55 of this judgment, is wholly in accordance with fundamental rights and avoids any disproportionate restriction on freedom of expression. It adds that it is difficult to justify an interpretation which would mean that the publication of personal data in a particular form, that is to say, on an internet page, is subject to far greater restrictions than those applicable to publication in other forms, such as on paper.

78 The Commission also submits that Directive 95/46 does not entail any restriction contrary to the general principle of freedom of expression or other rights and freedoms applicable in the European Union corresponding inter alia to the right provided for in Article 10 of the ECHR.

Reply of the Court

79 According to the seventh recital in the preamble to Directive 95/46, the establishment and functioning of the common market are liable to be seriously affected by differences in national rules applicable to the processing of personal

data. According to the third recital of that directive the harmonisation of those national rules must seek to ensure not only the free flow of such data between Member States but also the safeguarding of the fundamental rights of individuals. Those objectives may of course be inconsistent with one another.

96 On the one hand, the economic and social integration resulting from the establishment and functioning of the internal market will necessarily lead to a substantial increase in cross-border flows of personal data between all those involved in a private or public capacity in economic and social activity in the Member States. Those so involved will, to a certain extent, need to have access to personal data to perform their transactions or carry out their tasks within the area without internal frontiers which the internal market constitutes.

97 On the other hand, those affected by the processing of personal data understandably require those data to be effectively protected.

98 The mechanisms allowing those different rights and interests to be balanced are contained, first, in Directive 95/46 itself, in that it provides for rules which determine in what circumstances and to what extent the processing of personal data is lawful and what safeguards must be provided for. Second, they result from the adoption, by the Member States, of national provisions implementing that directive and their application by the national authorities.

99 As regards Directive 95/46 itself, its provisions are necessarily relatively general since it has to be applied to a large number of very different situations. Contrary to Mrs Lindqvist's contentions, the directive quite properly includes rules with a

degree of flexibility and, in many instances, leaves to the Member States the task of deciding the details or choosing between options.

84 It is true that, in many respects, the Member States have a margin for manoeuvre in implementing Directive 95/46. However, there is nothing to suggest that the regime it provides for lacks predictability or that its provisions are, as such, contrary to the general principles of Community law and, in particular, to the fundamental rights protected by the Community legal order.

85 Thus, it is, rather, at the stage of the application at national level of the legislation implementing Directive 95/46 in individual cases that a balance must be found between the rights and interests involved.

86 In that context, fundamental rights have a particular importance, as demonstrated by the case in the main proceedings, in which, in essence, Mrs Lindqvist's freedom of expression in her work preparing people for Communion and her freedom to carry out activities contributing to religious life have to be weighed against the protection of the private life of the individuals about whom Mrs Lindqvist has placed data on her internet site.

87 Consequently, it is for the authorities and courts of the Member States not only to interpret their national law in a manner consistent with Directive 95/46 but also to make sure they do not rely on an interpretation of it which would be in conflict with the fundamental rights protected by the Community legal order or with the other general principles of Community law, such as inter alia the principle of proportionality.

> Whilst it is true that the protection of private life requires the application of effective sanctions against people processing personal data in ways inconsistent with Directive 95/46, such sanctions must always respect the principle of proportionality. That is so *a fortiori* since the scope of Directive 95/46 is very wide and the obligations of those who process personal data are many and significant.

> It is for the referring court to take account, in accordance with the principle of proportionality, of all the circumstances of the case before it, in particular the duration of the breach of the rules implementing Directive 95/46 and the importance, for the persons concerned, of the protection of the data disclosed.

> The answer to the sixth question must therefore be that the provisions of Directive 95/46 do not, in themselves, bring about a restriction which conflicts with the general principles of freedom of expression or other freedoms and rights, which are applicable within the European Union and are enshrined inter alia in Article 10 of the ECHR. It is for the national authorities and courts responsible for applying the national legislation implementing Directive 95/46 to ensure a fair balance between the rights and interests in question, including the fundamental rights protected by the Community legal order.

The seventh question

> By its seventh question, the referring court essentially seeks to know whether it is permissible for the Member States to provide for greater protection for personal data or a wider scope than are required under Directive 95/46.

Observations submitted to the Court

92 The Swedish Government states that Directive 95/46 is not confined to fixing minimum conditions for the protection of personal data. Member States are obliged, in the course of implementing that directive, to attain the level of protection dictated by it and are not empowered to provide for greater or less protection. However, account must be taken of the discretion which the Member States have in implementing the directive to lay down in their domestic law the general conditions for the lawfulness of the processing of personal data.

93 The Netherlands Government submits that Directive 95/46 does not preclude Member States from providing for greater protection in certain areas. It is clear, for example, from Article 10, Article 11(1), subparagraph (a) of the first paragraph of Article 14, Article 17(3), Article 18(5) and Article 19(1) of that directive that the Member States may make provision for wider protection. Moreover, the Member States are free to apply the principles of Directive 95/46 also to activities which do not fall within its scope.

94 The Commission submits that Directive 95/46 is based on Article 100a of the Treaty and that, if a Member State wishes to maintain or introduce legislation which derogates from such a harmonising directive, it is obliged to notify the Commission pursuant to Article 95(4) or 95(5) EC. The Commission therefore submits that a Member State cannot make provision for more extensive protection for personal data or a wider scope than are required under the directive.

Reply of the Court

95 Directive 95/46 is intended, as appears from the eighth recital in the preamble thereto, to ensure that the level of protection of the rights and freedoms of

individuals with regard to the processing of personal data is equivalent in all Member States. The tenth recital adds that the approximation of the national laws applicable in this area 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.

96 The harmonisation of those national laws is therefore not limited to minimal harmonisation but amounts to harmonisation which is generally complete. It is upon that view that Directive 95/46 is intended to ensure free movement of personal data while guaranteeing a high level of protection for the rights and interests of the individuals to whom such data relate.

97 It is true that Directive 95/46 allows the Member States a margin for manoeuvre in certain areas and authorises them to maintain or introduce particular rules for specific situations as a large number of its provisions demonstrate. However, such possibilities must be made use of in the manner provided for by Directive 95/46 and in accordance with its objective of maintaining a balance between the free movement of personal data and the protection of private life.

98 On the other hand, nothing prevents a Member State from extending the scope of the national legislation implementing the provisions of Directive 95/46 to areas not included within the scope thereof, provided that no other provision of Community law precludes it.

99 In the light of those considerations, the answer to the seventh question must be that measures taken by the Member States to ensure the protection of personal data must be consistent both with the provisions of Directive 95/46 and with its objective of maintaining a balance between freedom of movement of personal

data and the protection of private life. However, nothing prevents a Member State from extending the scope of the national legislation implementing the provisions of Directive 95/46 to areas not included in the scope thereof provided that no other provision of Community law precludes it.

Costs

99 The costs incurred by the Swedish, Netherlands and United Kingdom Governments and by the Commission and the EFTA Surveillance Authority, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Göta hovrätt by order of 23 February 2001, hereby rules:

1. **The act of referring, on an internet page, to various persons and identifying them by name or by other means, for instance by giving their telephone**

number or information regarding their working conditions and hobbies, constitutes 'the processing of personal data wholly or partly by automatic means' within the meaning of Article 3(1) 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.

2. Such processing of personal data is not covered by any of the exceptions in Article 3(2) of Directive 95/46.

3. Reference to the fact that an individual has injured her foot and is on half-time on medical grounds constitutes personal data concerning health within the meaning of Article 8(1) of Directive 95/46.

4. There is no 'transfer [of data] to a third country' within the meaning of Article 25 of Directive 95/46 where an individual in a Member State loads personal data onto an internet page which is stored on an internet site on which the page can be consulted and which is hosted by a natural or legal person who is established in that State or in another Member State, thereby making those data accessible to anyone who connects to the internet, including people in a third country.

5. The provisions of Directive 95/46 do not, in themselves, bring about a restriction which conflicts with the general principles of freedom of expression or other freedoms and rights, which are applicable within the European Union and are enshrined inter alia in Article 10 of the European

Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950. It is for the national authorities and courts responsible for applying the national legislation implementing Directive 95/46 to ensure a fair balance between the rights and interests in question, including the fundamental rights protected by the Community legal order.

6. Measures taken by the Member States to ensure the protection of personal data must be consistent both with the provisions of Directive 95/46 and with its objective of maintaining a balance between freedom of movement of personal data and the protection of private life. However, nothing prevents a Member State from extending the scope of the national legislation implementing the provisions of Directive 95/46 to areas not included in the scope thereof provided that no other provision of Community law precludes it.

Jann	Timmermans	Gulmann
Cunha Rodrigues	Rosas	Edward
Puissochet	Macken	von Bahr

Delivered in open court in Luxembourg on 6 November 2003.

R. Grass — Registrar

V. Skouris — President

JUDGMENT OF THE COURT (Fifth Chamber)

25 March 2004 *

In Case C-71/02,

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

Herbert Karner Industrie-Auktionen GmbH

and

Troostwijk GmbH,

on the interpretation of Article 28 EC,

* Language of the case: German.

THE COURT (Fifth Chamber),

composed of C.W.A. Timmermans, acting as President of the Fifth Chamber, A. Rosas (Rapporteur) and S. von Bahr, Judges,

Advocate General: S. Alber,
Registrar: H. Cornet, Principal Administrator,

after considering the written observations submitted on behalf of:

— Herbert Karner Industrie-Auktionen GmbH, by M. Rajaba, Rechtsanwalt,

— Troostwijk GmbH, by A. Frauenberger, Rechtsanwalt,

— the Austrian Government, by C. Pesendorfer, acting as Agent,

the Swedish Government, by A. Falk, acting as Agent,

— the Commission of the European Communities, by U. Wolker and J.C. Schaffner, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Herbert Karner Industrie-Auktionen GmbH, represented by M. Kajaba; of Trooswijk GmbH, represented by A. Frauenberger; of the Austrian Government, represented by T. Kramler, acting as Agent; of the Swedish Government, represented by A. Falk; and of the Commission, represented by J.C. Schieferer, at the hearing on 26 February 2003,

after hearing the Opinion of the Advocate General at the sitting on 8 April 2003,

gives the following

Judgment

1 By order of 29 January 2002, received at the Court on 4 March 2002, the Oberster Gerichtshof referred to the Court for a preliminary ruling under Article 234 EC a question on the interpretation of Article 28 EC.

2 The question was raised in proceedings between Herbert Karner Industrie-Auktionen GmbH ('Karner') and Trooswijk GmbH ('Trooswijk'), companies authorised to auction moveable property, concerning advertising by Trooswijk for the sale of stock on insolvency.

Legal framework

Community rules

Under Article 28 EC, quantitative restrictions on imports and all measures having equivalent effect are prohibited between Member States. Article 30 EC allows such prohibitions and restrictions, however, where they are justified on certain grounds which are recognised as fundamental requirements under Community law and they do not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

Council Directive 84/450/EEC of 10 September 1984 concerning misleading and comparative advertising (OJ 1984 L 250, p. 17), as amended by Directive 97/55/EC of the European Parliament and of the Council of 6 October 1997 (OJ 1997 L 290, p. 18) ('Directive 84/450'), defines its purpose in Article 1 as follows.

'The purpose of this Directive is to protect consumers, persons carrying on a trade or business or practising a craft or profession and the interests of the public in general against misleading advertising and the unfair consequences thereof...'.

Article 2(2) of Directive 84/450 defines 'misleading advertising' as 'any advertising which in any way, including its presentation, deceives or is likely to deceive the persons to whom it is addressed or whom it reaches and which, by

reason of its deceptive nature, is likely to affect their economic behaviour or which, for those reasons, injures or is likely to injure a competitor".

6 Article 3 of Directive 84/450 provides that, in determining whether advertising is misleading, account is to be taken of all its features. The provision goes on to list a number of factors to be taken into account, such as, inter alia, the geographical or commercial origin of the goods in question.

7 Article 7 of Directive 84/450 states that the Directive is not to preclude Member States from retaining or adopting provisions with a view to ensuring more extensive protection, with regard to misleading advertising, for consumers and other persons referred to by that directive.

National rules

8 Paragraph 2(1) of the Bundesgesetz gegen den unlauteren Wettbewerb (Law on unfair competition) of 16 November 1984 (BGBl., 1984/448, 'UWG'), lays down a general prohibition on the provision, in the course of trade, of information likely to mislead the public.

9 Paragraph 30(1) of the UWG prohibits any public announcements or notices intended for a large circle of persons from making reference to the fact that the goods advertised originate from an insolvent estate when the goods in question, even though that was their origin, no longer form part of the insolvent estate.

Main proceedings and question referred for a preliminary ruling

10 The companies Karner and Troostwijk are engaged in the sale by auction of industrial goods and the purchase of the stock of insolvent companies.

11 By a sales contract of 26 March 2001, Troostwijk acquired, with the autorisation of the insolvency court, the stock of an insolvent construction company. Karner had also indicated its interest in the purchase of those goods.

12 Troostwijk intended to sell the stock from the insolvent estate in an auction sale which was to take place on 14 May 2001. It advertised the auction in a sales catalogue, stating that it was an insolvency auction and that the goods were from the insolvent estate of the company in question. The advertising notice was also posted on the internet.

13 In Karner's view, Troostwijk's advertising is contrary to Article 3(1) of the UWG because it gives the public concerned the impression that it is the insolvency administrator who is selling the insolvent company's assets. Irrespective of any risk that the public will be misled, such advertising is both contrary to the competition rules laid down in the EC Treaty and misleading within the meaning of Article 2 of the UWG.

11 On 10 May 2001, on application by Kanter, the Handelsgericht Wien (Commercial Court, Vienna) (Austria) issued an interim injunction ordering Ivostwijk, first, to refrain from referring in its advertising for the sale of the goods to the fact that the goods were from an insolvent company in so far as they no longer constituted part of the insolvent estate and, second, to make a public statement to potential buyers at the auction, informing them in particular that the auction was not being held on behalf or on the instructions of the insolvency administrator.

12 Ivostwijk appealed against that injunction to the Oberlandesgericht Wien (Higher Regional Court, Vienna) (Austria), on several grounds and questioned, in particular, the compatibility of Article 30(1) of the UWG with Article 28 EC.

13 Following the dismissal of its appeal, on 14 November 2001 Ivostwijk brought an action before the Oberster Gerichtshof (Supreme Court). It maintains that the prohibition in Article 30(1) of the UWG is contrary to Article 28 EC and incompatible with Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 ('ECHR'), concerning freedom of expression.

14 Taking the view that the Court had not yet ruled on the question of the compatibility of a national provision such as Article 30(1) of the UWG with Article 28 EC, the Oberster Gerichtshof decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Is Article 28 EC to be interpreted as precluding national legislation which, irrespective of the truthfulness of the information, prohibits any reference to the fact that goods come from an insolvent estate where, in public announcements or

notices intended for a large circle of persons, notice is given of the sale of goods which originate from, but no longer constitute part of, the insolvent estate?'

Admissibility

Observations submitted to the Court

Karner submits that the reference for a preliminary ruling is inadmissible. In its view, the facts giving rise to the dispute in the main proceedings relate to a purely internal situation because the parties thereto are established in Austria, the goods in question were acquired following a case of insolvency which occurred in the territory of that Member State and Paragraph 30(1) of the UWG concerns forms of advertising in Austria.

Findings of the Court

It should be borne in mind that Article 28 EC cannot be considered inapplicable simply because all the facts of the specific case before the national court are confined to a single Member State (see Joined Cases C-321/94 to C-324/94 *Pistre and Others* [1997] ECR I-2343, paragraph 44).

That principle has been upheld by the Court not only in cases where the national rule in question gave rise to direct discrimination against goods imported from other Member States (*Pistre and Others*, cited above, paragraph 44), but also in situations where the national rule applied without distinction to national and

imported products and was thus likely to constitute a potential impediment to intra-Community trade covered by Article 28 EC (see, to that effect, Case C-448/98 *Guimont* [2000] ECR I-10663, paragraphs 21 and 22).

21 In this case, it is not obvious that the interpretation of Community law requested is not necessary for the national court (see *Guimont*, cited above, paragraph 23). Such a reply might help it to determine whether a prohibition such as that provided for in Article 30(1) of the UWG is likely to constitute a potential impediment to intra-Community trade falling within the scope of application of Article 28 EC (see also Case C-254/98 *TK-Heimdienst* [2000] ECR I-151, paragraph 14).

22 It follows from the foregoing considerations that the reference for a preliminary ruling is admissible.

Substance

Observations submitted to the Court

23 Karner, the Austrian and Swedish Governments and the Commission submit that the prohibition in Paragraph 30(1) of the UWG is a selling arrangement within the

meaning of that term as described in Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097. The provision applies without distinction to domestic and imported products and is not by nature such as to impede the latters' access to the market any more than it impedes the access of domestic products. It therefore falls outside the scope of application of Article 28 EC.

14 If the Court should nevertheless find that Article 30(1) of the UWG does constitute a measure having equivalent effect within the meaning of Article 28 EC, Karner, supported by the Austrian and Swedish Governments, considers that it is justified by the mandatory requirement of consumer protection within the meaning of the line of case-law initiated in *'Cassis de Dijon'* (Case 120/78 *Rewe-Zentral* [1979] ECR 649). The Swedish Government also refers to the principle of fair trading.

15 Referring to the wording of Article 7 of Directive 84/450, the Austrian Government states that Article 30(1) of the UWG is aimed at combating misleading advertising in the interests of consumers, competing undertakings and the general public.

16 Troostwijk maintains that Article 30(1) of the UWG is incompatible with both Article 28 EC and Directive 84/450. The national provision prevents consumers from having the benefit of accurate information and is capable of affecting intra-Community trade. The reference to the origin of goods relates to one of their qualities and not to the marketing of those goods. Such a reference cannot therefore be regarded as a selling arrangement within the meaning of *Keck and Mithouard*, cited above.

27 According to Troostwijk, that provision restricts the possibility of disseminating advertising which is lawful in other Member States. It is clear that advertising an offer of sale such as that at issue in the main proceedings cannot be confined to the territory of a single Member State. Varying the information according to the Member States concerned is impossible on the internet, since that mode of communication is not restricted to a single region.

28 Regarding the compatibility of Article 3(1) of the UWG with Directive 84/450, Troostwijk submits that that directive establishes partial harmonisation and allows Member States to retain and adopt provisions aimed at ensuring more extensive consumer protection. The goal of consumer protection is not served by the provision in so far as it 'prohibits truthful assertions in advertisements'.

29 Lastly, Troostwijk submits that the provision is not compatible with Article 10 of the ECHR concerning freedom of expression, since restrictions on that right may be justified only if the expression of the truth might, even in a democratic society, seriously jeopardise a high-ranking individual or collective right.

Response of the Court

30 The Court notes, as a preliminary point, that the file on the case forwarded to it by the national court shows that Article 3(1) of the UWG is based on the

presumption that consumers prefer to purchase goods sold by an insolvency administrator when a company is wound up because they hope to make purchases at advantageous prices. Where advertising related to the sale of goods from an insolvent estate, it would be difficult to know whether the sale has organised by the insolvency administrator or by a party who had acquired goods from the insolvent estate. The national provision is intended to prevent economic operators from taking undue advantage of that tendency on the part of consumers.

31 Although it is true that the national rules governing consumer protection in the event of sales of goods from an insolvent estate have not been harmonised at the Community level, the fact remains that some aspects relating to advertising for such sales may fall within the scope of Directive 84/450.

32 It should be borne in mind that that directive is intended to set minimum criteria and objectives on the basis of which it is possible to determine whether advertising is misleading. The Directive's provisions include Article 2(2), which define 'misleading advertising' and Article 3, which states which factors are to be taken into account to determine whether advertising is misleading.

33 Without its being necessary to examine in detail the degree of harmonisation achieved by Directive 84/450, it is common ground that Article 7 of that directive allows the Member States to retain or adopt provisions aimed at ensuring more extensive consumer protection than that provided for thereunder.

15 It should be remembered, however, that that power must be exercised in a way that is consistent with the fundamental principle of the free movement of goods, as expressed in the prohibition contained in Article 28 EC on quantitative restrictions on imports and any measures having equivalent effect between Member States (see, to that effect, Case C-23/99 *Commission* v *France* [2000] ECR I-7653, paragraph 33).

16 It is appropriate, first of all, to determine whether a national rule such as Article 30(1) of the UWG, which prohibits any reference to the fact that the goods in question come from an insolvent estate where, in public announcements or notices intended for a large circle of persons, notice is given of the sale of goods which originate from, but no longer constitute part of the insolvent estate, falls within the scope of application of Article 28 EC.

17 It is settled case-law that all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be regarded as measures having an effect equivalent to quantitative restrictions and thus prohibited by Article 28 EC (see, in particular, Case 8/74 *Dassonville* [1974] ECR 837, paragraph 5; Case C-420/01 *Commission* v *Italy* [2003] ECR I-6445, paragraph 25; and *DocMorris*, cited above, paragraph 22).

18 The Court stated in paragraph 16 of *Keck and Mithouard*, cited above, that national provisions restricting or prohibiting certain selling arrangements which apply to all relevant traders operating within the national territory and affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States are not such as to hinder directly or indirectly,

actually or potentially, trade between Member States within the meaning of the line of case-law initiated by *Dassonville*, cited above.

38 The Court subsequently found provisions concerning inter alia the place and times of sale of certain products and advertising of those products as well as certain marketing methods to be provisions governing selling arrangements within the meaning of *Keck and Mithouard*, cited above (see inter alia Case C-292/92 *Hünermund and Others* [1993] ECR I-6787, paragraphs 21 and 22; Joined Cases C-401/92 and C-402/92 *Tankstation 't Heukske and Boermans* [1994] I 2199, paragraphs 12 to 14; and *TK-Heimdienst*, cited above, paragraph 24).

39 The Court notes that Paragraph 30(1) of the UWG is intended to regulate references which may be made in advertisements with regard to the commercial origin of goods from an insolvent estate when they no longer constitute part of that estate. In those circumstances, the Court finds such a provision does not relate to the conditions which those goods must satisfy, but rather governs the marketing of those goods. Accordingly, it must be regarded as concerning selling arrangements within the meaning of *Keck and Mithouard*, cited above.

40 As is clear from *Keck and Mithouard*, however, such a selling arrangement cannot escape the prohibition laid down in Article 28 EC unless it satisfies the two conditions set out in paragraph 37 of this judgment.

41 As regards the first of those conditions, Paragraph 30(1) of the UWG applies without distinction to all the operators concerned who carry on their business on Austrian territory, regardless of whether they are Austrian nationals or foreigners.

41 As regards the second condition, Paragraph 30(1) of the UWG, contrary to the national provisions which gave rise to Joined Cases C-34/95 to C-36/95 *De Agostini and TV-Shop* [1997] ECR I-3843 and to Case C-405/98 *Gourmet International Products* [2001] ECR I-1795, does not lay down a total prohibition on all forms of advertising in a Member State for a product which is lawfully sold there. It merely prohibits any reference, when a large number of people are targeted, to the fact that goods originate from an insolvent estate if those goods no longer constitute part of the insolvent estate, on grounds of consumer protection. Although such a prohibition is, in principle, likely to limit the total volume of sales in that Member State and, consequently, also to reduce the volume of sales of goods from other Member States, it nevertheless does not affect the marketing of products originating from other Member States more than it affects the marketing of products from the Member State in question. In any event, there is no evidence in the file forwarded to the Court by the national court to permit a finding that the prohibition has had such an effect.

42 In those circumstances, as the Advocate General stated in paragraph 66 of his Opinion, it must be held that the two conditions laid down by *Keck and Mithouard*, cited above, and referred to in paragraph 37 of this judgment, are fully satisfied in the case in the main proceedings. Accordingly, a national provision such as Paragraph 30(1) of the UWG is not caught by the prohibition in Article 28 EC.

43 Second, it is necessary to consider Trioworld's arguments that Paragraph 30(1) of the UWG, first, restricts the dissemination of advertising which is lawful in other Member States and, second, is incompatible with the principle of freedom of expression as laid down in Article 10 ECHR.

Regarding the first argument, it is appropriate to construe it as relating to the question whether Article 49 EC governing the freedom to provide services precludes a restriction on advertising such as that laid down in Paragraph 30 of the UWG.

Where a national measure relates to both the free movement of goods and freedom to provide services, the Court will in principle examine it in relation to one only of those two fundamental freedoms if it appears that, in the circumstances of the case, one of them is entirely secondary in relation to the other and may be considered together with it (see, to that effect, Case C-275/92 *Schindler* [1994] ECR I-1039, paragraph 22; and Case C-390/99 *Canal Satélite Digital* [2002] ECR I-607, paragraph 31).

In the circumstances of the case in the main proceedings, the dissemination of advertising is not an end in itself. It is a secondary element in relation to the sale of the goods in question. Consequently the free movement of goods aspect prevails over the freedom to provide services aspect. It is thus not necessary to consider Paragraph 30(1) of the UWG in the light of Article 49 EC.

Regarding Trumpf's second argument with regard to the compatibility of the legislation in question with freedom of expression, it should be recalled that, 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; Case C-94/00 *Roquette Frères* [2002] ECR I-9011, paragraph 25; and Case C-112/00 *Schmidberger* [2003] ECR I-5659, paragraph 71).

49 Further, according to the Court's case-law, where national legislation falls within the field of application of Community law the Court, in a reference for a preliminary ruling, must give the national court all the guidance as to interpretation necessary to enable it to assess the compatibility of that legislation with the fundamental rights whose observance the Court ensures (see, to that effect, Case C-299/95 *Kremzow* [1997] ECR I-2629, paragraph 15).

50 Whilst the principle of freedom of expression is expressly recognised by Article 10 ECHR and constitutes one of the fundamental pillars of a democratic society, it nevertheless follows from the wording of Article 10(2) that freedom of expression is 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 that provision 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 *Schmidberger*, cited above, paragraph 79).

51 It is common ground that the discretion enjoyed by the national authorities in determining the balance to be struck between freedom of expression and the abovementioned objectives varies for each of the goals justifying restrictions on that freedom and depends on the nature of the activities in question. When the exercise of the freedom does not contribute to a discussion of public interest and, in addition, arises in a context in which the Member States have a certain amount of discretion, review is limited to an examination of the reasonableness and proportionality of the interference. This holds true for the commercial use of freedom of expression, particularly in a field as complex and fluctuating as advertising (see, to that effect, Case C-245/01 *RTL Television* [2003] ECR I-12489, paragraph 73; judgments of the ECtHR of 20 November 1989, *Markt*

intern Verlag GmbH and Klaus Beermann, Reports of Judgments and Decisions series A No 165, paragraph 33; and of 28 June 2001, *VGT Verein gegen Tierfabriken v Switzerland*, Reports of Judgments and Decisions 2001-VI, paragraphs 69 to 70).

In this case it appears, having regard to the circumstances of fact and of law characterising the situation which gave rise to the case in the main proceedings and the discretion enjoyed by the Member States, that a restriction on advertising as provided for in Article 30 of the UWG is reasonable and proportionate in the light of the legitimate goals pursued by that provision, namely consumer protection and fair trading.

In the light of all the foregoing considerations, the question referred to the Court must be answered as follows: Article 28 EC does not preclude national legislation, which, irrespective of the truthfulness of the information, prohibits any reference to the fact that goods come from an insolvent estate where in public announcements or notices intended for a large circle of persons, notice is given of the sale of goods which originate from, but no longer constitute part of, the insolvent estate.

Costs

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

On those grounds,

THE COURT (Fifth Chamber)

in answer to the questions referred to it by the Oberster Gerichtshof by order of 29 January 2002, hereby rules:

Article 28 EC does not preclude national legislation which, irrespective of the truthfulness of the information, prohibits any reference to the fact that goods come from an insolvent estate, where, in public announcements or notices intended for a larger circle of persons, notice is given of the sale of goods which originate from, but no longer constitute part of, the insolvent estate.

Timmermans Rosas von Bahr

Delivered in open court in Luxembourg on 25 March 2004.

R. Grass

Registrar

V. Skouris

President

ARRÊT DU TRIBUNAL (troisième chambre)
28 octobre 2004 *

« Fonctionnaires – Réaffectation d'un chef de service – Intérêt du service – Équivalence des emplois – Droit à la liberté d'expression – Devoir de sollicitude – Motivation – Droit d'être entendu – Responsabilité extracontractuelle »

Dans l'affaire T-76/03,

Herbert Meister, fonctionnaire de l'Office de l'harmonisation dans le marché intérieur (marques, dessins et modèles), demeurant à Muchamiel (Espagne), représenté par Me G. Vandersanden, avocat,

partie requérante,

contre

Office de l'harmonisation dans le marché intérieur (marques, dessins et modèles) (OHMI), représenté par M. O. Waelbroeck, en qualité d'agent,

partie défenderesse,

ayant pour objet, d'une part, une demande d'annulation de la décision de l'OHMI PERS-AFFECF-02-30, du 22 avril 2003, portant nomination du requérant, dans l'intérêt du service, avec son emploi, comme conseiller juridique auprès de la vice-présidence chargée des affaires juridiques, et, d'autre part, une demande de dommages et intérêts,

* Langue de procédure : le français.

LE TRIBUNAL DE PREMIÈRE INSTANCE
DES COMMUNAUTÉS EUROPÉENNES (troisième chambre),

composé de MM. J. Azizi, président, M. Jaeger et M^me^ E. Cremona, juges,

greffier : M^me^ D. Christensen, administrateur,

vu la procédure écrite et à la suite de l'audience du 25 juin 2004,

rend le présent

Arrêt

Cadre juridique

1 L'Office de l'harmonisation dans le marché intérieur (marques, dessins et modèles) (OHMI) est un organisme de la Communauté européenne jouissant d'une personnalité juridique propre, régi par le titre XII du règlement (CE) n° 40/94 du Conseil, du 20 décembre 1993, sur la marque communautaire (JO 1994, L 11, p. 1), tel que modifié.

2 En vertu de l'article 112, paragraphe 1, du règlement n° 40/94, le statut des fonctionnaires des Communautés européennes, le régime applicable aux autres agents des Communautés européennes et les réglementations d'exécution de ces dispositions, arrêtées d'un commun accord par les institutions des Communautés européennes, s'appliquent au personnel de l'OHMI. L'article 112, paragraphe 2, du même règlement prévoit que les pouvoirs dévolus à chaque institution par le statut des fonctionnaires des Communautés européennes et par le régime applicable aux autres agents des Communautés européennes sont exercés par l'OHMI à l'égard de son personnel.

3 Aux termes de l'article 119 du règlement n° 40/94 :

« 1. La direction de l'[OHMI] est assurée par un président

2. À cet effet, le président a notamment les compétences mentionnées ci-après :

a) il prend toutes mesures utiles, notamment l'adoption d'instructions administratives internes et la publication de communications, en vue d'assurer le fonctionnement de l'[OHMI] ;

[...]

e) il exerce, à l'égard du personnel, les pouvoirs prévus à l'article 112, paragraphe 2 ;

[...]

3. Le président est assisté d'un ou de plusieurs vice-présidents.

[...] »

4 En vertu de l'article 5, paragraphe 1, deuxième alinéa, du statut des fonctionnaires des Communautés européennes, dans sa rédaction applicable à la présente espèce (ci-après le « statut »), les emplois de la catégorie A correspondent à « des fonctions de direction, de conception et d'étude, nécessitant des connaissances de niveau universitaire ou une expérience professionnelle d'un niveau équivalent ». Les emplois types et les carrières correspondant à cette catégorie sont décrits à l'annexe I du statut.

5 En vertu de l'article 7, paragraphe 1, du statut, l'autorité investie du pouvoir de nomination (ci-après l'« AIPN ») affecte, par voie de nomination ou de mutation, dans le seul intérêt du service et sans considération de nationalité, chaque fonctionnaire à un emploi de sa catégorie ou de son cadre correspondant à son grade.

6 Les articles 86 à 89 du statut, constituant le titre VI de celui-ci, instituent le régime disciplinaire applicable aux fonctionnaires. En vertu de l'article 87 du statut, l'intéressé doit être entendu préalablement à toute décision de l'AIPN prononçant une sanction disciplinaire.

Faits à l'origine du litige

1 Le requérant est entré au service de l'OHMI le 1er novembre 1995. Il a été nommé fonctionnaire de grade A 5 le 1er janvier 1997. Promu au grade A 4 avec effet au 1er janvier 2000, le requérant est actuellement fonctionnaire de grade A 4.

2 Au moment des faits ayant donné lieu à la présente affaire, le requérant était chef de service de la division « Annulation » de l'OHMI, sous l'autorité du vice-président chargé des affaires juridiques.

3 À la fin de l'année 2000, en vue d'évaluer le fonctionnement de l'OHMI à l'issue de ses cinq premières années de fonctionnement, deux rapports ont été commandés par celui-ci, l'un externe, réalisé par le cabinet d'audit Deloitte & Touche, l'autre interne, réalisé par l'unité de gestion de la qualité (ci-après l'« UGQ »). L'évaluation externe portait, notamment, sur la qualité de l'organisation, l'adéquation des procédures et des ressources, l'efficacité du fonctionnement ainsi que la satisfaction des usagers de l'OHMI. L'évaluation interne visait essentiellement « l'activité au sein de l'[OHMI] et [...] l'ensemble de l'activité de l'[OHMI] [...] dans ses moindres détails ».

4 Le rapport final du cabinet d'audit Deloitte & Touche, intitulé « Évaluation des processus et de l'organisation de l'OHMI », a été déposé en septembre 2001 (ci-après le « rapport Deloitte & Touche »). En substance, ce rapport recommande la création d'une structure de nature plus horizontale, dans le cadre de laquelle plusieurs départements seraient placés sous la supervision directe du président de l'OHMI. Dans cette optique, le rapport envisage, notamment, la création d'un département « Exploitation » couvrant tous les services directement impliqués dans la procédure d'examen et de demande des marques, exercés par les divisions « Examen », « Opposition » et « Annulation », ainsi que la création d'un département « Soutien de l'exploitation » impliquant tous les services relatifs aux marques qui ne sont pas directement impliqués dans l'examen de la marque.

5 Le 5 octobre 2001, l'UGQ a présenté un premier rapport, intitulé « Évaluation interne de l'[OHMI] – Premier rapport de synthèse », exposant les résultats intermédiaires tels qu'ils résultaient de l'évaluation de cinq services de l'OHMI (ci-après le « premier rapport UGQ »). Selon ce rapport, l'OHMI devrait être restructuré en procédant à des regroupements fonctionnels sur la base de quelques

grandes entités, notamment l'administration et la logistique ainsi que la procédure d'enregistrement, d'opposition et d'annulation. Le rapport recommande, dès lors, en tant que première mesure, la création d'un département « Administration et logistique des marques, dessins et modèles ».

12 Le 30 octobre 2001, le rapport Deloitte & Touche a été présenté au conseil d'administration de l'OHMI.

13 Par note du 15 novembre 2001, adressée au président de l'OHMI, ainsi qu'à plusieurs autres fonctionnaires dirigeants de l'OHMI, dont le vice-président chargé des affaires juridiques, le requérant a exposé ses observations critiques au sujet de ces deux rapports.

14 Par décision ADM-01-60, du 21 décembre 2001, adoptée en vertu de l'article 119, paragraphe 3 et paragraphe 2, sous a), du règlement n° 40/94, le président de l'OHMI a institué un département « Administration des marques, dessins et modèles », dépendant directement de lui-même et réunissant au sein de la même structure organisationnelle les différentes activités administratives relatives aux marques, dessins et modèles qui « ne sont pas étroitement liées aux activités principales d'examen, d'opposition ou de procédures de recours ». Selon cette décision, la responsabilité de ce département est confiée à un directeur de département.

15 Au début du mois de février 2002, l'UGQ a rendu un second rapport intitulé « Rapport intermédiaire 2001 – Division Annulation » portant uniquement sur cette dernière division (ci-après le « second rapport UGQ »). Dans celui-ci, l'UGQ propose d'examiner la possibilité de regrouper au sein d'un seul département les divisions « Annulation », « Examen » et « Opposition », afin d'assurer la cohérence des décisions rendues par les divisions opérationnelles de l'OHMI.

16 Par note du 15 février 2002, adressée au président de l'OHMI ainsi qu'à plusieurs fonctionnaires dirigeants de l'OHMI, dont le vice-président chargé des affaires juridiques, le requérant a exposé ses observations critiques au sujet de ce dernier rapport.

17 Les 18 et 19 février 2002, au cours de la présentation du second rapport UGQ au comité de direction de l'OHMI, le président de l'OHMI, le vice-président chargé des affaires juridiques et le directeur de l'UGQ ont rejeté les critiques formulées par le requérant dans sa note du 15 février 2002.

18 Le 25 février 2002, le vice-président chargé des affaires juridiques, après avoir discuté du contenu de ladite note avec le requérant, lui a demandé, ainsi qu'il l'a indiqué lui-même dans une note interne ultérieure du 19 avril 2002, de « reconsidérer la forme et le contenu » de celle-ci. Cette demande a été formulée à nouveau à la suite d'une réunion tenue le 11 mars 2002 entre le vice-président chargé des affaires juridiques et le requérant. Il est constant que le requérant a refusé d'entreprendre la démarche sollicitée.

19 Le 22 avril 2002, le président de l'OHMI, après en avoir averti verbalement le requérant au cours d'une réunion tenue avec le vice-président chargé des affaires juridiques et le directeur des ressources humaines, a notifié au requérant la décision PERS-AFFECP-02-30. Cette décision (ci-après la « décision attaquée ») se lit comme suit :

« Le président [de l'OHMI]

Eu égard au [règlement n° 40/94] et en particulier son article 119, paragraphe 2, sous e),

Eu égard au statut et en particulier son article 7,

Considérant que la division 'Annulation', au vu de la situation actuelle, doit être renforcée et doit adapter ses capacités de gestion de manière à traiter un nombre croissant d'affaires pendantes ;

Considérant que le style de gestion et le comportement [du requérant] ne sont pas acceptables et ne sont pas conformes au niveau et au style requis pour le poste de chef de service de la division 'Annulation' ;

Considérant que la vice-présidence chargée des affaires juridiques doit renforcer ses capacités de conseil dans le domaine du droit des marques ;

Considérant qu'il est dans l'intérêt du service de transférer [le requérant] au poste de conseiller juridique dépendant directement du vice-président chargé des affaires juridiques :

a décidé ce qui suit :

1 [Le requérant] est nommé, avec son emploi, dans l'intérêt du service, comme conseiller juridique à la vice-présidence chargée des affaires juridiques. Il dépendra directement du vice-président chargé des affaires juridiques. Les tâches pour lesquelles il exercera ses fonctions de conseiller juridique lui seront attribuées par le vice-président chargé des affaires juridiques.

2 La présente décision prendra effet le 1er mai 2002. »

« Aux termes de l'annexe de la décision attaquée, le requérant « est chargé de tâches de conception et d'étude relatives à différentes questions concernant le fonctionnement du système de la marque communautaire ».

« Par courrier électronique du 23 avril 2002, le président de l'OHMI a informé l'ensemble du personnel de l'OHMI de la décision attaquée dans les termes suivants :

« Le 22 avril 2002, le président de l'OHMI a décidé de relever [le requérant] de ses fonctions de chef de service de la division 'Annulation' et de le réaffecter aux fonctions de conseiller juridique dépendant directement de la vice-présidence chargée des affaires juridiques. »

« Le 1er mai 2002, la décision attaquée a pris effet.

« Par courrier électronique du 15 mai 2002, adressé au vice-président chargé des affaires juridiques, le requérant a formulé plusieurs remarques concernant les propos qu'il a tenus au cours de la réunion du comité de direction des 18 et 19 février 2002, ainsi que lors de ses entrevues ultérieures avec ledit vice-président.

« Par courrier électronique du même jour, le vice-président chargé des affaires juridiques a réagi à ces remarques.

« Le 16 juillet 2002, le requérant a, conformément à l'article 90, paragraphe 2, du statut, introduit auprès de l'AIPN une réclamation contre la décision attaquée.

« Le 26 juillet 2002, par note d'information n° 8/02, le président de l'OHMI a annoncé que le comité de direction avait décidé, au cours de sa réunion du 22 juillet 2002, la scission des tâches des divisions « Examen », « Opposition » et « Annulation » en tâches décisionnelles substantielles relatives aux marques, d'une part, et en tâches de soutien, d'autre part, les premières étant regroupées au sein d'un nouveau département, le département « Marques », et les secondes étant transférées au département « Administration des marques, dessins et modèles ».

« Le 20 novembre 2002, le président de l'OHMI a rejeté de manière explicite la réclamation du requérant, qui en a accusé réception le même jour.

« Par décision ADM-02-43, du 19 décembre 2002, adoptée en vertu de l'article 119, paragraphe 1 et paragraphe 2, sous a), du règlement n° 40/94, le président de l'OHMI a institué un département « Marques » dépendant directement de lui-même. Aux termes de cette décision, le département « Marques » est dirigé par un directeur.

« Par décision ADM-02-47, du 22 décembre 2002, adoptée sur le même fondement que la précédente décision, le président de l'OHMI a déterminé les tâches relevant du département « Marques ». Aux termes de l'article 4, sous a), de cette décision, le département « Marques » est compétent pour toutes les tâches décisionnelles exercées jusqu'alors par les divisions « Examen », « Opposition » et « Annulation ».

Procédure et conclusions des parties

« Par requête déposée au greffe du Tribunal le 28 février 2003, le requérant a introduit le présent recours.

» Sur rapport du juge rapporteur, le Tribunal (troisième chambre) a décidé d'ouvrir la procédure orale et, dans le cadre des mesures d'organisation de la procédure, a invité les parties à répondre à des questions écrites. Les parties ont déféré à ces demandes dans les délais impartis.

» Les parties ont été entendues en leurs plaidoiries et en leurs réponses aux questions orales posées par le Tribunal lors de l'audience publique du 25 juin 2004.

» Le requérant conclut à ce qu'il plaise au Tribunal :

– annuler la décision attaquée ;

– réparer le préjudice moral subi ;

– le restituer dans l'intégralité de ses droits à son ancien poste de chef du service de la division « Annulation » dans sa structure initiale ;

– condamner la partie défenderesse à supporter l'ensemble des dépens.

» La partie défenderesse conclut à ce qu'il plaise au Tribunal :

– rejeter le recours ;

– statuer comme de droit sur les dépens.

Sur la demande tendant à ce que le requérant soit réintégré à son poste antérieur

1. *Arguments des parties*

« Le requérant estime que l'annulation de la décision attaquée devrait conduire à sa réaffectation à son poste de chef de division « Annulation », dès lors que le motif tenant à la nécessité de renforcer les capacités de gestion de cette division n'est pas fondé. Dans une telle hypothèse, la décision de transfert devrait être considérée comme nulle et non avenue et, par conséquent, le requérant devrait retrouver son ancienne affectation avec l'emploi qu'il exerçait.

« Selon le requérant, sa demande ne constituerait pas une injonction adressée à la partie défenderesse, mais une demande visant à faire préciser les conséquences de l'annulation de la décision attaquée. À cet égard, le requérant précise que l'impossibilité de le réintégrer aura une influence sur le montant de l'indemnité qu'il réclame.

« La partie défenderesse conclut à l'irrecevabilité de la demande du requérant.

2. *Appréciation du Tribunal*

« Selon une jurisprudence constante, il n'incombe pas au Tribunal, dans le cadre d'un recours introduit au titre de l'article 91 du statut, de faire des déclarations de principe ou d'adresser des injonctions aux institutions communautaires. Le cas échéant, en cas d'annulation d'un acte, l'institution concernée est tenue, en vertu de l'article 233 CE, de prendre les mesures que comporte l'exécution de l'arrêt (voir, notamment, ordonnance du Tribunal du 25 mars 2003, JA/Commission, T-243/02, RecFP p. I-A-99, II-523, point 40 ; arrêt du Tribunal du 2 mars 2004, Di Marzio/Commission, T-14/03, RecFP p. I-167, point 63).

« En conséquence, la demande du requérant visant à ce qu'il soit réintégré dans ses fonctions antérieures à la décision attaquée doit être rejetée comme irrecevable.

Sur la demande en annulation

« À l'appui de sa demande en annulation, le requérant invoque cinq moyens. Le premier moyen est tiré d'une motivation « erronée, insuffisante et contradictoire ». Le deuxième moyen est tiré d'une violation du principe de proportionnalité et du droit à la liberté d'expression. Le troisième moyen est tiré d'une violation des droits de la défense, notamment du droit d'être entendu. Le quatrième moyen est tiré d'une violation du principe de bonne administration. Le cinquième moyen est tiré d'une violation du principe de sollicitude.

1. *Sur le premier moyen, tiré d'une motivation « erronée, insuffisante et contradictoire »*

Arguments des parties

» Le requérant allègue que la décision attaquée est motivée de manière « erronée, insuffisante et contradictoire ». Bien que la décision attaquée soit fondée sur l'intérêt du service, elle devrait en réalité s'analyser comme une sanction disciplinaire déguisée dont le véritable motif apparaît dans le considérant relatif au « style de gestion et au comportement » du requérant. Les autres motifs invoqués serviraient à « habiller » la décision attaquée.

« En premier lieu, le requérant relève que, en vertu de l'article 7 du statut, la nomination ou la mutation d'un fonctionnaire doit être effectuée dans l'intérêt du service et dans le respect de l'équivalence des emplois. Selon le requérant, aucune de ces conditions n'a été respectée en l'espèce.

« S'agissant, d'abord, de l'intérêt du service, le requérant estime, d'une part, que la restructuration de l'OHMI s'est faite de façon non conforme à celui-ci et, d'autre part, que cette restructuration a entraîné une décision qui est elle-même contraire audit intérêt. À cet égard, le requérant souligne que la restructuration de l'OHMI a été mal préparée et suivie d'effets négatifs et préjudiciables au bon fonctionnement de celui-ci. Le requérant relève d'ailleurs que ses critiques portant sur la restructuration de l'OHMI ont été formulées par d'autres fonctionnaires et par les représentants du personnel. Par ailleurs, le requérant souligne qu'il n'est pas opposé à toute espèce de réforme. Cependant, il considère que le travail effectué par le cabinet d'audit Deloitte & Touche et par l'UGQ était insuffisant et peu adapté à l'évolution future de l'OHMI.

41 Tout en reconnaissant que des incidents peuvent donner lieu, dans certaines circonstances, à la réaffectation d'un fonctionnaire, le requérant estime que, en l'espèce, la décision de le réaffecter n'est en aucune manière justifiée par une situation conflictuelle grave susceptible de mettre en péril le bon fonctionnement du service. Selon le requérant, plus que ses objections, d'ailleurs fondées, ce serait l'attitude intransigeante du président de l'OHMI, lequel n'admettrait pas la contradiction et voudrait mener à terme son projet malgré les réserves et les mises en garde, qui serait la cause de tensions.

42 S'agissant, ensuite, de l'équivalence des emplois, le requérant estime que celle-ci ne se limite pas à une question de grade, mais implique qu'il existe une corrélation étroite entre les tâches qui sont confiées à un fonctionnaire et le grade qui lui est attribué. Or, le requérant serait désormais chargé de tâches sans définition précise qui révéleraient, en réalité, une diminution de ses responsabilités et une privation des moyens tant techniques que professionnels dont il disposait. Le nom du requérant ne figurerait d'ailleurs pas dans l'organigramme de l'OHMI. Dans ces conditions, il ne serait pas possible de vérifier si les nouvelles fonctions du requérant correspondent à son grade.

43 En deuxième lieu, le requérant fait valoir que plusieurs des motifs de la décision attaquée sont erronés et incohérents.

44 S'agissant, d'abord, du motif retenu par la décision attaquée selon lequel la division « Annulation » doit être renforcée et ses capacités d'organisation doivent être adaptées afin de pouvoir faire face au nombre croissant d'affaires pendantes, le requérant estime qu'il est incohérent, dès lors qu'il a lui-même été affecté à un autre emploi.

45 S'agissant, ensuite, du motif relatif à la nécessité de renforcer la capacité de conseil de la vice-présidence chargée des affaires juridiques en matière de marque communautaire, le requérant estime qu'une telle justification relève de la restructuration de l'OHMI, laquelle est elle-même contraire à l'intérêt du service. D'ailleurs, cette considération dissimulerait le fait que la restructuration de l'OHMI a dépouillé la vice-présidence de la plupart de ses fonctions.

» En troisième lieu, le requérant considère qu'il a, en réalité, été sanctionné pour avoir formulé ouvertement des critiques à l'égard de personnes ayant participé à la réflexion sur la réorganisation de l'OHMI. Le requérant estime que, dans un tel cas, l'OHMI aurait dû engager la procédure de licenciement pour insuffisance professionnelle, laquelle exige que l'intéressé puisse se défendre dans le cadre de la procédure disciplinaire.

» Selon le requérant, cette motivation ressort d'abord de la circonstance retenue par la décision attaquée selon laquelle son « style de gestion » et son « comportement » seraient inacceptables et ne correspondraient pas au niveau et au style requis pour la fonction de chef de service de la division « Annulation ». Ce serait d'ailleurs cette explication qui lui aurait été fournie par le président de l'OHMI au cours de la réunion tenue avec lui le jour de l'adoption de la décision attaquée. Selon le requérant, une telle motivation montrerait clairement que c'est son comportement qui lui est reproché, ce qui a trait à un grief qui doit être appréhendé dans le cadre d'une procédure disciplinaire. Le requérant estime qu'un motif de cette nature constitue une accusation grave qui n'est pas expliquée, sinon en termes généraux.

» Ensuite, le requérant fait observer que la note d'information communiquée par courrier électronique du 23 avril 2002 au sujet de la décision attaquée indique que le président de l'OHMI l'a « relevé » de ses fonctions.

» Enfin, le requérant considère que l'aspect disciplinaire de la décision attaquée ressort également de la description des tâches de conseiller juridique figurant en annexe à la décision attaquée, celle-ci n'exposant pas les tâches spécifiques qui lui ont été confiées mais se bornant à mentionner, en termes évasifs, des tâches de conception et d'étude, ce qui traduit la « mise à l'écart » dont il fait l'objet.

» Le requérant considère qu'une telle motivation est insuffisante et erronée, dès lors qu'il n'a pas manqué à ses obligations professionnelles et qu'il ne s'est jamais vu reprocher une quelconque insuffisance professionnelle.

» La partie défenderesse estime que la décision attaquée, d'une part, a été prise dans l'intérêt du service et dans le respect de l'équivalence des emplois et, d'autre part, est suffisamment motivée à cet égard.

« Partant, la partie défenderesse conclut au rejet du premier moyen.

Appréciation du Tribunal

« Par le présent moyen, le requérant allègue, en substance, que la décision attaquée, bien que le réaffectant formellement dans l'intérêt du service, constitue, en réalité, une sanction disciplinaire infligée en raison des observations critiques qu'il a formulées au sujet de la restructuration de l'OHMI. La motivation de la décision attaquée serait, dès lors, erronée, insuffisante et incohérente.

« Les arguments soulevés par le requérant dans le cadre du présent moyen visant à mettre en cause, selon le cas, soit le bien-fondé de la décision attaquée soit sa motivation, il convient de les examiner de manière distincte dès lors que le premier aspect concerne la légalité au fond de la décision attaquée, tandis que le second concerne la violation des formes substantielles (voir, en ce sens, arrêt de la Cour du 2 avril 1998, Commission/Sytraval et Brink's France, C-367/95 P, Rec. p. I-1719, point 67).

Sur le bien-fondé de la décision attaquée

« Il est constant que, avant l'adoption de la décision attaquée, le requérant exerçait les fonctions de chef de service de la division « Annulation » de l'OHMI. Ce dernier était placé sous l'autorité directe du vice-président chargé des affaires juridiques, lequel exerce ses fonctions sous l'autorité du président de l'OHMI.

« Il apparaît que, aux termes du dispositif de la décision attaquée, le requérant a été nommé « dans l'intérêt du service » et « avec son emploi » comme conseiller juridique auprès de la vice-présidence chargée des affaires juridiques. Il ressort du deuxième visa de ladite décision que cette nomination est fondée sur l'article 7 du statut. Le dernier considérant de la décision attaquée indique, en outre, que le président de l'OHMI considère qu'il est « dans l'intérêt du service » de « transférer » le requérant au poste de conseiller juridique.

« Il en ressort que la décision attaquée se présente, et cela n'est pas contesté, comme une décision de « réaffectation » du requérant dans un service autre que celui dans lequel il était initialement affecté.

« Selon la jurisprudence, s'il est vrai que l'administration a tout intérêt à affecter les fonctionnaires en considération de leurs aptitudes et de leurs préférences personnelles, il ne saurait être reconnu pour autant aux fonctionnaires le droit d'exercer ou de conserver des fonctions spécifiques (arrêt du Tribunal du 6 mars 2001, Campoli/Commission, T-100/00, RecFP p. I-A-71 et II-347, point 71). Dès lors, même si le statut, en particulier son article 7, ne prévoit pas explicitement la possibilité de « réaffecter » un fonctionnaire, il ressort d'une jurisprudence constante que les institutions disposent d'un large pouvoir d'appréciation dans l'organisation de leurs services en fonction des missions qui leur sont confiées et dans l'affectation, en vue de celles-ci, du personnel qui se trouve à leur disposition, à la condition, cependant, d'une part, que cette affectation se fasse dans l'intérêt du service et, d'autre part, qu'elle respecte l'équivalence des emplois (arrêts de la Cour du 23 mars 1988, Hecq/Commission, 19/87, Rec. p. 1681, point 6, et du 7 mars 1990, Hecq/Commission, C-116/88 et C-149/88, Rec. p. I-599, point 11 ; arrêts du Tribunal du 22 janvier 1998, Costacurta/Commission, T-98/96, RecFP p. I-A-21 et II-49, point 36, et du 26 novembre 2002, Cwik/Commission, T-103/01, RecFP p. I-A-229 et II-1137, point 30).

» En l'espèce, afin de déterminer si, comme le soutient le requérant, la décision attaquée constitue, en réalité, une mesure disciplinaire déguisée, il convient dès lors d'examiner si la décision attaquée satisfait aux deux conditions précitées.

« En effet, selon la jurisprudence, lorsqu'une décision de réaffectation a été adoptée dans l'intérêt du service et n'a porté atteinte ni à la position statutaire du requérant ni au principe de correspondance entre le grade et l'emploi, étant considéré que les nouvelles fonctions qui lui ont été attribuées correspondent, dans un tel cas, à son grade, il ne saurait être question de mesure disciplinaire, mais bien d'une mesure de réaffectation (voir, en ce sens, arrêts du Tribunal du 6 novembre 1991, von Bonkewitz-Lindner/Parlement, T-33/90, Rec. p. II-1251, point 93, et Campoli/Commission, point 61 supra, point 70).

– Sur l'intérêt du service

« À titre liminaire, il y a lieu de rappeler que, compte tenu de l'étendue du pouvoir d'appréciation des institutions dans l'évaluation de l'intérêt du service, le contrôle du Tribunal portant sur le respect de la condition relative à l'intérêt du service doit se limiter à la question de savoir si l'AIPN s'est tenue dans des limites raisonnables et n'a pas usé de son pouvoir d'appréciation de manière manifestement erronée (arrêt Costacurta/Commission, point 61 supra, point 36, et

arrêt du Tribunal du 12 décembre 2000, Dejaiffe/OHMI, T-223/99, RecFP p. I-A-277 et II-1267, point 53).

« En l'espèce, il y a lieu de rappeler que la décision attaquée expose qu'il est dans l'intérêt du service de réaffecter le requérant en tant que conseiller juridique auprès de la vice-présidence chargée des affaires juridiques.

« Il ressort, à cet égard, des considérants de ladite décision que l'intérêt du service est justifié, d'une part, par des circonstances organisationnelles propres à l'administration, à savoir le fait que la division « Annulation » doit être renforcée et doit adapter ses capacités de gestion de manière à traiter un nombre croissant d'affaires pendantes ainsi que le fait que la vice-présidence chargée des affaires juridiques doit renforcer ses capacités de conseil dans le domaine du droit des marques et, d'autre part, par des circonstances individuelles relatives au requérant, à savoir le fait que son style de gestion et son comportement ne sont pas acceptables et ne sont pas conformes au niveau et au style requis pour le poste de chef de service de la division « Annulation ».

« Il ressort du dossier devant le Tribunal, et cela n'est pas contesté, que ces considérations doivent être comprises dans le contexte de la restructuration de l'OHMI.

« À cet égard, il est constant que, à la fin de l'année 2000, l'OHMI a demandé à un cabinet d'audit externe, Deloitte & Touche, et à l'unité interne chargée de la gestion de la qualité, l'UGQ, d'examiner son fonctionnement au cours de ses cinq premières années d'existence.

« Il n'est pas contesté que les rapports préparés dans ce cadre, à savoir le rapport Deloitte & Touche, le premier rapport UGQ et le second rapport UGQ, ont, en substance, recommandé la restructuration de l'OHMI dans le sens d'une intégration plus horizontale, notamment, d'une part, des activités d'exploitation, à savoir, pour l'essentiel, les tâches décisionnelles exercées par les divisions « Examen », « Opposition » et « Annulation », et, d'autre part, des activités de support administratif, en ce compris celles exercées par ces dernières divisions. Le regroupement de ces dernières activités au sein d'un département « Administration des marques, dessins et modèles » a fait l'objet d'une décision du président de l'OHMI le 21 décembre 2001. Quant au regroupement des

activités décisionnelles des divisions concernées au sein d'un département « Marques », il a fait l'objet de deux décisions du président de l'OHMI datées respectivement des 19 et 22 décembre 2002.

» C'est dans ce contexte qu'il convient d'apprécier si l'OHMI a pu, sans commettre d'erreur manifeste d'appréciation, fonder la décision attaquée sur les circonstances organisationnelles et individuelles précitées.

» À cet égard, il convient toutefois de préciser d'emblée qu'il n'appartient pas au Tribunal de se prononcer, dans le cadre du présent recours, sur le bien-fondé de la restructuration engagée par l'OHMI. En effet, par le présent recours, le Tribunal n'est pas saisi de la légalité des décisions prises par le président de l'OHMI en vue de restructurer celui-ci, mais uniquement de la légalité de la décision attaquée en ce qu'elle transfère le requérant au poste de conseiller juridique auprès de la vice-présidence chargée des affaires juridiques. Il s'ensuit que les arguments par lesquels le requérant fait valoir que la restructuration de l'OHMI n'a pas été effectuée dans l'intérêt du service doivent être rejetés comme étant dépourvus de pertinence dans le cadre du présent recours.

» En ce qui concerne, en premier lieu, les circonstances organisationnelles retenues par la décision attaquée, il convient de constater que lesdites circonstances, ce que le requérant a d'ailleurs lui-même explicitement admis à l'audience, sont directement liées à la restructuration de l'OHMI.

» Ainsi, s'agissant, d'abord, de la nécessité de renforcer la division « Annulation » et d'adapter ses capacités de gestion de manière à traiter un nombre croissant d'affaires pendantes, il y a lieu de relever que c'est notamment en vue de réaliser cet objectif que l'OHMI, suivant sur ce point les recommandations des rapports d'évaluation, a regroupé les tâches décisionnelles de cette dernière division avec celles exercées par les divisions « Examen » et « Opposition ». Ainsi qu'il ressort, en particulier, du second rapport UGO, ce regroupement, en retirant aux divisions précitées la charge des tâches purement administratives, avait notamment pour objet de réduire les délais de traitement des requêtes en annulation pendantes devant la division « Annulation ». Par ailleurs, en regroupant les différentes tâches décisionnelles de l'OHMI dans un seul département « Marques », la restructuration visait à accroître l'efficacité de l'OHMI en assurant un traitement plus cohérent des dossiers.

« S'agissant, ensuite, de la nécessité d'un renforcement de la capacité de conseil de la vice-présidence chargée des affaires juridiques dans le domaine du droit des marques, il est, ainsi que le requérant le reconnaît explicitement, inhérent à la restructuration envisagée par l'OHMI, dès lors que ladite restructuration a pour objet, ainsi qu'il ressort notamment du rapport Deloitte & Touche, de placer les différents départements composant l'OHMI directement sous la direction de son président, en ce compris ceux, dont la division « Annulation », qui relevaient, auparavant, de la compétence de la vice-présidence chargée des affaires juridiques. Dans ces circonstances, puisque, conformément aux conclusions du rapport Deloitte & Touche et du premier rapport UGO, la restructuration prévoit que la vice-présidence chargée des affaires juridiques est maintenue, du moins jusqu'à l'expiration du mandat du vice-président, en vue d'assister le président de l'OHMI en qualité de conseiller interne, il s'ensuit nécessairement que ladite vice-présidence devait être renforcée afin de pallier la perte du personnel des divisions qui relevaient antérieurement d'elle.

» Force est d'admettre que, dès lors que les circonstances organisationnelles précitées sont directement liées à la restructuration de l'OHMI, le président de l'OHMI a pu, sans commettre d'erreur manifeste d'appréciation, fonder la décision attaquée sur lesdites circonstances en vue de réaffecter le requérant. En effet, selon la jurisprudence, une institution est en droit d'estimer, en application du large pouvoir dont elle dispose en matière d'organisation de ses services, que l'intérêt du service justifie une mesure de réaffectation d'un fonctionnaire, décidée dans le cadre opérationnel de la réorganisation des structures administratives de ladite institution (voir, en ce sens, arrêt du Tribunal du 16 avril 2002, Fronia/Commission, T-51/01, RecFP p. I-A-113 et II-587, point 55).

» À cet égard, c'est à tort que le requérant soutient que le motif tiré de la nécessité de renforcer la division « Annulation » en vue d'assurer le traitement d'un nombre croissant d'affaires pendantes est en contradiction avec son départ de la division « Annulation ». En effet, ainsi qu'il a déjà été constaté, c'est par le regroupement des tâches décisionnelles de la division « Annulation » et des divisions « Examen » et « Opposition » que la restructuration visait à remédier à l'arriéré auquel était confrontée la division « Annulation ». Dans ces conditions, le départ du requérant de la division « Annulation » était parfaitement conciliable avec le renforcement de ladite division. Par ailleurs, il convient de rappeler que, ainsi qu'il a été rappelé au point 61 ci-dessus, le requérant ne disposait d'aucun droit à conserver ses fonctions de chef de service de la division « Annulation ».

77 Partant, il y a lieu de considérer que les circonstances organisationnelles retenues par la décision attaquée étaient de nature à justifier une mesure de réaffectation au titre de l'intérêt du service.

78 En ce qui concerne, en second lieu, les circonstances individuelles retenues par la décision attaquée, il ressort du dossier devant le Tribunal, et cela n'a pas été contesté, que celles-ci doivent être comprises dans le contexte des observations critiques émises par le requérant au sujet de la restructuration de l'OHMI. Alors que l'OHMI considère que les critiques du requérant ont nécessité sa réaffectation dans l'intérêt du service, le requérant estime, en revanche, qu'il a fait l'objet d'une sanction disciplinaire en raison de la teneur de ces critiques.

79 Il y a lieu de rappeler que, selon la jurisprudence, des difficultés relationnelles internes, lorsqu'elles causent des tensions préjudiciables au bon fonctionnement du service, peuvent justifier, dans l'intérêt du service, le transfert d'un fonctionnaire, afin de mettre fin à une situation administrative devenue intenable (voir, en ce sens, arrêts de la Cour du 7 mars 1990, Hecq/Commission, point 61 supra, point 22 ; du 12 novembre 1996, Ojha/Commission, C-294/95 P, Rec. p. I-5863, point 41 ; arrêts du Tribunal du 28 mai 1998, W/Commission, T-78/96 et T-170/96, RecFP p. I-A-239 et II-745, point 88 ; Costacurta/Commission, point 61 supra, point 39, et Campoli/Commission, point 61 supra, point 45).

80 À cet égard, aux fins d'examiner si des tensions peuvent justifier, dans l'intérêt du service, le transfert d'un fonctionnaire, il est indifférent de déterminer l'identité du responsable des incidents en cause ou même de savoir si les reproches formulés sont fondés (voir arrêts de la Cour du 12 juillet 1979, List/Commission, 124/78, Rec. p. 2499, point 13, et Ojha/Commission, point 79 supra, point 41). Ainsi qu'il a déjà été relevé ci-dessus, par le présent recours, le Tribunal n'est d'ailleurs pas saisi de la légalité des décisions prises par le président de l'OHMI en vue de restructurer celui-ci.

81 En l'espèce, aux fins d'examiner si les circonstances individuelles retenues par la décision attaquée étaient justifiées par l'intérêt du service, il n'appartient dès lors pas au Tribunal de se prononcer sur le bien-fondé des observations critiques formulées par le requérant, mais uniquement d'examiner, de manière objective, si ces observations ont créé une tension préjudiciable au bon fonctionnement du service qui était de nature à permettre à l'OHMI, sans commettre d'erreur manifeste d'appréciation à cet égard, de le réaffecter dans un autre service.

« À cet égard, il ressort du dossier soumis au Tribunal que le requérant a formulé des observations critiques à l'égard de la restructuration de l'OHMI par deux notes écrites datées, respectivement, du 15 novembre 2001, portant sur le rapport Deloitte & Touche et le premier rapport UGO, et du 15 février 2002, portant sur le second rapport UGO. Il ressort des termes de ces notes que celles-ci ont été envoyées, outre au personnel de la division « Annulation », non seulement au président de l'OHMI, mais également à de nombreux autres fonctionnaires dirigeants de l'OHMI, en particulier, aux deux vice-présidents de l'OHMI, au directeur du département juridique et à divers chefs de service.

« Il doit être constaté, en premier lieu, que, par ces notes, et cela n'est pas contesté, le requérant s'oppose à la restructuration horizontale proposée par les différents rapports d'évaluation. Ainsi, aux termes de sa note du 15 novembre 2001, le requérant indique clairement que « aucun organisme public moderne ne peut être organisé de cette manière », tandis qu'aux termes de sa note du 15 février 2002 le requérant expose, tout en mentionnant qu'il est disposé à coopérer quant à la mise en œuvre de certaines mesures limitées, telle que la tenue d'une réunion à jour fixe, que sa « réaction globale au rapport est négative ». À l'appui de ses critiques, le requérant formule, dans lesdites notes, des arguments tant sur le fond de la restructuration que sur la méthode d'évaluation retenue par le cabinet d'audit Deloitte & Touche et par l'UGO.

« En deuxième lieu, il apparaît qu'en formulant de telles observations au sujet de la restructuration de l'OHMI le requérant est ouvertement et directement entré en conflit avec la direction de l'OHMI. Selon les termes des notes du requérant, la restructuration horizontale de l'OHMI est en effet celle envisagée personnellement par le président de l'OHMI, ainsi que par le directeur de l'UGO.

« Or, contrairement à ce que le requérant a soutenu à l'audience, il ressort du dossier soumis au Tribunal que, au moment de l'adoption de la décision attaquée, le 22 avril 2002, la restructuration contestée par le requérant était déjà engagée et, en partie, exécutée.

« Ainsi, il ressort du compte rendu de la réunion du conseil d'administration de l'OHMI du 30 octobre 2001, au cours de laquelle a été présenté le rapport Deloitte & Touche, que l'OHMI, représenté, en vertu de l'article 124, paragraphe 1, du règlement n° 40/94, par son président, a marqué à cette occasion « sa préférence pour une structure plus horizontale ». À cet égard, s'il est certes exact,

ainsi que le requérant le fait valoir, que le conseil d'administration n'a pas formellement approuvé le rapport Deloitte & Touche, il n'en demeure pas moins qu'il ressort clairement dudit compte rendu que la Commission et l'ensemble des délégations nationales représentées au conseil d'administration, à l'exception des délégations italienne et grecque, se sont montrées, en substance, favorables à la restructuration proposée par ce rapport. Par ailleurs, il y a lieu de relever que, en vertu de l'article 121, paragraphe 4, du règlement n° 40/93, le conseil d'administration « conseille » le président, lequel est seul compétent, en vertu de l'article 119, paragraphe 2, sous a), dudit règlement, pour prendre toutes les mesures d'instruction administratives en vue d'assurer le fonctionnement de l'OHMI.

« Ensuite, par décision du 21 décembre 2001, soit avant la seconde note critique du requérant, le président de l'OHMI a procédé, conformément aux conclusions du rapport Deloitte & Touche et du premier rapport UGQ, au regroupement de l'ensemble des activités administratives qui ne sont pas étroitement liées aux activités principales d'examen, d'annulation et aux procédures de recours, en instituant un nouveau département « Administration des marques, dessins et modèles ». Ce faisant, le président de l'OHMI mettait clairement à exécution la première étape de la restructuration proposée dans les rapports d'évaluation.

» Par ailleurs, le 19 février 2002, le président de l'OHMI, le vice-président chargé des affaires juridiques et le directeur de l'UGQ ont indiqué au requérant, au cours de la présentation du premier rapport UGQ au comité de direction, qu'ils rejetaient ses critiques concernant la restructuration envisagée par les rapports d'évaluation, confirmant ainsi la poursuite de la restructuration engagée selon les conclusions des rapports d'évaluation.

» Enfin, par décisions des 19 et 22 décembre 2002, prises après l'adoption de la décision attaquée, le président de l'OHMI a complété la mise en œuvre progressive de la restructuration engagée par la décision du 21 décembre 2001 en regroupant, conformément aux conclusions du rapport Deloitte & Touche et du second rapport UGQ, les tâches décisionnelles relatives aux procédures d'examen, d'opposition et d'annulation au sein d'une seule et même unité, le département « Marques ».

« En troisième lieu, il y a lieu de constater que le conflit né entre le requérant et la direction de l'OHMI a porté sur une question fondamentale, à savoir l'organisation des services de l'OHMI, laquelle était susceptible d'entraîner, si la restructuration était adoptée, la création de nouveaux départements et, parallèlement, la suppression de départements existants, ainsi que, par voie de conséquence, de certains postes rattachés à ceux-ci.

« En quatrième lieu, il apparaît que, au moment de l'adoption de la décision attaquée, l'opposition du requérant à la restructuration de l'OHMI selon le mode recommandé par les rapports d'audit externe et interne avait atteint un stade irréversible.

« À cet égard, il y a d'abord lieu de relever qu'il n'est pas contesté que les tentatives du vice-président chargé des affaires juridiques, le supérieur hiérarchique du requérant, visant, le 25 février et le 11 mars 2002, à le faire revenir sur la teneur et la forme de ses notes ont échoué. Or, s'il est vrai que le requérant ne saurait être considéré comme tenu de donner une suite favorable à une telle demande émanant de sa hiérarchie (voir, en ce sens, arrêt Dejaiffe/OHMI, point 64 supra, points 74 et 75), il n'en demeure pas moins que son refus confirme, après six mois de conflit avec la direction de l'OHMI, le caractère irréversible de son opposition à la restructuration telle qu'envisagée par ladite direction.

« Il y a ensuite lieu de constater qu'une telle opposition ressort, en outre, du style utilisé par le requérant dans ses notes du 15 novembre 2001 et du 15 février 2002. Ainsi que la partie défenderesse le soutient à juste titre, les termes utilisés par le requérant dans lesdites notes pour exposer ses arguments sur près de seize pages manquent en effet, pour le moins, de réserve.

« En particulier, il convient de relever que, dans sa note du 15 novembre 2001, le requérant indique que le rapport Deloitte & Touche produit « beaucoup d'air » et reflète les souhaits du directeur de l'UGO, avant de poursuivre en soulignant qu'un tel rapport ne doit pas aboutir à une situation où « un aveugle conseille un autre aveugle » et en qualifiant certaines conclusions du rapport d'« affirmations de type Rambo » et de « tripotage amateur ». En outre, et surtout, il apparaît que, dans sa note du 15 février 2002, le requérant, pour contester la méthode de travail retenue par l'UGO, qualifie cette unité de « marionnette aux mains de la présidence » et d'« alibi ». Par ailleurs, il n'hésite pas à dénigrer directement et

personnellement les deux auteurs du rapport en indiquant, après les avoir cités nommément, qu'il doute de leur « compétence psychosociale », que le fait pour l'un d'eux d'avoir étudié la théologie ne rend pas le rapport « acta sanctorum », avant d'ironiser, en guise de conclusion, sur le fait que, « lorsque le soleil est bas, même les nains projettent de longues ombres ». Enfin, le requérant ajoute encore que ledit rapport n'est pas digne d'un étudiant de première année, qu'il constitue un travail d'amateur et qu'il équivaut à un acte de harcèlement.

» Outre le fait que de tels propos, qui revêtent une nature irrespectueuse, voire pour certains d'entre eux, et contrairement à ce que soutient le requérant, une nature injurieuse, sont difficilement justifiables pour un chef de service de grade A 4, lequel doit faire preuve de la maturité nécessaire pour présenter son point de vue, en particulier par écrit, d'une manière technique dépourvue d'émotivité excessive, des propos de cette nature reflètent également, et surtout, le caractère irréversible de la dissension existant entre le requérant et sa hiérarchie en ce qui concerne la restructuration envisagée.

» Il résulte de ce qui précède qu'il peut être considéré comme établi que, au moment de l'adoption de la décision attaquée, le requérant avait indiqué de manière irréversible à l'ensemble de la direction de l'OHMI, en particulier à son président et au vice-président chargé des affaires juridiques, son opposition à une mesure d'organisation fondamentale concernant le fonctionnement de l'OHMI, à savoir sa restructuration, laquelle était déjà engagée et était, en partie, exécutée.

» Il doit d'ailleurs être observé que le caractère irréversible de cette opposition est confirmé par l'objet même du présent recours, puisqu'aux termes de sa requête le requérant demande au Tribunal, outre l'annulation de la décision attaquée, sa « restitution [...] dans l'intégralité de ses droits à son ancien poste comme chef de service de la division 'Annulation' dans sa structure initiale ».

» Contrairement à ce que le requérant a soutenu dans sa duplique, sa situation ne saurait, à cet égard, en aucun cas être comparée à celle de l'ancien chef de service de la division « Examen », lequel, dans une brève note d'une page et demie, datée du 31 janvier 2002, a également exposé par écrit les motifs pour lesquels il rejetait les « recommandations principales et les plus radicales » contenues dans le premier rapport UGO, sans que cela conduise l'OHMI à le réaffecter dans un autre service.

99 En effet, s'il est vrai que les critiques formulées par ce dirigeant de l'ancienne division « Examen » de l'OHMI sont, pour certaines d'entre elles, relativement sévères quant au fond, elles ne revêtent, cependant, à aucun endroit une nature irrespectueuse ou injurieuse et ne contiennent aucune critique personnelle à l'encontre des auteurs du rapport. En outre, il doit être relevé que la note en question a uniquement été envoyée à un nombre restreint de personnes, à savoir, outre le personnel de la division « Examen », le directeur de l'UGQ, le vice-président chargé des affaires juridiques et le directeur de l'OHMI. Par ailleurs, en dépit de ses critiques, ce chef de service souligne explicitement dans sa note, à deux reprises, son intention d'adopter et d'exécuter les idées positives contenues dans le rapport, mais sans se limiter, à cet égard, à certains points mineurs contenus dans celui-ci. Enfin, et surtout, il n'apparaît pas que, à l'instar de la situation visée en l'espèce, le conflit entre ledit chef de service et l'OHMI se soit prolongé au-delà de l'envoi de sa seule note sur une longue période de temps.

100 Dans ces conditions, il convient de constater que les critiques formulées par l'ancien chef de service de la division « Examen » n'ont, à aucun moment, atteint le stade irréversible auquel les critiques répétées du requérant ont abouti après environ six mois de conflit.

101 Or, il doit être admis que le bon fonctionnement de l'OHMI après sa restructuration telle qu'envisagée par son président sur la base des rapports d'évaluation externe et interne exigeait la coopération pleine et entière de ses cadres dirigeants. En particulier, s'agissant du nouveau département « Marques », la coopération des chefs de service des anciennes divisions « Examen », « Opposition » et « Annulation » revêtait une importance capitale pour en assurer le succès, en particulier en égard au nombre croissant de dossiers dont était saisi l'OHMI.

102 À cet égard, il y a d'abord lieu de relever que le nouveau département « Marques », qui est dirigé par un directeur et un vice-directeur, est divisé en plusieurs services dont chacun est sous la direction d'un chef de service. Or, si le requérant est certainement en droit de ne pas partager le point de vue de la direction quant à la restructuration de l'OHMI, il ne saurait prétendre conserver son poste de chef de service lorsque celui-ci le conduirait à diriger un service d'un département dont la création fait précisément suite à la mise en place d'une nouvelle organisation dont il n'a cessé de contester le principe même, d'une manière radicale et définitive, et dont les critiques ont été largement diffusées au sein de l'OHMI. Tel est d'autant plus le cas que, comme l'UGQ l'a souligné dans

son premier rapport, la nouvelle organisation de l'OHMI a, notamment, pour objectif de responsabiliser davantage les chefs de service en leur attribuant « des objectifs précis, assortis de ressources précises pour accomplir ces objectifs sous leur propre responsabilité [ ] tout en rendant compte de leurs résultats périodiquement à la direction générale de l'organisme »

89 Ensuite, il convient de souligner que le droit du requérant d'émettre des objections, fussent-elles fondées, aux projets de restructuration envisagés par le président de l'OHMI ne saurait remettre en cause le fait que c'est à ce dernier, et non au requérant, qu'il appartient, conformément à l'article 119 du règlement n° 40/94, de diriger l'OHMI et de décider de mettre ou non en œuvre lesdits projets. En conséquence, dès lors que le président de l'OHMI a estimé qu'il convenait de restructurer l'OHMI, ainsi qu'il ressort de la réunion du conseil d'administration du 30 octobre 2001 et de la décision du 21 décembre 2001, selon les conclusions formulées dans les rapports d'évaluation, c'était au requérant qu'il appartenait d'en accepter les conséquences, dans le respect des conditions posées par le statut, tel qu'interprété par la jurisprudence.

90 Enfin, dès lors que, ainsi qu'il a déjà été rappelé au point 75 ci-dessus, une institution est, selon la jurisprudence, en droit d'estimer, en application du large pouvoir dont elle dispose en matière d'organisation de ses services, que l'intérêt du service justifie une mesure de réaffectation d'un fonctionnaire décidée dans le cadre opérationnel de la réorganisation des structures administratives de ladite institution (arrêt Frania/Commission, point 75 supra, point 55), lorsque, comme en l'espèce, le fonctionnaire concerné s'est opposé à ladite réorganisation en créant à ce sujet une tension significative irréversible avec sa direction, l'intérêt du service justifie, à plus forte raison, une telle mesure de réaffectation de ce fonctionnaire. En décider autrement reviendrait à donner aux fonctionnaires qui ont exposé publiquement leur désaccord au sujet de la restructuration de l'institution à laquelle ils appartiennent la possibilité de se prémunir contre le risque de réaffectation auquel ils sont exposés. Un tel résultat, pour le moins paradoxal, ne saurait, à l'évidence, être admis.

91 En conséquence, face à l'opposition du requérant à la restructuration envisagée, il appartenait à l'OHMI de prendre les mesures nécessaires pour mettre fin à la situation de conflit qui n'aurait pas manqué de perdurer en cas de maintien du requérant dans ses fonctions de chef de division. Tel est précisément l'objet de la décision attaquée qui, en réaffectant le requérant à un poste de conseiller juridique dépendant directement du vice-président chargé des affaires juridiques, retire le

requérant des divisions concernées directement par la restructuration horizontale en l'affectant à un service distinct de consultation juridique interne à l'OHMI indépendant des nouveaux services opérationnels et administratifs issus de la restructuration. Ainsi que la partie défenderesse le fait valoir à juste titre, une telle décision permet de tirer parti des compétences techniques du requérant dans le domaine des marques, tout en le déchargeant de ses responsabilités de gestionnaire d'un service de l'OHMI, pour lesquelles il s'est disqualifié par son hostilité à la restructuration.

88 Partant, il y a lieu de considérer que les circonstances individuelles retenues par la décision attaquée étaient de nature à justifier une mesure de réaffectation au titre de l'intérêt du service.

89 Il résulte de ce qui précède que le président de l'OHMI n'a pas effectué une application manifestement erronée du large pouvoir d'appréciation dont il dispose dans l'organisation des services de l'OHMI en décidant que, compte tenu de la nécessité de renforcer et d'adapter les capacités de gestion de la division « Annulation » de manière à traiter un nombre croissant d'affaires pendantes et eu égard au fait que le style de gestion et le comportement du requérant ne sont pas conformes au niveau et au style requis pour le poste de chef de service de la division « Annulation », il était nécessaire de le réaffecter dans l'intérêt du service au poste de conseiller juridique.

90 Il convient toutefois encore de vérifier si ladite réaffectation a respecté l'équivalence des emplois.

– Sur l'équivalence des emplois

91 Dès lors que le requérant a été réaffecté dans l'intérêt du service, le caractère de sanction de la décision attaquée ne serait avéré que s'il était démontré que les nouvelles fonctions attribuées au requérant ne respectent pas l'équivalence des emplois exigée par la jurisprudence.

92 En l'espèce, il est constant que, conformément au dispositif de la décision attaquée, le requérant a fait l'objet d'une réaffectation « avec son emploi ».

111 Étant donné que le requérant a gardé le même grade après sa réaffectation, à savoir le grade A 4, et qu'il a été transféré avec son emploi, l'équivalence des grades et emplois a, par hypothèse, été respectée (voir, en ce sens, arrêts Chopade/Commission, point 61 supra, point 42, et Fronia/Commission, point 75 supra, point 51)

112 Le requérant fait toutefois valoir qu'il a été affecté à des tâches sans définition précise qui constituent, en réalité, une diminution de ses responsabilités et une privation des moyens tant techniques que professionnels dont il disposait auparavant

113 À cet égard, il convient de rappeler que, selon la jurisprudence, en cas de modification des fonctions attribuées à un fonctionnaire, la règle de correspondance entre grade et emploi implique une comparaison non pas entre les fonctions actuelles et antérieures de l'intéressé, mais entre ses fonctions actuelles et son grade dans la hiérarchie (arrêts du Tribunal du 10 juillet 1992, Eppe/Commission, T-59/91 et T-79/91, Rec. p. II-2061, point 49, et Fronia/Commission, point 75 supra, point 50). Dès lors, rien ne s'oppose à ce qu'une décision entraîne l'attribution de nouvelles fonctions qui, si elles diffèrent de celles précédemment exercées et sont perçues par l'intéressé comme comportant une réduction de ses attributions, sont néanmoins conformes à l'emploi correspondant à son grade. Ainsi une diminution effective des attributions d'un fonctionnaire n'enfreint la règle de correspondance entre le grade et l'emploi que si ses fonctions sont, dans leur ensemble, nettement en deçà de celles correspondant à ses grade et emploi, compte tenu de leur nature, de leur importance et de leur ampleur (arrêts W/Commission, point 79 supra, point 104, et la jurisprudence citée, et Eppe/Commission, précité, point 51)

114 En l'espèce, il ressort de la décision attaquée que le requérant a été réaffecté comme « conseiller juridique » dépendant directement du vice-président chargé des affaires juridiques afin de renforcer les capacités de conseil de celui-ci. Selon la décision attaquée, les tâches pour lesquelles le requérant exercera ses fonctions lui seront attribuées par le vice-président chargé des affaires juridiques. Aux termes de l'annexe de la décision attaquée, les nouvelles fonctions du requérant consisteront dans des tâches de conception et d'étude se rapportant à différentes questions relatives à la marque communautaire

112 Force est de constater, en premier lieu, que, comme cela ressort de l'article 5, paragraphe 1, du statut et de l'annexe I dudit statut, la carrière du requérant, à savoir la carrière A 4/A 5, correspond à l'emploi d'« administrateur principal » et, notamment, à des fonctions de conception et d'étude, telles que mentionnées à l'annexe de la décision attaquée.

113 En deuxième lieu, il y a lieu de relever qu'il ressort des dispositions générales d'exécution de l'article 43 du statut arrêtées par la Commission en date du 15 mai 1997 que la fonction d'administrateur principal de grade A 4/A 5 peut consister, notamment, à « conseiller une direction générale ou une direction dans un cadre déterminé », sous la dénomination « conseiller ». Il en résulte que le nouvel emploi assumé par le requérant entre dans la description des fonctions caractéristiques de la carrière A 4/A 5.

114 En troisième lieu, il doit être observé que, non seulement le grade attribué à la fonction de conseiller juridique est le même que celui de chef de service, mais en outre que la fonction de conseiller juridique demeure également placée sous l'autorité directe du vice-président chargé des affaires juridiques.

115 En dernier lieu, il convient de noter que le requérant sera le seul à exercer cette nouvelle fonction pour l'ensemble de l'OHMI.

116 Dans ces circonstances, il y a lieu de considérer que la fonction de conseiller juridique correspond au grade A 4 du requérant et, en tout état de cause, n'apparaît pas, en tant que telle, d'un niveau moindre que celui de la fonction de chef de service.

117 Aucun des arguments ou circonstances avancés par le requérant n'est susceptible de remettre en cause cette conclusion.

118 S'agissant, premièrement, de la circonstance alléguée selon laquelle le requérant ne disposerait plus des ressources matérielles et humaines dont il disposait auparavant, il suffit de rappeler que, à la supposer démontrée, cette circonstance est sans pertinence, dès lors que, selon la jurisprudence précitée, l'équivalence des emplois ne requiert pas une comparaison avec les fonctions exercées antérieurement.

82 S'agissant, deuxièmement, de la circonstance alléguée selon laquelle la fonction de conseiller juridique de l'OHMI ne serait pas reprise dans l'organigramme de l'OHMI, il doit être souligné qu'aucune conclusion définitive ne saurait, à l'évidence, être déduite du seul organigramme d'une institution pour déterminer si l'équivalence des emplois a été respectée, et ce d'autant plus qu'il n'est pas contesté que, dans le cas d'espèce, cette fonction existe et qu'elle a été confiée au requérant.

83 S'agissant, troisièmement, de l'allégation du requérant selon laquelle ses nouvelles fonctions n'auraient pas été définies précisément, il convient d'admettre que la description desdites fonctions figurant à l'annexe de la décision attaquée se présente en termes relativement généraux, ladite annexe se bornant à reprendre, en partie, la description des tâches de la catégorie A figurant à l'article 5, paragraphe 1, du statut.

84 Toutefois, cette seule circonstance ne saurait suffire à établir que l'équivalence des emplois n'a pas été respectée en l'espèce.

85 En effet, d'abord, pour autant que, par ce grief, le requérant reprocherait à l'OHMI d'avoir motivé insuffisamment la décision attaquée sur ce point, lequel grief relèverait, dans un tel cas, d'un moyen distinct tiré d'un défaut de motivation, il doit être constaté, ainsi qu'il sera exposé ci-dessous lors de l'examen des griefs concernant la motivation de la décision attaquée, qu'il résulte de la jurisprudence tant de la Cour que du Tribunal qu'une décision de réaffectation ne doit pas être motivée (arrêts de la Cour du 17 mai 1984, Albertini e.a./Commission, 338/82, Rec. p. 2123, point 46, et du 7 mars 1990, Hecq/Commission, point 61 supra, point 14 ; arrêt Cwik/Commission, point 61 supra, point 62).

86 Ensuite, il convient de considérer que le fait que la décision attaquée se borne à procéder à une description générale des tâches confiées au requérant ne saurait être critiqué, dès lors, d'une part, que la fonction de conseiller juridique auprès de la vice-présidence chargée des affaires juridiques est une fonction nouvellement créée dans le cadre de la restructuration de l'OHMI et, d'autre part, qu'une telle fonction, par sa nature, est susceptible de requérir des compétences variées dans le domaine du droit des marques, dont la mise en œuvre doit pouvoir être adaptée en fonction des besoins concrets de l'OHMI. Or, l'habilitation

générale prévue par la décision attaquée en faveur du vice-président de l'OHMI est incontestablement de nature à assurer une telle flexibilité.

82 Par ailleurs, en l'espèce, il doit être constaté que le requérant était, en dépit du caractère général de la description figurant en annexe à la décision attaquée, en mesure de déduire des indications contenues dans la décision attaquée le contenu, au moins approximatif, de ses fonctions, dès lors que l'examen des rapports d'évaluation dont il a fait la critique exhaustive, et dont le contenu lui était donc parfaitement connu, lui permettait de constater que la restructuration envisagée avait, notamment, pour objet de retirer à la vice-présidence chargée des affaires juridiques le contrôle des divisions de l'OHMI compétentes en matière décisionnelle. Dans ce contexte, le requérant ne pouvait pas manquer de comprendre, ainsi qu'il ressort d'ailleurs explicitement du rapport Deloitte & Touche, que la fonction de conseiller juridique consisterait à permettre au vice-président chargé des affaires juridiques d'assister le président de l'OHMI en qualité de conseiller interne sur des questions de nature horizontale ne portant pas sur des cas concrets faisant l'objet de procédures décisionnelles de l'OHMI.

83 Enfin, quant à la circonstance alléguée selon laquelle les fonctions exercées par le requérant depuis sa réaffectation n'auraient pas de contenu concret, il convient d'observer qu'une telle circonstance, à la supposer démontrée, ne saurait affecter la légalité de la décision attaquée, dès lors que celle-ci doit, selon une jurisprudence constante, s'apprécier au moment de l'adoption de la décision (arrêt Costacurta/Commission, point 61 supra, point 43).

84 Dans ces circonstances, il convient de considérer que la décision attaquée n'enfreint pas l'équivalence des emplois.

Conclusion

85 Il résulte de ce qui précède que la décision attaquée peut être considérée comme ayant été adoptée dans l'intérêt du service et dans le respect de l'équivalence des emplois. Partant, la décision attaquée ne saurait être considérée comme une sanction infligée au requérant.

86 Il y a dès lors lieu de rejeter l'ensemble des griefs et arguments du requérant tirés de la prétendue illégalité de la décision attaquée quant au fond.

Sur la motivation de la décision attaquée

108 Ainsi qu'il a été relevé au point 125 ci-dessus, il ressort de la jurisprudence de la Cour et du Tribunal que, si une simple mesure d'organisation interne, prise dans l'intérêt du service, ne porte pas atteinte à la position statutaire du fonctionnaire ou au principe de correspondance entre grade et emploi, l'administration n'est pas tenue de la motiver (arrêts Alberti e.a./Commission, point 125 supra, point 46, et du 7 mars 1990, Hecq/Commission, point 61 supra, point 34, et Cwik/Commission, point 61 supra, point 62).

109 En tout état de cause, il y a lieu de rappeler que, selon la jurisprudence, l'obligation de motivation a pour but, d'une part, de fournir à l'intéressé une indication suffisante pour apprécier le bien-fondé de la décision prise par l'administration et l'opportunité d'introduire un recours devant le Tribunal et, d'autre part, de permettre à ce dernier d'exercer son contrôle. Son étendue doit être appréciée en fonction des circonstances concrètes, notamment du contenu de l'acte, de la nature des motifs invoqués et de l'intérêt que le destinataire peut avoir à recevoir des explications (arrêt du Tribunal du 12 décembre 2002, Morello/Commission, T-135/00, RecFP p. I-A-265 et II-1313, point 28).

110 Il ressort ainsi d'une jurisprudence constante qu'une décision est suffisamment motivée dès lors qu'elle est intervenue dans un contexte connu du fonctionnaire concerné qui lui permet de comprendre la portée de la mesure prise à son égard (arrêts Campoli/Commission, point 61 supra, point 50, et Cwik/Commission, point 61 supra, point 63).

111 En l'espèce, ainsi qu'il a déjà été constaté ci-dessus, il ressort des termes des considérants de la décision attaquée que la réaffectation du requérant dans l'intérêt du service a été prise en égard aux éléments suivants : la division « Annulation » doit être renforcée et doit adapter ses capacités de gestion de manière à traiter un nombre croissant d'affaires pendantes (premier considérant) ; le style de gestion et le comportement du requérant ne sont pas acceptables et ne sont pas conformes au niveau et au style requis pour le poste de chef de service de la division « Annulation » (deuxième considérant), et la vice-présidence chargée des affaires juridiques doit renforcer ses capacités de conseil dans le domaine du droit des marques (troisième considérant).

55 Force est de constater que ces considérants font clairement ressortir les motifs sur lesquels la décision attaquée est fondée, à savoir, en substance, que, eu égard à son comportement, le requérant n'apparaît plus apte à diriger un département, la division « Annulation », alors que celui-ci doit, par ailleurs, remédier à un arriéré en voie d'augmentation, ce qui justifie la réaffectation du requérant dans l'intérêt du service auprès du vice-président chargé des affaires juridiques, lequel requiert un conseiller apte à lui fournir des avis dans le domaine du droit des marques.

57 Par ailleurs, s'agissant des circonstances organisationnelles retenues par le premier et le troisième considérant de la décision attaquée, il ressort à l'évidence du dossier, notamment des notes du requérant des 15 novembre 2001 et 15 février 2002, que ce dernier avait connaissance de la teneur de la restructuration de l'OHMI et qu'il était averti des conséquences que cette restructuration pouvait avoir pour sa situation administrative personnelle.

58 De même, s'agissant des circonstances individuelles retenues par le deuxième considérant de la décision attaquée, il est constant entre les parties que l'adoption de la décision attaquée a été précédée de plusieurs entrevues entre le requérant et sa direction, respectivement, le 19 février 2002, le 25 février 2002, le 11 mars 2002 et le 22 avril 2002, entrevues au cours desquelles le président de l'OHMI et le vice-président chargé des affaires juridiques ont exposé leur désaccord au sujet des critiques formulées par le requérant dans ses notes du 15 novembre 2001 et du 15 février 2002 à propos de la restructuration envisagée.

59 Dans ce contexte bien connu du requérant, ce dernier ne pouvait dès lors avoir aucun doute quant à la signification des considérants de la décision attaquée.

60 Dans ces circonstances, compte tenu des motifs de la décision attaquée et du contexte dans lequel elle est intervenue, le requérant était parfaitement en mesure d'apprécier la légalité de ladite décision, ainsi que l'opportunité de la soumettre à un contrôle juridictionnel, comme il ressort d'ailleurs de sa longue réclamation.

61 Partant, il y a lieu de rejeter les griefs et arguments du requérant concernant la motivation de la décision attaquée.

Conclusion sur le premier moyen

53. Pour les motifs exposés ci-dessus, il convient dès lors de rejeter dans son intégralité le premier moyen, tiré d'une motivation erronée, insuffisante et contradictoire.

2. *Sur le deuxième moyen, tiré d'une violation du principe de proportionnalité et du droit à la liberté d'expression*

Arguments des parties

54. Le requérant soutient que, en formulant des observations critiques au sujet de la restructuration de l'OHMI, il a exercé de manière légitime son droit à la liberté d'expression, lequel est un droit fondamental également garanti aux fonctionnaires, sans pour autant méconnaître l'intérêt du service ou tenir des propos qui pourraient être considérés comme blessants à l'égard de quiconque.

55. Quant à la recevabilité de ce moyen, le requérant estime que la violation alléguée du droit à la liberté d'expression a déjà été évoquée dans sa réclamation administrative. En outre, le requérant considère que le droit à la liberté d'expression est un droit fondamental, de sorte que la violation d'une telle liberté doit pouvoir être examinée d'office par le juge communautaire comme moyen d'ordre public.

56. Quant au fond, le requérant se prévaut, d'abord, du caractère constructif et purement professionnel de ses observations critiques, lesquelles visaient uniquement la façon dont la restructuration de l'OHMI a été conduite, et non le président de l'OHMI ou les auteurs des rapports d'évaluation en tant que personnes. En formulant de telles observations, le requérant n'aurait rien fait d'autre qu'agir selon sa conscience professionnelle, et ce dans l'intérêt de l'institution qu'il sert.

57. En particulier, le requérant souligne qu'il ne s'est pas rendu coupable d'une conduite attentatoire à la dignité et au respect dû à l'institution et à ses supérieurs hiérarchiques. Dans cette mesure, il n'aurait pas dépassé les limites de l'exercice du droit fondamental à la liberté d'expression, lequel est garanti par l'article 10 de la convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales (CEDH), signée à Rome le 4 novembre 1950. À cet égard, le

requérant rappelle que, dans l'arrêt Dejaiffe/OHIM, point 64 supra (point 81), en dépit du comportement impulsif et irrespectueux du requérant, le Tribunal a relevé :

« Sur le fond, l'intervention du requérant, dont les qualités professionnelles sont reconnues par la partie défenderesse, révèle chez l'intéressé un sens des responsabilités et de l'initiative hautement développé. C'est donc son attachement à l'intérêt du service qui a été à l'origine de son comportement, quant à la forme, incorrect. »

69 Le requérant fait observer, ensuite, que ses qualités professionnelles ne sont pas contestées. Le rapport de fin de stage et le rapport de notation dont il a fait l'objet ne contiendraient aucune remarque quant à un éventuel écart de comportement qui serait répréhensible. Bien au contraire, ces rapports seraient élogieux. En particulier, le requérant souligne que son sens critique y est souligné, non comme défaut, mais comme qualité.

70 Dans ces conditions, et pour les mêmes raisons, la décision attaquée serait disproportionnée par rapport aux critiques formulées par le requérant à l'égard de la restructuration générale de l'OHIM.

71 La partie défenderesse, sans se prononcer clairement sur la recevabilité du deuxième moyen, soutient que celui-ci n'est, en tout état de cause, pas fondé.

Appréciation du Tribunal

72 Par le présent moyen, le requérant soutient que la décision attaquée a violé son droit à la liberté d'expression, garanti notamment par l'article 10 de la CEDH, ainsi que le principe de proportionnalité.

73 S'agissant de la recevabilité du moyen, il y a lieu de rappeler que, selon une jurisprudence constante, dans les recours de fonctionnaires, les conclusions présentées devant le juge communautaire ne peuvent contenir que des chefs de contestation reposant sur la même cause que celle des chefs de contestation invoqués dans la réclamation et que ces chefs de contestation peuvent, devant le juge communautaire, être développés par la présentation de moyens et arguments ne figurant pas nécessairement dans la réclamation, mais s'y rattachant

étroitement (voir, notamment, arrêt de la Cour du 13 décembre 2001, Cubero Veramendi/Commission, C-446/00 P, Rec. p. I-10315, point 12, et arrêt du Tribunal du 14 octobre 2003, Wieme/Commission, T-170/02, RecFP p. I-A-241 et II-1165, point 18).

52 En l'espèce, bien que le requérant n'ait pas, dans sa réclamation, invoqué de manière explicite la violation de son droit à la liberté d'expression, tel que garanti par l'article 10 de la CEDH, il convient toutefois de constater que, à l'appui de sa réclamation, le requérant allègue, en substance, ainsi qu'il ressort notamment des points 24 et 38 de ladite réclamation, que la décision attaquée a été adoptée en raison de la teneur des critiques qu'il a émises à l'encontre de la restructuration envisagée par le président de l'OHMI sur la base des rapports d'évaluation interne et externe souhaités par l'OHMI.

53 Par ailleurs, il y a lieu de relever que, dans sa réclamation, le requérant invoque la violation du principe de proportionnalité, lequel est explicitement mentionné dans l'intitulé du présent moyen.

54 Dans ces conditions, sans qu'il soit besoin de se prononcer sur la question de savoir si la violation du droit à la liberté d'expression fait partie des moyens que le Tribunal peut ou doit soulever d'office en tant que droit fondamental garanti par la CEDH, il convient de considérer que le présent moyen se rattache aux chefs de contestation figurant dans la réclamation.

55 Partant, il y a lieu de déclarer que le deuxième moyen est recevable.

56 S'agissant du bien-fondé de ce moyen, force est de constater, à titre liminaire, que, par celui-ci, le requérant se borne, en substance, à reprendre les arguments avancés dans le cadre du premier moyen, dont il a été jugé ci-dessus qu'il devait être rejeté.

57 En ce qui concerne, en premier lieu, la violation alléguée du droit à la liberté d'expression, il convient de rappeler que, si le requérant est parfaitement en droit, ainsi qu'il ressort de l'examen du premier moyen, de formuler des observations critiques au sujet de la restructuration envisagée par la direction de l'OHMI, en exerçant, de ce fait, le droit à la liberté d'expression qui lui est reconnu par

l'article 10 de la CEDH, l'exercice d'un tel droit n'est pas sans limite, ainsi que la Cour l'a jugé dans son arrêt du 6 mars 2001, Connolly/Commission (C-274/99 P, Rec. p. I-1611, points 43 à 48).

88 À cet égard, il convient de relever que l'article 10, paragraphe 2, de la CEDH prévoit que l'exercice de la liberté d'expression comporte des devoirs et des responsabilités, de sorte qu'il peut être soumis à certaines conditions ou restrictions. Aussi, la Cour a-t-elle admis que des restrictions spécifiques à l'exercice de la liberté d'expression peuvent en principe trouver leur justification dans le but légitime de protéger les droits des institutions chargées de missions d'intérêt général sur le bon accomplissement desquelles les citoyens doivent pouvoir compter (arrêt Connolly/Commission, point 157 supra, point 46).

89 En exerçant son contrôle, le juge communautaire doit, selon la Cour, vérifier, eu égard à l'ensemble des circonstances de l'espèce, si un juste équilibre a été respecté entre le droit fondamental de l'individu à la liberté d'expression et l'intérêt légitime de l'institution à veiller à ce que ses fonctionnaires et agents œuvrent dans le respect des devoirs et des responsabilités liés à leur charge (arrêt Connolly/Commission, point 157 supra, point 48).

90 En l'espèce, il y a lieu de considérer que le droit à la liberté d'expression dont bénéficient les fonctionnaires communautaires doit être mis en balance avec le droit des institutions, reconnu par une jurisprudence constante, d'affecter, en vertu de l'article 7 du statut, le personnel à leur disposition en vue d'organiser les services selon leurs besoins.

91 Or, force est de constater que l'intérêt du service et l'équivalence des emplois constituent manifestement des conditions propres à assurer l'équilibre entre ces droits. En effet, ces conditions permettent à l'institution concernée de disposer du pouvoir d'appréciation nécessaire dans l'organisation de ses services en disposant de la possibilité de réaffecter les fonctionnaires à d'autres fonctions que celles exercées initialement, d'une part, tout en garantissant aux fonctionnaires concernés qu'une telle réaffectation n'est pas motivée par des considérations arbitraires étrangères à l'intérêt du service et ne porte pas atteinte à leur situation statutaire, d'autre part.

102 En conséquence, dès lors que, pour les motifs exposés dans le cadre de l'examen du premier moyen, la décision attaquée respecte l'intérêt du service et l'équivalence des emplois, elle ne saurait violer le droit à la liberté d'expression du requérant.

103 En outre, il y a lieu de rappeler que, selon la jurisprudence, une décision de réaffectation adoptée dans l'intérêt du service et respectant l'équivalence des emplois ne constitue pas une mesure de sanction. Le requérant ne saurait dès lors soutenir que la décision attaquée l'a sanctionné pour avoir exercé son droit à la liberté d'expression.

104 Quant à l'allégation du requérant selon laquelle ses critiques, loin d'être contraires à l'intérêt du service, seraient, en réalité, justifiées par celui-ci, un fonctionnaire devant faire preuve de sens critique, il est exact que le Tribunal a reconnu qu'un fonctionnaire peut être amené, dans l'intérêt du service, à formuler des observations critiques à l'égard de l'action de l'administration (voir, en ce sens, arrêt Dejaiffe/OHMI, point 64 supra, point 81). Toutefois, lorsque ces critiques concernent un aspect aussi essentiel que la restructuration de l'institution en cause et qu'elles émanent d'un fonctionnaire exerçant des fonctions de chef de service dont la coopération est requise afin d'assurer la mise en œuvre de ladite restructuration, l'intérêt du service exige également que l'institution concernée puisse, pour en assurer le bon fonctionnement, adopter toutes les mesures nécessaires à cette mise en œuvre. Ainsi qu'il a déjà été indiqué dans le cadre de l'examen du premier moyen, si les fonctionnaires peuvent certes exercer leur droit à la critique quant aux décisions adoptées par l'institution à laquelle ils appartiennent, il n'en demeure pas moins que la direction de l'institution ne leur appartient pas.

105 En ce qui concerne, en second lieu, la violation alléguée du principe de proportionnalité, il y a lieu de constater que la décision attaquée respecte ce principe dès lors qu'elle met un terme au conflit entre la direction de l'OHMI et le requérant en retirant ce dernier des services directement concernés par la restructuration horizontale pour tirer profit de ses compétences techniques dans le domaine du droit des marques et en le réaffectant dans un service distinct comme conseiller juridique de l'ensemble de l'OHMI.

166 À cet égard, il doit être relevé que, nonobstant les termes irrespectueux, voire, pour certains d'entre eux, injurieux, utilisés par le requérant dans ses notes du 15 novembre 2001 et du 15 février 2002, l'OHMI n'a pas adopté, en l'espèce, une mesure de sanction contre lui, mais a simplement transféré le requérant à un autre emploi de niveau équivalent.

167 Il est vrai que, dans l'affaire ayant donné lieu à l'arrêt Dejaiffe/OHMI, point 64 supra, le comportement jugé « impulsif et irrespectueux » du requérant n'a pas empêché le Tribunal de considérer que la mesure prise par l'administration contre lui était excessive.

168 Toutefois, il y a lieu de relever que, dans cette affaire, le Tribunal ne devait pas se prononcer sur la proportionnalité d'une décision de réaffectation, mais sur celle d'une décision de résiliation anticipée d'un contrat à durée déterminée, neuf mois et demi avant son échéance, d'un fonctionnaire détaché auprès de l'OHMI dans un autre État membre que celui de son affectation initiale. Dans son arrêt, le Tribunal a estimé que cette décision était « manifestement » excessive par rapport au comportement du requérant, notamment en égard au fait que le fonctionnaire concerné avait un intérêt légitime à ce que son contrat soit exécuté jusqu'à son terme, ce qui lui conférait une « protection particulière » en application du principe d'exécution de bonne foi des conventions (arrêt Dejaiffe/OHMI, point 64 supra, point 79). Ainsi qu'il a été observé dans l'arrêt du Tribunal du 30 septembre 2003, Kenny/Cour de justice (T-302/02, RecFP p. I-A-235 et II-1137, point 85), c'est pour cette raison que le Tribunal a jugé que la décision attaquée dans cette affaire n'était pas raisonnablement motivée par l'intérêt du service et qu'elle avait été adoptée en méconnaissance des intérêts légitimes du requérant.

169 Or, en l'espèce, d'une part, force est de constater que le requérant ne bénéficie pas d'une telle protection particulière à l'égard des réaffectations. Bien au contraire, il ressort d'une jurisprudence constante que l'OHMI est en droit de réaffecter ses fonctionnaires dans l'intérêt du service en respectant l'équivalence des emplois. D'autre part, la résiliation anticipée d'un contrat à durée déterminée ayant pour effet d'obliger un fonctionnaire détaché auprès de l'OHMI à réintégrer son affectation initiale dans un autre État membre, mettant ainsi fin à l'ensemble de ses activités au sein de l'OHMI, ne saurait raisonnablement être assimilée à la réaffectation d'un fonctionnaire de l'OHMI, dans l'intérêt du service, dans un autre département de l'OHMI dans le même État membre.

82 Par ailleurs, il doit être relevé que, à la différence du requérant dans l'affaire ayant donné lieu à l'arrêt Dejaiffe/OHMI, point 64 supra, lequel était un fonctionnaire de la Commission de grade B 3 disposant seulement d'une expérience de trois ans dans les institutions au moment de l'adoption de la décision en cause mettant fin à son contrat en raison de certains propos impulsifs et irrespectueux tenus au cours d'une réunion, le requérant en l'espèce est un fonctionnaire de grade A 4, chef de service, disposant d'une longue expérience professionnelle accomplie dans le secteur industriel et au sein de l'OHMI, qui devait, pour ce motif, et ainsi qu'il a déjà été constaté ci-dessus, être en mesure de présenter son point de vue, à plus forte raison dans un écrit, d'une manière technique dépourvue d'émotivité excessive.

83 En outre, alors que, dans l'arrêt Dejaiffe/OHMI, point 64 supra, la décision en cause était uniquement motivée par la forme des critiques émises par le requérant, le bien-fondé de ces critiques n'étant pas contesté, en revanche, dans le cas d'espèce, il doit être observé, ainsi qu'il ressort d'ailleurs explicitement d'une note interne du vice-président des affaires juridiques du 19 avril 2002, que, outre la forme des critiques émises par le requérant, le contenu de celles-ci a également motivé la décision attaquée, lesdites critiques démontrant l'impossibilité pour l'OHMI d'associer le requérant à la mise en œuvre de la restructuration envisagée.

84 Dans ces conditions, il y a lieu de rejeter le deuxième moyen, tiré d'une violation du principe de proportionnalité et du droit à la liberté d'expression.

3. Sur le troisième moyen, tiré d'une violation des droits de la défense, notamment du droit d'être entendu

Arguments des parties

85 Le requérant estime que les reproches formulés à son égard étant de nature disciplinaire, la décision attaquée devait être adoptée conformément à la procédure instituée par les articles 86 à 89 du statut. Or, en vertu de l'article 87 du statut, toute sanction disciplinaire ne pourrait être adoptée qu'après que l'intéressé a été préalablement entendu.

94 En l'espèce, le requérant fait observer d'abord que la décision attaquée avait déjà été adoptée au moment de son entretien, le jour même de l'adoption de celle-ci, avec le président de l'OHMI. Ensuite, le requérant aurait été souffrant le jour de cette entrevue. Par ailleurs, les entretiens de février 2002 et de mars 2002 auraient porté sur d'autres sujets et ce ne serait qu'à la fin de ces entretiens que mention aurait été faite des remarques formulées par le requérant au sujet de l'UGQ, ce que confirmerait le courrier électronique envoyé le 17 mai 2002 par le vice-président chargé des affaires juridiques. Quant à la présence du requérant au cours de la réunion du comité de direction du 19 février 2002, elle ne saurait impliquer que le requérant a été entendu, dès lors que rien n'y aurait été dit sur sa situation personnelle, mais qu'il aurait uniquement été fait référence à sa note du 15 février 2002 en cin de réunion par le vice-président chargé des affaires juridiques, l'assistant du président et le président. Enfin, la communication au personnel concernant la décision attaquée ne lui aurait été communiquée que le 23 avril 2002.

95 En toute hypothèse, le requérant estime qu'il ne pouvait nullement s'attendre, au moment de la tenue des entretiens formels antérieurs à la décision attaquée, au contenu de celle-ci.

96 La partie défenderesse soutient que la réaffectation d'un fonctionnaire ne suppose pas le consentement de celui-ci et que l'administration communautaire n'a aucune obligation d'entendre au préalable le fonctionnaire concerné.

Appréciation du Tribunal

97 Ainsi qu'il ressort de l'examen du premier moyen, la décision attaquée ne constitue pas une mesure de sanction mais une décision de réaffectation adoptée dans l'intérêt du service qui n'a porté atteinte ni à la position statutaire du requérant ni au principe de correspondance entre le grade et l'emploi.

98 Or, selon une jurisprudence constante de la Cour et du Tribunal, l'administration n'est pas tenue d'entendre au préalable le fonctionnaire concerné par une telle décision de réaffectation (arrêt du 7 mars 1990, Hecq/Commission, point 61 supra, point 14 ; arrêts von Bonkewitz-Lindner/Parlement, point 63 supra, point 94, et Cwik/Commission, point 61 supra, point 62).

99 En tout état de cause, il ressort du dossier que le requérant a eu divers entretiens avec ses supérieurs hiérarchiques, en particulier les 19 février, 25 février et 11 mars 2002, au sujet des critiques qu'il avait formulées quant à la restructuration de l'OHMI. En outre, il n'est pas contesté que le président de l'OHMI a averti préalablement le requérant de l'adoption de la décision attaquée au cours d'un entretien tenu le 22 avril 2002.

100 Partant, il convient de rejeter le troisième moyen, tiré d'une violation des droits de la défense.

4. Sur les quatrième et cinquième moyens, tirés d'une violation, respectivement, du principe de bonne administration et du principe de sollicitude

Arguments des parties

101 Le requérant allègue, en premier lieu, que la restructuration de l'OHMI et la décision attaquée sont contraires au principe de bonne administration.

102 Selon le requérant, la restructuration de l'OHMI aura des conséquences désastreuses pour son fonctionnement. Ainsi, de nombreux fonctionnaires de l'OHMI quitteraient celui-ci pour d'autres institutions. Par ailleurs, les membres du personnel auraient également critiqué de manière unanime ladite restructuration.

103 Le requérant estime qu'il appartient à ceux qui subissent les conséquences de mesures de restructuration de les contester, dès lors que celles-ci affectent le bon fonctionnement du service et leur situation personnelle ainsi que leur carrière. C'est ce qu'il aurait fait en l'espèce, de façon raisonnée, dûment expliquée et argumentée.

104 En second lieu, le requérant estime que l'OHMI a violé le principe de sollicitude en ce que ce dernier n'a pas fait preuve d'attention, d'ouverture et de discussion à son égard. Le requérant souligne qu'aucune indication précise ne lui a été donnée quant à la décision qui serait prise à son égard, de sorte que, le jour de l'adoption de celle-ci, il s'est trouvé devant un fait accompli.

85 Selon le requérant, il a été déplacé parce qu'il gênait, sans que l'OHMI se soit inquiété des tâches qui lui seraient confiées et de l'intérêt que ce déplacement pourrait avoir pour le bon fonctionnement du service. Comme la décision attaquée serait contraire à l'intérêt du service, la partie défenderesse aurait manqué de sollicitude à son égard.

86 La partie défenderesse estime qu'elle n'a violé ni le principe de bonne administration ni son devoir de sollicitude vis-à-vis du requérant.

Appréciation du Tribunal

87 Par les présents moyens, le requérant invoque une violation tant du principe de bonne administration que du devoir de sollicitude.

88 S'agissant, en premier lieu, du moyen tiré d'une violation du principe de bonne administration, il convient d'abord de relever que, par ses griefs, le requérant cherche essentiellement à mettre en cause la restructuration de l'OHMI telle qu'elle a été décidée par son président. Or, pour les motifs exposés dans le cadre du premier moyen, il n'appartient pas au Tribunal de se prononcer sur cette question en l'espèce. Partant, les griefs soulevés dans le cadre de ce moyen doivent être rejetés.

89 Pour autant que le requérant allègue, par les présents griefs, qu'il appartient à chaque fonctionnaire de contester les mesures susceptibles d'affecter sa situation professionnelle, il y a lieu de constater que le requérant se borne à reprendre une nouvelle fois les arguments déjà avancés dans le cadre des premier et deuxième moyens.

90 À cet égard, il suffit de rappeler que, comme il ressort de l'examen du premier et du deuxième moyen, si le requérant est certes en droit de formuler des observations critiques au sujet de la restructuration de l'OHMI, la direction de celui-ci était à son tour en droit, dans l'intérêt du service, de le réaffecter afin d'assurer que la mise en œuvre de ladite restructuration soit réalisée avec la pleine coopération des chefs de service des départements directement affectés par celle-ci. À cet égard, il y a lieu de rappeler que, selon la jurisprudence, les intérêts personnels du fonctionnaire à voir évoluer sa carrière ne peuvent légitimement

primer l'intérêt du service défini par l'institution, notamment dans le cadre d'une réorganisation (arrêt Fronia/Commission, point 75 supra, point 57).

191 Pour ces motifs, il y a lieu de rejeter le quatrième moyen, tiré de la violation du principe de bonne administration.

192 S'agissant, en second lieu, du moyen tiré de la méconnaissance du devoir de sollicitude, il convient de rappeler que, selon la jurisprudence, le devoir de sollicitude de l'administration reflète l'équilibre des droits et obligations réciproques que le statut a créé dans les relations entre l'autorité publique et ses agents. Si, en vertu de ce principe, l'autorité compétente est tenue, lorsqu'elle apprécie l'intérêt du service, de prendre en considération l'ensemble des éléments qui sont susceptibles de déterminer sa décision, notamment l'intérêt de l'agent concerné (arrêt Dejaiffe/OHMI, point 64 supra, point 53), la prise en compte de l'intérêt personnel du fonctionnaire ne saurait aller jusqu'à interdire à l'AIPN de réaffecter un fonctionnaire contre son gré (voir, en ce sens, arrêts Costacurta/Commission, point 61 supra, point 78, et Cwik/Commission, point 61 supra, point 52).

193 Or, en l'espèce, il ressort de l'examen du premier moyen que la décision attaquée a été adoptée dans l'intérêt du service.

194 En outre, le requérant a été réaffecté à la fonction de conseiller juridique de l'OHMI auprès du vice-président chargé des affaires juridiques. Ainsi qu'il a été exposé dans le cadre du premier moyen, cette fonction permet d'exploiter les capacités techniques du requérant dans le domaine du droit des marques en le maintenant sous la même autorité hiérarchique que précédemment tout en conservant son poste.

195 Dans ces circonstances, il convient de considérer que, en adoptant la décision attaquée, l'OHMI a dûment pris en compte, conformément au devoir de sollicitude, l'intérêt du requérant.

196 Partant, il y a lieu de rejeter le cinquième moyen, tiré d'une violation du devoir de sollicitude.

Sur la demande en indemnité

1. *Arguments des parties*

59 Le requérant estime que les violations dénoncées dans le cadre de sa demande en annulation traduisent de nombreuses fautes commises par l'OHMI, lesquelles lui ont causé un préjudice moral qu'il évalue à 50 000 euros.

60 À cet égard, le requérant relève que sa réaffectation a entraîné une réduction de ses responsabilités ainsi que de ses ressources en personnel et en matériel. Le requérant serait à présent démotivé. Par ailleurs, la décision attaquée le priverait de la possibilité de se valoriser, eu égard à la diminution de ses tâches, et porterait atteinte à l'évolution de sa carrière.

61 Selon le requérant, un tel dommage n'est pas purement hypothétique, dès lors que la décision attaquée a été rendue publique et que des tiers, à savoir tant le personnel de l'OHMI que le monde professionnel extérieur en contact avec l'OHMI, ont perçu celle-ci comme une mesure de caractère disciplinaire. En outre, le requérant ne se serait vu attribuer, à son nouveau poste, aucune tâche précise pendant de nombreux mois.

62 La partie défenderesse fait valoir, à titre principal, que l'examen des moyens d'annulation avancés par le requérant fait apparaître que l'OHMI n'a commis, en l'espèce, aucune faute de nature à engager sa responsabilité. Quant au préjudice moral découlant de l'éventuelle impossibilité de réintégrer le requérant, la partie défenderesse estime qu'il est purement hypothétique.

63 À titre subsidiaire, la partie défenderesse fait observer que le requérant ne s'est pas vu attribuer des fonctions d'un niveau inférieur à son grade (arrêt von Bonkewitz-Lindner/Parlement, point 63 supra, point 100). En particulier, la décision attaquée ne traduirait pas la volonté de maintenir le requérant dans une condition inférieure à celle à laquelle il a droit (arrêt du Tribunal du 26 octobre 2000, Verheyden/Commission, T-138/99, RecFP p. I-A-219 et II-1001, point 80). Il serait erroné de soutenir que le requérant aurait été privé de moyens matériels. Le requérant aurait été chargé de tâches de conception et d'étude en rapport avec son grade, son expérience et ses connaissances, et il aurait continué de représenter l'OHMI par rapport au monde extérieur.

2. Appréciation du Tribunal

77 Selon la jurisprudence, l'engagement de la responsabilité non contractuelle de la Communauté suppose la réunion d'un ensemble de conditions constituées par l'illégalité du comportement reproché à l'institution concernée, la réalité du dommage et l'existence d'un lien de causalité entre le comportement reproché et le préjudice invoqué (voir, notamment, arrêts du Tribunal Campoli/Commission, point 61 supra, point 76, et du 12 décembre 2002, Morello/Commission, T-338/00 et T-376/00, RecFP p. I-A-301 et II-1457, point 150).

78 En l'espèce, ainsi qu'il résulte de l'examen des moyens avancés par le requérant à l'appui de sa demande d'annulation, la décision attaquée n'est, en tant que telle, entachée d'aucun vice susceptible d'affecter sa légalité.

79 Toutefois, il convient de relever que, le lendemain de l'adoption de la décision attaquée, le 23 avril 2002, le président de l'OHMI a informé, par courriel électronique, l'ensemble du personnel de l'OHMI de l'adoption et du contenu de la décision attaquée dans les termes suivants :

« Le 23 [avril 2002], le président de l'[OHMI] a décidé de relever [le requérant] de ses fonctions de chef de service de la division 'Annulation' et de le réaffecter aux fonctions de conseiller juridique dépendant directement de la vice-présidence chargée des affaires juridiques. »

80 Il convient de constater que, même si cette communication indique explicitement que le requérant est « réaffecté » à de nouvelles fonctions, ladite communication indique, dans sa première partie, que le requérant est « relevé » de ses fonctions antérieures.

81 Force est d'admettre que, comme le requérant l'a fait valoir à juste titre dans ses écritures et à l'audience, par l'utilisation de ce terme à la connotation disciplinaire évidente, le personnel de l'OHMI, ou du moins une partie de celui-ci, a été fortement induit à croire que, par la décision attaquée, le président de l'OHMI a infligé au requérant, en le transférant dans un autre service, une sanction justifiée par des motifs disciplinaires.

87 Partant, même si la décision attaquée, adoptée le 22 avril 2002, ne constitue pas, en tant que telle, une sanction disciplinaire, étant conforme à l'intérêt du service et respectant l'équivalence des emplois, il n'en demeure pas moins que, par la communication ultérieure du 23 avril 2002 informant le personnel de l'OHMI de la teneur de la décision attaquée, le président de l'OHMI a créé l'impression erronée que ladite décision constituait, néanmoins, une telle sanction infligée au requérant.

88 Il convient de considérer que, ce faisant, le président de l'OHMI a commis une faute de service susceptible de donner lieu à réparation dans le cadre du présent recours, dès lors que ladite faute est étroitement liée à la décision attaquée faisant l'objet de la demande en annulation.

89 Or, il ne saurait être nié qu'une telle faute a causé un préjudice moral au requérant, dès lors qu'elle l'a placé dans la situation de devoir continuellement se justifier, vis-à-vis de ses collègues, quant à la mesure dont il a fait l'objet, en corrigeant l'impression erronée créée à cet égard par le président de l'OHMI dans sa communication du 23 avril 2002. Force est d'admettre qu'une telle situation est susceptible d'affecter substantiellement un fonctionnaire de l'âge et de l'expérience du requérant, dont il est constant, ainsi qu'il ressort du rapport de fin de stage établi en 1996 et du rapport de notation pour la période 1997/1999, que les qualités professionnelles étaient appréciées tant par ses supérieurs hiérarchiques que par ses collègues.

90 Dans ces circonstances, le Tribunal, évaluant le préjudice subi ex aequo et bono, estime qu'une allocation d'un montant de 5 000 euros constitue une indemnisation adéquate du requérant pour le préjudice moral qu'il a subi du fait de la faute de service commise par le président de l'OHMI.

Sur les dépens

50 Aux termes de l'article 87, paragraphe 3, premier alinéa, du règlement de procédure du Tribunal, le Tribunal peut répartir les dépens si les parties succombent respectivement sur un ou plusieurs chefs, étant entendu que, en vertu de l'article 88 du même règlement, dans les litiges entre les Communautés et leurs agents, les frais exposés par les institutions restent à la charge de celles-ci.

51 En l'espèce, le recours ayant été accueilli en partie, il sera fait une juste appréciation de la cause en décidant que la partie défenderesse supportera, outre ses propres dépens, le cinquième des dépens exposés par le requérant.

Par ces motifs,

LE TRIBUNAL (troisième chambre)

déclare et arrête :

1) **L'Office de l'harmonisation dans le marché intérieur (marques, dessins et modèles) (OHMI) est condamné à payer au requérant une somme de 5 000 euros à titre de dommages et intérêts pour faute de service.**

2) **Le recours est rejeté pour le surplus.**

3) **L'OHMI supportera ses propres dépens et le cinquième des dépens exposés par le requérant.**

4) Le requérant supportera quatre cinquièmes de ses propres dépens.

Azizi Jaeger Cremona

Ainsi prononcé en audience publique à Luxembourg, le 28 octobre 2004

Le greffier
H. Jung

Le président
J. Azizi

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JUDGMENT OF THE COURT (Grand Chamber)

12 December 2006 *

In Case C-380/03,

ACTION for annulment under Article 230 EC, brought on 9 September 2003,

Federal Republic of Germany, represented by M. Lumma, W.-D. Plessing and C.-D. Quassowski, acting as Agents, and I. Sedemund, Rechtsanwalt,

applicant,

v

European Parliament, represented by R. Passos, E. Waldherr and U. Rösslein, acting as Agents, with an address for service in Luxembourg,

* Language of the case: German.

Council of the European Union, represented by E. Karlsson and J. P. Hix, acting as Agents,

defendants,

supported by:

Kingdom of Spain, represented by L. Fraguas Gadea and M. Rodríguez Cárcamo, acting as Agents, with an address for service in Luxembourg,

Republic of Finland, represented by A. Guimarães Purokoski and E. Bygglin, acting as Agents, with an address for service in Luxembourg,

French Republic, represented by C. de Bergues and R. Loosli-Surrans, acting as Agents, with an address for service in Luxembourg,

Commission of the European Communities, represented by M.-J. Jonczy, L. Pignataro-Nolin and F. Hoffmeister, acting as Agents, with an address for service in Luxembourg,

interveners,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, K. Lenaerts, P. Kūris and E. Juhász, Presidents of Chambers, I.N. Cunha Rodrigues (Rapporteur), R. Silva de Lapuerta, K. Schiemann, G. Arestis, A. Borg Barthet, M. Ilešič and J. Malenovský, Judges,

Advocate General: P. Léger,
Registrar: K. Sztranc-Sławiczek, Administrator,

having regard to the written procedure and further to the hearing on 6 December 2005,

after hearing the Opinion of the Advocate General at the sitting on 13 June 2006,

gives the following

Judgment

By its application, the Federal Republic of Germany ('the applicant') seeks the annulment of Articles 3 and 4 of Directive 2003/33/EC of the European Parliament and of the Council of 26 May 2003 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products (OJ 2003 L 152, p. 16; 'the Directive').

2 The Directive was adopted by the European Parliament and the Council of the European Union following the annulment by the Court (judgment of 5 October 2000 in Case C-376/98 *Germany v Parliament and Council* [2000] ECR I-8419, the tobacco advertising judgment') of Directive 98/43/EC of the European Parliament and of the Council of 6 July 1998 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products (OJ 1998 L 213, p. 9).

Legal context

3 The Directive was adopted on the same legal bases as Directive 98/43. Like the latter, it regulates advertising and sponsorship in respect of tobacco products in media other than television.

4 The first recital in the preamble to the Directive states that certain obstacles to the free movement of products and services resulting from differences in the relevant legislation of the Member States have already been encountered in the case of press advertising and that distortions of competition arising in the same circumstances have also been noted as regards the sponsorship of certain major sporting and cultural events.

5 The fourth recital in the preamble to the Directive states:

'The circulation in the internal market of publications such as periodicals, newspapers and magazines is subject to an appreciable risk of obstacles to free movement as a result of Member States' laws, regulations and administrative

provisions which prohibit or regulate tobacco advertising in those media. In order to ensure free circulation throughout the internal market for all such media, it is necessary to limit tobacco advertising therein to those magazines and periodicals which are not intended for the general public such as publications intended exclusively for professionals in the tobacco trade and to publications printed and published in third countries, that are not principally intended for the Community market.'

- The fifth recital is worded as follows:

'The laws, regulations and administrative provisions of the Member States relating to certain types of sponsorship for the benefit of tobacco products with cross-border effects give rise to an appreciable risk of distortion of the conditions of competition for this activity within the internal market. In order to eliminate these distortions, it is necessary to prohibit such sponsorship only for those activities or events with cross-border effects which otherwise may be a means of circumventing the restrictions placed on direct forms of advertising, without regulating sponsorship on a purely national level.'

- The sixth recital states:

'Use of information society services is a means of advertising tobacco products which is increasing as public consumption and access to such services increases. Such services, as well as radio broadcasting, which may also be transmitted via information society services, are particularly attractive and accessible to young consumers. Tobacco advertising by both these media has, by its very nature, a cross-border character, and should be regulated at Community level.'

2 Article 3 of the Directive provides:

'1. Advertising in the press and other printed publications shall be limited to publications intended exclusively for professionals in the tobacco trade and to publications which are printed and published in third countries, where those publications are not principally intended for the Community market.

Other advertising in the press and other printed publications shall be prohibited.

2. Advertising that is not permitted in the press and other printed publications shall not be permitted in information society services.'

3 Article 4 of the Directive states:

'1. All forms of radio advertising for tobacco products shall be prohibited.

2. Radio programmes shall not be sponsored by undertakings whose principal activity is the manufacture or sale of tobacco products.'

Article 5 of the Directive is worded as follows:

'1. Sponsorship of events or activities involving or taking place in several Member States or otherwise having cross-border effects shall be prohibited.

2. Any free distribution of tobacco products in the context of the sponsorship of the events referred to in paragraph 1 having the purpose or the direct or indirect effect of promoting such products shall be prohibited.'

Article 8 of the Directive provides:

'Member States shall not prohibit or restrict the free movement of products or services which comply with this Directive.'

Forms of order sought

The applicant claims that the Court should:

annul Articles 3 and 4 of the Directive;

order the defendants to pay the costs.

4 The Parliament and the Council contend that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

5 The Parliament contends in the alternative that, were the Court to intend to annul the Directive because of a formal breach of the duty to state reasons in of the codecision procedure, it should order in accordance with Article 231 EC that the effects of the annulled Directive be preserved until new legislation has been adopted in the field.

6 By orders of the President of the Court of 6 January and 2 March 2004, the Kingdom of Spain, the French Republic, the Republic of Finland and the Commission of the European Communities were granted leave to intervene in support of the forms of order sought by the Parliament and the Council.

The action

7 The applicant puts forward five pleas in law in support of its action. It submits, first, that Article 95 EC is not an appropriate legal basis for the Directive and, second, that the Directive was adopted in breach of Article 152(4)(c) EC. In the alternative it pleads breach of the duty to state reasons, of the rules governing the codecision procedure that are laid down in Article 251 EC and of the principle of proportionality.

The first plea: allegedly incorrect choice of Article 95 EC as legal basis

Arguments of the parties

- The applicant submits that the conditions justifying recourse to Article 95 EC for the adoption of Articles 3 and 4 of the Directive are not met. None of the prohibitions laid down in those articles actually contributes to eliminating obstacles to the free movement of goods or to removing appreciable distortions of competition.

- As regards, first, 'the press and other printed publications', referred to in Article 3(1) of the Directive, more than 99,9% of products are marketed not in a number of Member States but only regionally or locally, so that the general prohibition on the advertising of tobacco products which is laid down in that provision responds only very marginally to the supposed need to eliminate barriers to trade.

- 'Press' products are traded between Member States only rarely, on account of not only linguistic and cultural reasons, but also policy reasons of publishers. There is no actual obstacle to their movement within the Community even though certain Member States prohibit tobacco advertising in the press since in those States the foreign press is not subject to such a prohibition.

20 In the applicant's submission, the same is true of the term 'other printed publications' which appears in Article 3(1) of the Directive and covers a wide range of publications such as bulletins produced by local associations, programmes for cultural events, posters, telephone directories and various advertising leaflets and prospectuses. These publications are targeted solely at local people and do not have any cross border character.

21 Nor does Article 3(1) of the Directive meet the objective of removing appreciable distortions of competition. There is no competitive relationship between local publications in one Member State and those in other Member States or between newspapers, periodicals and magazines with a wider circulation and comparable foreign newspapers, periodicals and magazines.

22 As regards information society services, Article 3(2) of the Directive contributes neither to the elimination of obstacles to the free movement of goods or the freedom to provide services nor to the removal of distortions of competition. In the applicant's view, consultation on the internet of printed publications from other Member States is marginal and, in any event, does not meet with any technical obstacle because of the freedom of access to those services worldwide.

23 Likewise, in the applicant's submission, the choice of Article 95 EC as legal basis for the Directive is incorrect with regard to the prohibition, laid down in Article 4 of the Directive, on radio advertising and the sponsorship of radio programmes since the vast majority of radio programmes are addressed to the public in a locality or region and cannot be picked up outside a given area because of the limited range of the

transmitters. Furthermore, since the advertising of tobacco products on the radio is prohibited in most Member States, the prohibition thereof in Article 4(1) of the Directive is not justified. The same is true of the prohibition on sponsorship of radio programmes in Article 4(2) of the Directive.

21 Finally, Article 95 EC cannot constitute an appropriate legal basis for the prohibitions on the advertising of tobacco products set out in Articles 3 and 4 of the Directive since the true purpose of those prohibitions is not to improve the conditions for the establishment and functioning of the internal market, but solely to protect public health. The applicant submits that recourse to Article 95 EC as legal basis for the Directive is also contrary to Article 152(4)(c) EC, which expressly excludes any harmonisation of the laws and regulations of the Member States in the field of public health.

22 The Parliament, the Council and the parties intervening in support of them argue that Articles 3 and 4 of the Directive were legitimately adopted on the basis of Article 95 EC and are not contrary to Article 152(4)(c) EC.

23 They state that the prohibition on advertising and sponsorship in respect of tobacco products which is laid down in Articles 3 and 4 of the Directive merely prohibits advertising of those products in periodicals, magazines and newspapers and does not extend to the other publications relied upon by the applicant such as bulletins produced by associations, programmes for cultural events, posters, telephone directories, leaflets and prospectuses.

24 They further contend that intra-Community trade in press products is an incontrovertible reality and that, as is apparent from the first, second and fourth recitals in the preamble to the Directive, there are cross-border effects and an

appreciable risk of obstacles to free movement in the internal market as a result of differences between Member States' national legislation. That risk may increase on account of the accession of the new Member States and differences between their laws.

55 With regard to the prohibition on advertising in the press and other printed publications, the Parliament, the Council and the parties intervening in support of them dispute the relevance of the applicant's statistical analysis, which is limited exclusively to the German market and cannot be extended to the whole of the European Community, while the current phenomenon of 'media convergence' is making a considerable contribution to the development of intra-Community trade in press products inasmuch as numerous newspapers, periodicals and magazines are now available on the internet and thus circulate in all the Member States.

56 They state that it is difficult, or even impossible, to draw a distinction between the press with a local or national circulation and the press with a European or international circulation, and to prohibit advertising of tobacco products in publications distributed across borders while excluding those which are purely local or national would have the effect of rendering the limits of the prohibition particularly unsure and uncertain. Besides, that distinction would be contrary to the objective pursued by the Directive of approximating the laws, regulations and administrative provisions of the Member States relating to the advertising of tobacco products.

57 So far as concerns information society services and the prohibition, laid down in Article 3(2) of the Directive, on advertising tobacco products in those services, the Parliament, the Council and the parties intervening in support of them contest the applicant's argument that obstacles to trade do not exist as regards information society services.

I – They submit that the prohibition on advertising tobacco products in information society services is prompted by the concern to prevent the circumvention of the prohibition on advertising tobacco products in the press and other printed publications by recourse to media offered on the internet and to avoid distortions of competition. As a result of the current process of media convergence, printed media and radio programmes are already available on the internet. The development of e-papers is tending, moreover, to intensify that process.

II – As regards the prohibition on radio advertising, laid down in Article 4(1) of the Directive, the Parliament, the Council and the parties intervening in support of them submit that it cannot seriously be doubted that radio broadcasting is cross-border in nature since terrestrial frequencies reach well beyond Member States' borders and more and more radio programmes are broadcast by satellite or by cable.

III – They also state that the 14th recital in the preamble to the Directive expressly refers to Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (OJ 1989 L 298 p. 23) which, in Articles 13 and 17(2), prohibits all forms of television advertising for tobacco and all sponsorship of television programmes by tobacco-related businesses.

IV – The prohibition on radio advertising for tobacco products and on the sponsorship of radio programmes which is laid down in Articles 3 and 4 of the Directive is a prohibition parallel to that laid down by Directive 89/552.

V – The fact that radio advertising is already prohibited in almost all the Member States does not prevent new rules from being introduced at Community level.

Findings of the Court

9 Article 95(1) EC establishes that the Council is to adopt measures for the approximation of provisions laid down by law, regulation or administrative action in the Member States which have as their object the establishment and functioning of the internal market.

10 While a mere finding of disparities between national rules is not sufficient to justify having recourse to Article 95 EC, it is otherwise where there are differences between the laws, regulations or administrative provisions of the Member States which are such as to obstruct the fundamental freedoms and thus have a direct effect on the functioning of the internal market (see, to this effect, the tobacco advertising judgment, paragraphs 84 and 95; Case C-491/01 *British American Tobacco (Investments) and Imperial Tobacco* [2002] ECR I-11453, paragraph 60; Case C-434/02 *Arnold André* [2004] ECR I-11825, paragraph 30; Case C-210/03 *Swedish Match* [2004] ECR I-11893, paragraph 29; and joined Cases C-154/04 and C-155/04 *Alliance for Natural Health and Others* [2005] ECR I-6451, paragraph 28).

11 It is also settled case-law that, although recourse to Article 95 EC as a legal basis is possible if the aim is to prevent the emergence of future obstacles to trade resulting from multifarious development of national laws, the emergence of such obstacles must be likely and the measure in question must be designed to prevent them (Case C-350/92 *Spain v Council* [1995] ECR I-1985, paragraph 35; Case C-377/98 *Netherlands v Parliament and Council* [2001] ECR I-7079, paragraph 15; *British American Tobacco (Investments) and Imperial Tobacco*, paragraph 61; *Arnold André*, paragraph 31; *Swedish Match*, paragraph 30; and *Alliance for Natural Health and Others*, paragraph 29).

41 The Court has also held that, provided that the conditions for recourse to Article 95 EC as a legal basis are fulfilled, the Community legislature cannot be prevented from relying on that legal basis on the ground that public health protection is a decisive factor in the choices to be made (*British American Tobacco (Investments) and Imperial Tobacco*, paragraph 62; *Arnold André*, paragraph 32; *Swedish Match*, paragraph 31; and *Alliance for Natural Health and Others*, paragraph 30).

42 It should be noted that the first subparagraph of Article 152(1) EC provides that a high level of human health protection is to be ensured in the definition and implementation of all Community policies and activities, and that Article 95(3) EC explicitly requires that, in achieving harmonisation, a high level of protection of human health should be guaranteed (*British American Tobacco (Investments) and Imperial Tobacco*, paragraph 62; *Arnold André*, paragraph 33; *Swedish Match*, paragraph 32; and *Alliance for Natural Health and Others*, paragraph 31).

43 It follows from the foregoing that when there are obstacles to trade, or it is likely that such obstacles will emerge in the future, because the Member States have taken, or are about to take, divergent measures with respect to a product or a class of products, which bring about different levels of protection and thereby prevent the product or products concerned from moving freely within the Community, Article 95 EC authorises the Community legislature to intervene by adopting appropriate measures, in compliance with Article 95(3) EC and with the legal principles mentioned in the EC Treaty or identified in the case law, in particular the principle of proportionality (*Arnold André*, paragraph 34; *Swedish Match*, paragraph 33; and *Alliance for Natural Health and Others*, paragraph 32).

44 It is also to be observed that, by using the words 'measures for the approximation' in Article 95 EC, the authors of the Treaty intended to confer on the Community legislature a discretion, depending on the general context and the specific

circumstances of the matter to be harmonised, as regards the method of approximation most appropriate for achieving the desired result, in particular in fields with complex technical features (see Case C-66/04 *United Kingdom* v *Parliament and Council* [2005] ECR I-10553, paragraph 45, and Case C-217/04 *United Kingdom* v *Parliament and Council* [2006] ECR I-3771, paragraph 43).

11 Depending on the circumstances, those measures may consist in requiring all the Member States to authorise the marketing of the product or products concerned, subjecting such an obligation of authorisation to certain conditions, or even provisionally or definitively prohibiting the marketing of a product or products (*Arnold André*, paragraph 35; *Swedish Match*, paragraph 34; and *Alliance for Natural Health and Others*, paragraph 33).

12 It is in the light of those principles that it must be ascertained whether the conditions for recourse to Article 95 EC as a legal basis for Articles 3 and 4 of the Directive were met.

13 First of all, it is to be recalled that the Court has already found that, at the time of adoption of Directive 98/43, disparities existed between national laws on the advertising of tobacco products and that there was a trend in national legislation towards ever greater restrictions (the tobacco advertising judgment, paragraphs 96 and 97).

14 It is common ground that, as mentioned in the first recital in the preamble to Directive 2003/33, at the time of the Directive's adoption there were differences, as regards those products, between the Member States' laws, regulations and administrative provisions. According to the information given by the Commission

in its written observations, when the draft directive was submitted advertising and sponsorship in respect of such products were partially prohibited in six Member States, totally prohibited in four, and the subject of legislative proposals seeking a total prohibition in the remaining five.

Having regard, in addition, to the enlargement of the European Union through the accession of 10 new Member States, there was an appreciable risk that those disparities would increase. According to the Commission, some of the new Member States envisaged a total prohibition on advertising and sponsorship in respect of tobacco products while others accepted such acts subject to compliance with certain conditions.

The fact that, as pointed out in the eighth recital in the preamble to the Directive, at the time of its adoption negotiations were in progress under the aegis of the World Health Organisation with a view to drawing up a Framework Convention on Tobacco Control ('the WHO Convention') does not affect this finding.

It is true that the WHO Convention seeks to reduce consumption of tobacco products by providing, inter alia, for a comprehensive ban on advertising, promotion and sponsorship in respect of tobacco products. However, the Convention entered into force after the Directive and not all the Member States have ratified it.

Furthermore, the Member States which have signed the Convention are free, under Article 13(2) thereof, to adopt, within a period of five years after the Convention's entry into force, either a comprehensive ban on tobacco advertising, promotion and sponsorship or, if they are not in a position to undertake a comprehensive ban due to their constitution or constitutional principles, only certain restrictions.

- It follows that, at the time of the Directive's adoption, disparities existed between national rules on advertising and sponsorship in respect of tobacco products which justified intervention by the Community legislature.

- It is in that context that it is necessary to examine the effects of such disparities, in the fields covered by Articles 3 and 4 of the Directive, on the establishment and functioning of the internal market, in order to determine whether the Community legislature was able to use Article 95 EC as a basis for adoption of the contested provisions.

- The market in press products, like the radio market, is a market in which trade between Member States is relatively sizeable and is set to grow further as a result, in particular, of the link between the media in question and the internet, which is the cross-border medium *par excellence*.

- Having regard, first of all, to press products, the movement of newspapers, periodicals and magazines is a reality common to all the Member States and is not limited only to States sharing the same language. The proportion of publications from other Member States may even in certain cases come to more than half of the publications on the market, according to information provided at the hearing by the Parliament, the Council and the parties intervening in support of them which was not challenged. It is necessary to include, in that intra-Community trade in press products on paper, trade made possible by information society services, especially the internet which enables direct access in real time to publications distributed in other Member States.

- Also, on the date when the Directive was adopted, several Member States already prohibited advertising of tobacco products, as indicated in paragraph 46 of the present judgment, while others were about to do so. Consequently, disparities

existed between the Member States' national laws and, contrary to the applicant's submissions, those disparities were such as to impede the free movement of goods and the freedom to provide services.

- First, measures prohibiting or restricting the advertising of tobacco products are liable to impede access to the market by products from other Member States more than they impede access by domestic products.

- Second, such measures restrict the ability of undertakings established in the Member States where they are in force to offer advertising space in their publications to advertisers established in other Member States, thereby affecting the cross-border supply of services (see, to this effect, Case C-405/98 *Gourmet International Products* [2001] ECR I-1795, paragraphs 38 and 39).

- Moreover, even if, in reality, certain publications are not sold in other Member States, the fact remains that the adoption of divergent laws on the advertising of tobacco products creates, or is likely to create, incontestably, legal obstacles to trade in respect of press products and other printed publications (see, to this effect, the tobacco advertising judgment, paragraph 97). Such obstacles therefore also exist for publications placed essentially on a local, regional or national market that are sold in other Member States, even if only by way of exception or in small quantities.

- Furthermore, it is common ground that certain Member States which have prohibited the advertising of tobacco products exclude the foreign press from that prohibition. The fact that those Member States have chosen to accompany the

prohibition with such an exception confirms that, in their eyes at least, there is significant intra-Community trade in press products.

... Finally, the risk that new barriers to trade or to the freedom to provide services would emerge as a result of the accession of new Member States was real.

... The same finding must be made with regard to the advertising of tobacco products in radio broadcasts and information society services. Many Member States had already legislated in those areas or were preparing to do so. Given the increasing public awareness of the harm caused to health by the consumption of tobacco products, it was likely that new barriers to trade or to the freedom to provide services were going to emerge as a result of the adoption of new rules reflecting that development and intended to discourage more effectively the consumption of tobacco products.

... The sixth recital in the preamble to the Directive should be recalled, in which it is stated that use of information society services is a means enabling the advertising of tobacco products which is increasing as public consumption and access to such services increases and that such services, as well as radio broadcasting, which may also be transmitted via information society services, are particularly attractive and accessible to young consumers.

... Contrary to the applicant's submissions, tobacco advertising by means of those two media has a cross-border character which enables undertakings engaged in the production and sale of tobacco products to develop marketing strategies for the widening of their customer base outside the Member State from which they come.

84 Furthermore, it was conceivable that, since Article 13 of Directive 89/552 prohibited all forms of television advertising for cigarettes and other tobacco products, the disparities between national rules in respect of tobacco advertising in radio broadcasts and in information society services were liable to encourage the possibility of circumventing that prohibition by recourse to those two media.

85 The same finding can be made as regards sponsorship of radio programmes by tobacco companies. Differences between national rules had already emerged on the date when the Directive was adopted or were about to emerge and those differences were liable to impede the freedom to provide services by denying, *qua* recipients of services, radio broadcasting bodies established in a Member State where a measure prohibiting sponsorship was in force the benefit of sponsorship from tobacco companies established in another Member State, where such a measure did not exist.

86 As pointed out in the first and fifth recitals in the preamble to the Directive, those differences also meant that there was an appreciable risk of distortions of competition.

87 In any event, as the Court has already held, when the existence of obstacles to trade has been established, it is not necessary also to prove distortions of competition in order to justify recourse to Article 95 EC (see *British American Tobacco (Investments) and Imperial Tobacco*, paragraph 60).

88 It follows from the foregoing that the barriers and the risks of distortions of competition warranted intervention by the Community legislature on the basis of Article 95 EC.

77 It remains to determine whether, in the fields covered by Articles 3 and 4 of the Directive, those articles are in fact designed to eliminate or prevent obstacles to the free movement of goods or the freedom to provide services or to remove distortions of competition.

78 As regards, first of all, Article 3 of the Directive, the Court has already held that a prohibition on the advertising of tobacco products in periodicals, magazines and newspapers with a view to ensuring the free movement of those goods may be adopted on the basis of Article 95 EC, following the example of Directive 89/552, Article 13 of which, as mentioned in paragraph 64 of the present judgment, prohibits television advertising for tobacco products (the tobacco advertising judgment, paragraph 98).

79 The adoption of such a prohibition, which is designed to apply uniformly throughout the Community, is intended to prevent intra-Community trade in press products from being impeded by the national rules of one or other Member State.

80 It should be pointed out that Article 3(1) of the Directive expressly permits the insertion of advertising for tobacco products in certain publications, in particular in those which are intended exclusively for professionals in the tobacco trade.

81 Furthermore, unlike Directive 98/43, Article 8 of the Directive provides that the Member States are not to prohibit or restrict the free movement of products which comply with the Directive. This article consequently precludes Member States from impeding the movement within the Community of publications intended exclusively for professionals in the tobacco trade, inter alia by means of more restrictive provisions which they consider necessary in order to protect human health with regard to advertising or sponsorship for tobacco products.

In preventing the Member States in this way from opposing the provision of advertising space in publications intended exclusively for professionals in the tobacco trade, Article 8 of the Directive gives expression to the objective laid down in Article 1(2) of improving the conditions for the functioning of the internal market.

The same finding must be made with regard to the freedom to provide services, which is also covered by Article 8 of the Directive. Under this article, the Member States cannot prohibit or restrict that freedom where services comply with the Directive.

Following the example of Article 13 of Directive 89/552, Articles 3(2) and 4(1) of the Directive, which prohibit the advertising of tobacco products in information society services and in radio broadcasting, seek to promote freedom to broadcast by radio and the free movement of communications which fall within information society services.

Likewise, in prohibiting the sponsorship of radio programmes by undertakings whose principal activity is the manufacture or sale of tobacco products, Article 4(2) of the Directive seeks to prevent the freedom to provide services from being impeded by the national rules of one or other Member State.

It follows from the foregoing that Articles 3 and 4 of the Directive do in fact have as their object the improvement of the conditions for the functioning of the internal market and, therefore, that they were able to be adopted on the basis of Article 95 EC.

This conclusion is not called into question by the applicant's line of argument that the prohibition laid down in Articles 3 and 4 of the Directive concerns only advertising media which are of a local or national nature and lack cross-border effects.

Recourse to Article 95 EC as a legal basis does not presuppose the existence of an actual link with free movement between the Member States in every situation covered by the measure founded on that basis. As the Court has previously pointed out, to justify recourse to Article 95 EC as the legal basis what matters is that the measure adopted on that basis must actually be intended to improve the conditions for the establishment and functioning of the internal market (see, to this effect, joined Cases C-465/00, C-138/01 and C-139/01 *Österreichischer Rundfunk and Others* [2003] ECR I-4989, paragraphs 41 and 42, and Case C-101/01 *Lindqvist* [2003] ECR I-12971, paragraphs 40 and 41).

Accordingly, it must be held that, as has been stated in paragraph 78 of the present judgment, Articles 3 and 4 of the Directive are intended to improve the conditions for the functioning of the internal market.

It should be pointed out that the limits of the field of application of the prohibition set out in Articles 3 and 4 of the Directive are far from random and uncertain.

In defining the field of application of the prohibition laid down in Article 3 of the Directive, the German version alone uses the term 'printed products' ('Druckerzeugnisse') in the heading of that article, whereas the other language versions use the term 'printed media', thereby showing the will of the Community legislature not to include every type of publication in the field of application of that prohibition.

Furthermore, contrary to the applicant's argument that the term 'printed publications' used in Article 3(1) of the Directive should be interpreted broadly, encompassing bulletins produced by local associations, programmes for cultural events, posters, telephone directories and various leaflets and prospectuses, the term covers only publications such as newspapers, periodicals and magazines.

This interpretation is borne out by the fourth recital in the preamble to the Directive, which notes that the circulation in the internal market of publications such as periodicals, newspapers and magazines is subject to an appreciable risk of obstacles to free movement as a result of Member States' laws, regulations and administrative provisions which prohibit or regulate tobacco advertising in those media.

The same recital states that, in order to ensure free circulation throughout the internal market for all such media, it is necessary to limit tobacco advertising therein to those magazines and periodicals which are not intended for the general public.

In addition, the prohibition laid down in Articles 3 and 4 of the Directive is limited to various forms of advertising and sponsorship and, contrary to the provisions of Directive 98/43, does not amount to a general ban.

It follows from the foregoing that Article 95 EC constitutes an appropriate legal basis for Articles 3 and 4 of the Directive.

The first plea is accordingly not well founded and must be dismissed.

The second plea: circumvention of Article 152(4)(c) EC

Arguments of the parties

92 The applicant maintains that, since the true purpose of the prohibition laid down in Articles 3 and 4 of the Directive is not to improve the conditions for the establishment and functioning of the internal market, the Community legislature, in adopting the provisions at issue, infringed the prohibition laid down in Article 152(4)(c) EC on any harmonisation of the laws and regulations of the Member States in the field of public health.

93 The Parliament, the Council and the parties intervening in support of them, relying on the Court's case-law, submit that, given that the conditions for recourse to Article 95 EC as a legal basis are fulfilled, the objective of public health protection does not in any way preclude the measures covered by that provision from improving the conditions for the establishment and functioning of the internal market (see, to this effect, *British American Tobacco (Investments) and Imperial Tobacco*, paragraphs 60 and 62).

Findings of the Court

94 As stated in paragraph 39 of the present judgment, it is settled case-law that, provided that the conditions for recourse to Article 95 EC as a legal basis are fulfilled, the Community legislature cannot be prevented from relying on that legal basis on the ground that public health protection is a decisive factor in the choices to be made

Article 95(3) EC explicitly requires that, in achieving harmonisation, a high level of protection of human health should be guaranteed.

The first subparagraph of Article 152(1) EC provides that a high level of human health protection is to be ensured in the definition and implementation of all Community policies and activities (*British American Tobacco (Investments) and Imperial Tobacco*, paragraph 62; *Arnold André*, paragraph 33; *Swedish Match*, paragraph 32; and *Alliance for Natural Health and Others*, paragraph 31).

While it is true that Article 152(4)(c) EC excludes any harmonisation of laws and regulations of the Member States designed to protect and improve human health, that provision does not mean, however, that harmonising measures adopted on the basis of other provisions of the Treaty cannot have any impact on the protection of human health (see the tobacco advertising judgment, paragraphs 77 and 78).

With regard to the applicant's argument that public health protection largely prompted the choices made by the Community legislature when adopting the Directive, in particular so far as concerns Articles 3 and 4, suffice it to state that the conditions for recourse to Article 95 EC were met in this instance.

The Community legislature therefore did not infringe Article 152(4)(c) EC by adopting Articles 3 and 4 of the Directive on the basis of Article 95 EC.

Accordingly, the second plea is unfounded and must also be dismissed.

Third plea: breach of the duty to state reasons

Arguments of the parties

25 The applicant submits that the Directive fails to comply with the requirement to state reasons laid down in Article 253 EC. The existence of actual barriers to trade, a condition required by the Court to be met if the Community legislature is to have competence, is not mentioned with regard to the prohibition on radio advertising laid down in Article 4 of the Directive or the prohibition on advertising in information society services that is envisaged in Article 3(2). Nor does the preamble to the Directive make any reference whatsoever to the existence of significant distortions of competition concerning those services.

26 In the applicant's submission, the mere reference in the first recital in the preamble to the Directive to the existence of differences between national laws is not sufficient to justify competence on the part of the Community legislature. The same is true of the consideration that information society services and radio broadcasting have a cross-border character by their very nature.

27 So far as concerns the prohibition on advertising in the press and other printed publications, the applicant contends that, while it is stated in the first recital in the preamble to the Directive that 'certain obstacles have already been encountered', no detail is provided concerning the rules and the specific obstacles to trade which could justify competence of the Community legislature under Article 95 EC.

28 Finally, the particular circumstance that the products and services falling within Articles 3 and 4 of the Directive have only marginal cross-border effects should have entailed an assessment as to whether the extension of the prohibitions on

advertising to non-cross-border situations was a measure necessary for the functioning of the internal market within the meaning of Article 14 EC. However, no such assessment was carried out.

. The Parliament, the Council and the parties intervening in support of them observe that the Community legislature clearly set out the grounds which prompted it to adopt the Directive, in particular in the first, second, fourth, fifth and sixth recitals in the preamble, and that the duty to state reasons does not require every relevant point of fact and law to be gone into (see, to this effect, Case 87/78 *Welding* [1978] ECR 2157, paragraph 11, and *British American Tobacco (Investments) and Imperial Tobacco*, paragraph 165).

. They plead that the prohibition on the advertising of tobacco products in printed media laid down in Article 3(1) of the Directive is justified in the first and fourth recitals in the preamble thereto by reference to barriers to trade, whose intensification is to be feared in the future.

. They explain that the reasons for the prohibition on advertising in information society services are set out in the sixth recital in the preamble to the Directive.

. They state with regard to the prohibition on radio advertising that a parallel must be drawn with Directive 89/552 which, in Articles 13 and 17(2), prohibits all forms of television advertising for tobacco products and all sponsorship of television programmes by tobacco-related businesses.

Findings of the Court

- Although the statement of reasons required by Article 253 EC must show clearly and unequivocally the reasoning of the Community authority which adopted the contested measure, so as to enable the persons concerned to ascertain the reasons for 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 (Case C-122/94 *Commission v Council* [1996] ECR I-881, paragraph 29; *British American Tobacco (Investments) and Imperial Tobacco*, paragraph 165; *Arnold André*, paragraph 61; *Swedish Match*, paragraph 63; and *Alliance for Natural Health and Others*, paragraph 133).

- Furthermore, the question whether a statement of reasons satisfies the requirements must be assessed with reference not only to the wording of the measure but also to its context and to the whole body of legal rules governing the matter in question. If the contested measure clearly discloses the overall objective pursued by the Community institution concerned, it would be excessive to require a specific statement of reasons for each of the technical choices made by the institution (Case C-100/99 *Italy v Council and Commission* [2001] ECR I-5217, paragraph 64; *British American Tobacco (Investments) and Imperial Tobacco*, paragraph 166; *Arnold André*, paragraph 62; *Swedish Match*, paragraph 64; and *Alliance for Natural Health and Others*, paragraph 134).

- In the present case, the 1st, 2nd, 3rd and 12th recitals in the preamble to the Directive clearly show that the measures laid down by it prohibiting advertising and sponsorship in respect of tobacco products are designed to eliminate obstacles to the free movement of goods or services resulting from differences between the Member States' national laws in that field, while ensuring a high level of public health protection.

- In addition, the reasons which determined the adoption of such measures are specified for each of the forms of advertising and sponsorship referred to in Articles 3 and 4 of the Directive.

- As regards, first, the prohibition on advertising in printed media and in certain publications, the fourth recital in the preamble to the Directive states that an appreciable risk exists of obstacles to free movement in the internal market as a result of Member States' laws, regulations and administrative provisions and that, in order to ensure free circulation throughout the internal market for all such media, it is necessary to limit tobacco advertising therein to those magazines and periodicals which are not intended for the general public such as publications intended exclusively for professionals in the tobacco trade and to publications printed and published in third countries that are not principally intended for the Community market.

- So far as concerns, second, radio advertising and advertising transmitted via information society services, the sixth recital in the preamble to the Directive refers to the particular attraction and accessibility of these services for young people, whose consumption increases in line with the use of those media.

- Regarding, third, the prohibition on certain types of sponsorship such as that of radio programmes and activities or events having cross-border effects, the fifth recital in the preamble to the Directive explains that the prohibition in question is intended to prevent the possible circumvention of the restrictions placed on direct forms of advertising.

- These recitals clearly disclose the essential objective pursued by the Community legislature, namely the improvement of the conditions for the establishment and

functioning of the internal market by the removal of obstacles to the free movement of goods or services which serve as a medium for advertising or sponsorship in respect of tobacco products.

- Furthermore, it is to be noted that the Directive was adopted, following the annulment of Directive 98/43, on the basis of a Commission proposal which was accompanied by an explanatory memorandum that set out comprehensively the differences between the national rules in force in the Member States on advertising and sponsorship in respect of tobacco products.

- It follows that Articles 3 and 4 of the Directive satisfy the duty to state reasons laid down in Article 253 EC.

- The third plea is therefore unfounded and must be dismissed.

The fourth plea, infringement of the codecision procedure

Arguments of the parties

- The applicant contends that the Directive was adopted in breach of the codecision procedure set out in Article 251 EC. It submits that substantive amendments were made by the Council after the vote of the Parliament in plenary sitting on the proposal for a directive.

19 According to the applicant, those amendments go beyond mere linguistic or editorial adjustment of the various language versions or the mere correction of manifest factual errors. Article 10(2) of the Directive was added to the text of the Directive after its approval, and Article 11 was substantially amended compared with the version approved by the Parliament since the date of the Directive's entry into force was brought forward. Furthermore, Article 3 was amended and, in the German version at least, permits a broader interpretation of 'printed media' which enlarges the Directive's field of application.

20 The Parliament, the Council and the parties intervening in support of their submissions that, under the codecision procedure, measures are not adopted solely by the Council but, pursuant to Article 254 EC, are jointly signed by the President of the Parliament and by the President of the Council who, by their signatures, take formal notice that the Directive corresponds to the Commission's proposal coupled with the amendments approved by the Parliament.

21 It would be incompatible with the drafting quality requirements resulting from the existence of a large number of official languages to require the text approved by the Parliament and the text adopted in accordance with the codecision procedure to be strictly identical.

22 In the submission of the Parliament, the Council and the parties intervening in support of them, the corrections made to the Directive do not go beyond the limits of the legal-linguistic finalisation of a text, whether it be a question of Article 3(1), of the Directive, relating to the press and printed publications, or Article 10(2), relating to communication by the Member States to the Commission of the main provisions of national law which they adopt in the field of the Directive.

23 They observe that the amendment to Article 11, which concerns the Directive's entry into force, was made in accordance with the manual of precedents for acts of

the Council, which envisages the entry into force of directives on the day of their publication in order to keep the number of dates as small as possible.

Findings of the Court

71 By the present action, the applicant seeks to call into question the validity of Articles 3 and 4 of the Directive alone.

72 Accordingly, the plea alleging infringement of the codecision procedure laid down in Article 251 EC with regard to the adoption of Articles 10 and 11 of the Directive in their final form is immaterial to the assessment of the validity of Articles 3 and 4 of the Directive.

73 In any event, the amendments to Articles 10 and 11 of the Directive were the subject of a corrigendum, a fact which is indeed not disputed, and this corrigendum was signed pursuant to Article 251 EC by the President of the Parliament and by the President of the Council, and then published in the *Official Journal of the European Union*.

74 The amendments made to Article 3 of the Directive, as the Advocate General has rightly stated in point 197 of his Opinion, do not appear to have exceeded the limits applicable when the various language versions of a Community measure are harmonised.

75 The fourth plea must therefore necessarily be dismissed.

The fifth plea: breach of the principle of proportionality

Arguments of the parties

25 The applicant submits that the prohibitions laid down in Articles 3 and 4 of the Directive infringe the principle of proportionality laid down in the third paragraph of Article 5 EC.

26 These prohibitions, which are drafted in extremely broad terms, cover almost exclusively situations of a local or regional nature and seriously compromise fundamental rights in the economic sectors concerned, rights which are protected by the Community legislature.

27 That is true of freedom of the press and of expression which, in accordance with the Court's case-law relating to Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 ('the ECHR'), is ensured in particular, from the point of view of the financing of press products, by advertising revenue and unimpeded commercial communication.

28 The extremely general way in which the prohibitions on advertising laid down in Articles 3 and 4 of the Directive have been formulated and in which the term 'advertising' has been defined means that the prohibition on advertising covers any indirect effect on the sale of tobacco products of any form of commercial communication and that the editorial contributions of journalists on certain subjects having a link with the production or distribution of tobacco products may be covered by that prohibition.

15 The prejudice caused thereby to freedom of the press is, in the applicant's submission, all the greater because the press derives 50% to 60% of its income not from the sale of its products but from advertising revenue and in Europe today the media are experiencing a structural economic crisis that is very deep.

16 Furthermore, the inappropriateness of enacting the prohibitions laid down in Articles 3 and 4 of the Directive is shown by the fact that the number of cases in which products or services have a cross-border character is marginal and out of all proportion to the purely local or regional situations, 99% of which have no cross-border effect whatever.

17 It follows that the extension of the prohibitions on advertising to purely national situations is disproportionate vis-à-vis the alleged objective of harmonisation of the internal market.

18 In any event, that measure is neither necessary nor appropriate. The Directive itself contains an appropriate solution in Article 3(1) since press products from third countries not principally intended for the Community market are not subject to that prohibition on advertising. No explanation is given as to why this solution would not also have sufficed for press products from the Community.

19 Likewise, no reason has been given regarding the refusal of the alternative proposed by the applicant of limiting the prohibitions on advertising to activities and services having cross-border effects, a solution which was indeed adopted in Article 5 of the Directive with regard to sponsorship.

108 The applicant thus considers that, if the objective of the Community legislature is weighed against the prejudice to fundamental rights, the contested provisions contained in Articles 3 and 4 of the Directive are inappropriate. It is only as a last resort that the Community legislature could have adopted measures as restrictive as the total prohibition on advertising tobacco products in the press.

109 The Parliament, the Council and the parties intervening in support of them contend that means less restrictive than a directive prohibiting advertising in all printed media and in radio broadcasts were not available to the Community legislature in order to achieve the objective of harmonisation of the internal market.

110 They submit that the Community legislature did not resort to a total prohibition on the advertising of tobacco products. Such advertising was not prohibited in publications intended for professionals in the tobacco trade or in publications printed and published in third countries when those publications are not principally intended for the Community market. Likewise, such advertising was not prohibited in information society services unless it was prohibited in the press and other printed publications. They add that, contrary to the applicant's contention, the term 'printed publications' covers only newspapers, magazines and periodicals.

111 They explain, with regard to the prejudice pleaded by the applicant to the fundamental rights of freedom of the press and freedom of expression, that freedom of expression may, under Article 10(2) of the ECHR, be subject to certain restrictions or penalties, prescribed by law, which are necessary in a democratic society in the interests of the protection of health or morals and that in the present case the prohibition relates to 'any form of commercial communication with the aim or direct or indirect effect of promoting a tobacco product', as is apparent from the definition of 'advertising' in Article 2(b) of the Directive. Consequently, editorial contributions of journalists are not affected by Articles 3 and 4 of the Directive.

They submit that the Court has already held that the 'discretion enjoyed by the [competent] authorities in determining the balance to be struck between freedom of expression and the abovementioned objectives varies for each of the goals justifying restrictions on that freedom and depends on the nature of the activities in question. When the exercise of the freedom does not contribute to a discussion of public interest . . . review is limited to an examination of the reasonableness and proportionality of the interference. This holds true for the commercial use of freedom of expression, particularly in a field as complex and fluctuating as advertising' (Case C-71/02 *Karner* [2004] ECR I-3025, paragraph 51).

They contend that the Community legislature did not exceed the broad discretion which it enjoys in an area such as that involved in the present case, which entails political, economic and social choices on its part, and in which it is called upon to undertake complex assessments, and that the prohibitions laid down in Articles 3 and 4 of the Directive are necessary and appropriate for achieving the objective of harmonisation of the internal market at a high level of health protection.

Findings of the Court

The principle of proportionality, which is one of the general principles of Community law, requires the means employed by a Community provision to be appropriate for attaining the objective pursued and not to go beyond what is necessary to achieve it (see, inter alia, Case 13/83 *Parliament and Others* [1987] ECR 1587, paragraph 15; Case C-339/92 *ADM Ölmühlen* [1993] ECR I-6473, paragraph 13; and Case C-210/00 *Käserei Champignon Hofmeister* [2002] ECR I-6453, paragraph 59).

With regard to judicial review of the conditions referred to in the previous paragraph, the Community legislature must be allowed a broad discretion in an area

such as that involved in the present case, which entails political, economic and social choices on its part, and in which it is called upon to undertake complex assessments. The legality of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institutions are seeking to pursue (see, to this effect, Case C-84/94 *United Kingdom v Council* [1996] ECR I-5755, paragraph 58; Case C-233/94 *Germany v Parliament and Council* [1997] ECR I-2405, paragraphs 55 and 56; Case C-157/96 *National Farmers' Union and Others* [1998] ECR I-2211, paragraph 61; and *British American Tobacco (Investments) and Imperial Tobacco*, paragraph 123).

84 Here, it is apparent from the analysis set out in paragraphs 72 to 80 of the present judgment that Articles 3 and 4 of the Directive may be regarded as measures appropriate for achieving the objective that they pursue.

85 Nor, given the obligation on the Community legislature to ensure a high level of human health protection, do they go beyond what is necessary in order to achieve that objective.

86 The prohibition on the advertising of tobacco products in printed media which is laid down in Article 3 of the Directive does not cover publications intended for professionals in the tobacco trade or published in third countries and not intended principally for the Community market.

87 Furthermore, contrary to the applicant's assertions, it was not possible for the Community legislature to adopt, as a less restrictive measure, a prohibition on advertising from which publications intended for a local or regional market would be exempted, given that such an exception would have rendered the field of application of the prohibition on the advertising of tobacco products unsure and uncertain, which would have prevented the Directive from achieving its objective of harmonisation of national law on the advertising of tobacco products (see, to this effect, *Lindqvist*, paragraph 41).

50 The same finding must be made with regard to the prohibition, laid down in Articles 3(2) and 1(1) of the Directive, on the advertising of tobacco products in information society services and in radio broadcasts.

51 The prohibition on the advertising of tobacco products in those media, following the example of the prohibition laid down in Article 13 of Directive 89/552, cannot be regarded as disproportionate and can, moreover, be justified by the concern to prevent circumvention, made possible through media convergence, of the prohibition applicable to printed media through increased recourse to those two media.

52 As regards the prohibition on sponsorship of radio programmes which is laid down in Article 4(2) of the Directive, it is not apparent from the preamble to the Directive, particularly the fifth recital, that in not limiting such a measure to activities or events with cross-border effects, following the example of Article 17 of Directive 89/552, the Community legislature exceeded the limits of the discretion available to it in this area.

53 This interpretation is not called into question by the applicant's argument that prohibitions of this kind would have the effect of denying the press significant advertising income, or even contribute to the closure of certain undertakings, and would, ultimately, prejudice the freedom of expression guaranteed by Article 10 of the ECHR.

54 In accordance with settled case law, whilst the principle of freedom of expression is expressly recognised by Article 10 of the ECHR and constitutes one of the fundamental pillars of a democratic society, it nevertheless follows from Article 10(2) that freedom of expression may also be 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 that provision 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 this effect, Case C-368/95 *Familiapress* [1997] ECR I-3689, paragraph 26; Case C-60/00 *Carpenter* [2002] ECR I-6279, paragraph 42; Case C-112/00 *Schmidberger* [2003] ECR I-5659, paragraph 79; and *Karner*, paragraph 50).

91 Also, as has been correctly pointed out by the Parliament, the Council and the parties intervening in support of them, the discretion enjoyed by the competent authorities in determining the balance to be struck between freedom of expression and the objectives in the public interest which are referred to in Article 10(2) of the ECHR varies for each of the goals justifying restrictions on that freedom and depends on the nature of the activities in question. When a certain amount of discretion is available, review is limited to an examination of the reasonableness and proportionality of the interference. This holds true for the commercial use of freedom of expression in a field as complex and fluctuating as advertising (see, in particular, *Karner*, paragraph 51).

92 In the present case, even assuming that the measures laid down in Articles 3 and 4 of the Directive prohibiting advertising and sponsorship have the effect of weakening freedom of expression indirectly, journalistic freedom of expression, as such, remains unimpaired and the editorial contributions of journalists are therefore not affected.

93 It must therefore be found that the Community legislature did not, by adopting such measures, exceed the limits of the discretion which it is expressly accorded.

94 It follows that those measures cannot be regarded as disproportionate.

79 The fifth plea is therefore unfounded and must be dismissed.

80 Since none of the pleas relied upon by the applicant in support of its action is well founded, the action should be dismissed.

Costs

81 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Parliament and the Council have applied for costs to be awarded against the Federal Republic of Germany, and the latter has been unsuccessful, it must be ordered to pay the costs. Under Article 69(4) of the Rules of Procedure, Member States and institutions which intervene in the proceedings are to bear their own costs.

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

1. **Dismisses the action;**

2. **Orders the Federal Republic of Germany to pay the costs;**

3. **Orders the Kingdom of Spain, the French Republic, the Republic of Finland and the Commission of the European Communities each to bear their own costs.**

[Signatures]

ARRÊT DU TRIBUNAL DE LA FONCTION PUBLIQUE
(deuxième chambre)
13 décembre 2007 *

« Fonction publique — Fonctionnaires — Évaluation — Rapport d'évolution de carrière — Exercice d'évaluation pour 2004 — Recours en annulation — Motivation — Erreur manifeste d'appréciation »

Dans l'affaire F-28/06,

ayant pour objet un recours introduit au titre des articles 236 CE et 152 EA,

Paulo Sequeira Wandschneider, fonctionnaire de la Commission des Communautés européennes, demeurant à Bruxelles (Belgique), représenté initialement par M^es^ G. Vandersanden et C. Ronzi, avocats, puis par M^es^ G. Vandersanden, C. Ronzi et L. Levi, avocats,

partie requérante,

contre

Commission des Communautés européennes, représentée par M. G. Berscheid et M^me^ C. Berardis-Kayser, en qualité d'agents,

partie défenderesse,

* Langue de procédure : le français.

LE TRIBUNAL (deuxième chambre),

composé de M. S. Van Raepenbusch, président, M^me^ I. Boruta (rapporteur) et M. H. Kanninen, juges,

greffier : M. S. Boni, administrateur,

vu la procédure écrite et à la suite de l'audience du 5 juillet 2007,

rend le présent

Arrêt

1 Par requête parvenue au greffe du Tribunal le 17 mars 2006 par télécopie (le dépôt de l'original étant intervenu le même jour), M. Sequeira Wandschneider demande l'annulation de son rapport d'évolution de carrière établi pour la période du 1^er^ janvier au 31 décembre 2004 (ci-après le « REC 2004 ») et la condamnation de la Commission des Communautés européennes à lui payer la somme de 5 000 euros en réparation du préjudice matériel et moral qu'il aurait subi du fait du REC 2004.

Cadre juridique

2 L'article 43 du statut des fonctionnaires des Communautés européennes (ci-après le « statut ») dispose :

« La compétence, le rendement et la conduite dans le service de chaque fonctionnaire, font l'objet d'un rapport périodique établi au moins tous les deux ans, dans les conditions fixées par chaque institution conformément à l'article 110. […] »

3 L'article 1er, paragraphes 1 et 2, des dispositions générales d'exécution de l'article 43 du statut, adoptées par la Commission le 23 décembre 2004 (ci-après les « DGE »), dispose :

« 1. Conformément à l'article 43 du statut […], un exercice d'évaluation est organisé au début de chaque année. La période de référence pour l'évaluation s'étend du 1[er] janvier au 31 décembre de l'année précédente. À cette fin, un rapport annuel couvrant la période de référence, appelé rapport d'évolution de carrière, est établi pour chaque fonctionnaire au sens de l'article [1er] du statut […], qui a été dans une position d'activité ou de détachement dans l'intérêt du service, pendant au moins un mois continu au cours de la période de référence. […]

2. L'exercice d'évaluation a notamment pour objet d'évaluer le rendement, les compétences et la conduite dans le service du titulaire du poste. Une note de mérite est attribuée sur la base des appréciations relatives à chacun de ces trois volets, comme indiqué dans le modèle de rapport joint en annexe II. »

4 Les acteurs de la procédure d'évaluation sont, premièrement, l'évaluateur, qui est, en règle générale, le chef d'unité, en tant que supérieur hiérarchique direct du fonctionnaire évalué (article 2, paragraphe 2, et article 3, paragraphes 1 et 3, des DGE), deuxièmement, le validateur, qui est, en règle générale, le directeur, en tant que supérieur hiérarchique direct de l'évaluateur (article 2, paragraphe 3, et article 3, paragraphe 1, des DGE), et, troisièmement, l'évaluateur d'appel, qui

est, en règle générale, le directeur général, en tant que supérieur hiérarchique direct du validateur (article 2, paragraphe 4, et article 3, paragraphe 1, des DGE).

5 Toutefois, selon l'article 3, paragraphe 3, troisième alinéa, des DGE :

« Pour les titulaires de poste ayant formellement mis en œuvre la procédure prévue par la décision de la Commission du 4 avril 2002 […] concernant la conduite à tenir en cas de suspicion d'actes répréhensibles graves et dont la note de mérite visée à l'article 1[er,] paragraphe 2, figurant dans le rapport d'évolution de carrière établi par l'évaluateur et le validateur, est inférieure de 1 point à celle figurant dans son dernier rapport, l'évaluateur d'appel est le directeur général de la direction générale [du personnel et de l'administration]. […] »

6 Quant au déroulement concret de la procédure d'évaluation, l'article 8, paragraphe 4, des DGE dispose que, dans les huit jours ouvrables suivant la demande de l'évaluateur, le titulaire de poste établit une autoévaluation qui est intégrée dans le rapport d'évolution de carrière (ci-après le « REC »). Dix jours ouvrables au plus tard après communication de l'autoévaluation par le titulaire du poste, l'évaluateur et le titulaire de poste tiennent un dialogue formel qui, en application de l'article 8, paragraphe 5, quatrième alinéa, des DGE, porte sur trois éléments : l'évaluation du titulaire de poste pendant la période de référence, la fixation des objectifs pour l'année qui suit la période de référence et la définition d'une carte de formation. À la suite de l'entretien entre le fonctionnaire et l'évaluateur, le REC est établi par l'évaluateur et le validateur. Le fonctionnaire évalué a alors le droit de demander un entretien avec le validateur, lequel a la faculté soit de modifier, soit de confirmer le REC. Ensuite, le fonctionnaire évalué peut demander au validateur de saisir le comité paritaire d'évaluation prévu à l'article 9 des DGE (ci-après le « CPE »), dont le rôle consiste à vérifier si le REC a été établi équitablement, objectivement, c'est-à-dire dans la mesure du possible sur des éléments factuels, et conformément aux DGE et au guide d'évaluation. Le CPE émet un avis motivé sur la base duquel l'évaluateur d'appel soit modifie, soit confirme le REC. Si l'évaluateur d'appel s'écarte des recommandations figurant dans cet avis, il est tenu de motiver sa décision.

7 Selon le formulaire ad hoc de REC, repris à l'annexe II des DGE (ci-après le « formulaire ad hoc »), il est prévu, pour chacune des rubriques d'évaluation, l'attribution d'une note ainsi que d'une appréciation correspondante. S'agissant de la note, le nombre maximal de points est de 10 pour la rubrique 6.1 « Rendement », de 6 pour la rubrique 6.2 « Aptitudes (compétences) » et de 4 pour la rubrique 6.3 « Conduite dans le service ». Quant à l'appréciation, elle va de « insuffisant » à « très bon », voire « exceptionnel » pour les rubriques 6.1 « Rendement » et 6.2 « Aptitudes (compétences) », les appréciations intermédiaires étant, par ordre croissant, « faible », « suffisant » et « bon ».

Faits à l'origine du litige

8 Le requérant était, pendant la période allant du 1er janvier au 31 décembre 2004 (ci-après la « période de référence »), fonctionnaire de la Commission de grade A 6 (renommé A*10 à compter du 1er mai 2004, puis AD 10 à compter du 1er mai 2006). Il était affecté à la direction général (DG) « Commerce », où il était chargé, au sein de l'unité B.3 « Instruments de défense commerciale : enquêtes II » (ci-après l'« unité B.3 ») puis, à compter du 16 septembre 2004, au sein de l'unité B.2 « Instruments de défense commerciale : enquête I. Monitoring des mesures de pays tiers » (ci-après l'« unité B.2 »), de procéder à des enquêtes antidumping.

9 Au cours de la période de référence, le requérant a terminé l'analyse de l'aspect « préjudice et intérêt communautaire » dans le cadre d'un réexamen de mesures parvenant à expiration (cas R 260). Il a également procédé à l'analyse de l'aspect « dumping » dans deux enquêtes ouvertes à la suite de demandes de réexamen au titre de « nouvel exportateur » (cas R 315 et R 346) ainsi que dans une enquête ouverte dans le cadre d'un réexamen intermédiaire partiel (cas R 347).

10 Reprochant à sa hiérarchie de favoriser l'industrie communautaire lors des procédures d'enquête et d'avaliser ainsi des méthodes de travail qui porteraient atteinte à son autorité d'enquêteur, le requérant a introduit, le 20 juin 2003, une

plainte auprès de l'Office européen de lutte antifraude (OLAF). Cette plainte a été classée par l'OLAF pour absence d'atteinte aux intérêts financiers de la Communauté européenne, ce dont le requérant a été informé par une note de l'OLAF du 11 août 2003.

11 Le 19 janvier 2005, le chef de l'unité B.3 a établi, en application de l'article 4, paragraphe 3, premier alinéa, des DGE, un rapport simplifié concernant le requérant, portant sur la période du 1er janvier au 15 septembre 2004 (ci-après le « rapport simplifié 2004 »).

12 Le 7 avril 2005, le chef de l'unité B.2 a, en qualité d'évaluateur du requérant, établi le projet de REC 2004 de celui-ci. Dans ce projet, il était attribué à l'intéressé la note globale de 12/20, à savoir 6/10 au titre du rendement, 4/6 au titre de la compétence et 2/4 au titre de la conduite dans le service.

13 Le 8 avril 2005, le directeur de la direction B « Défense commerciale » (ci-après la « direction B ») a, en qualité de validateur du requérant, contresigné le projet de REC 2004.

14 Le 14 avril 2005, le requérant a demandé la révision de son REC 2004.

15 Le 22 avril 2005, le validateur a eu un entretien avec le requérant et a confirmé le REC 2004 le 29 avril 2005.

16 Le 31 mai 2005, le requérant a saisi le CPE, lequel, dans un avis adopté à l'unanimité le 3 juin 2005, a considéré que l'appel n'était pas fondé.

17 Le 13 juin 2005, le directeur général de la DG « Commerce » a, en qualité d'évaluateur d'appel du requérant, visé le REC 2004 et l'a rendu définitif.

18 Le 5 septembre 2005, le requérant a introduit une réclamation au titre de l'article 90, paragraphe 2, du statut, par laquelle il demandait l'annulation du REC 2004 ainsi que la condamnation de la Commission à lui verser, en réparation du préjudice moral et matériel subi, la somme de 5 000 euros.

19 Par décision du 7 décembre 2005, dont le requérant a accusé réception le 13 décembre suivant, l'autorité investie du pouvoir de nomination (ci-après l'« AIPN ») a rejeté cette réclamation.

Conclusions des parties et procédure

20 Le requérant conclut à ce qu'il plaise au Tribunal :

— annuler le REC 2004 ;

— pour autant que de besoin, annuler la décision du 7 décembre 2005 rejetant sa réclamation introduite en application de l'article 90, paragraphe 2, du statut ;

— condamner la Commission à lui allouer le versement de dommages et intérêts en réparation du préjudice moral et matériel subi évalué ex aequo et bono à 5 000 euros ;

— condamner la Commission aux dépens.

21 La Commission conclut à ce qu'il plaise au Tribunal :

— rejeter le recours en annulation comme en partie irrecevable et en partie non fondé, sinon comme entièrement non fondé ;

— rejeter la demande de dommages et intérêts comme irrecevable, à titre subsidiaire comme partiellement irrecevable et partiellement non fondée, à titre plus subsidiaire comme entièrement non fondée, et plus subsidiairement encore, en réduire substantiellement le montant ;

— statuer sur les dépens comme de droit.

22 Par note parvenue au greffe du Tribunal le 23 octobre 2006 par télécopie (le dépôt de l'original étant intervenu le 25 octobre suivant), le requérant a soumis au Tribunal une offre de preuve tendant à l'audition du fonctionnaire ayant été son chef de section lors de la période allant du 1er janvier au 15 septembre 2004.

23 À la suite du prononcé de l'arrêt du Tribunal de première instance du 7 mars 2007, Sequeira Wandschneider/Commission (T-110/04, RecFP p. I-A-2-73 et II-A-2-533), les parties ont été invitées à présenter leurs observations sur les conséquences à tirer, dans le cadre de la présente affaire, dudit arrêt.

24 Par ordonnance du président de la deuxième chambre du Tribunal du 11 juin 2007, les affaires F-65/05 et F-28/06 ont été jointes au fins de la procédure orale.

25 Avant l'ouverture de l'audience, une réunion informelle s'est tenue entre les parties afin d'examiner la possibilité d'un règlement amiable. Les parties ne sont toutefois pas parvenues à un accord.

Sur l'objet du recours

26 Il convient de rappeler que, conformément à une jurisprudence constante, une demande tendant à l'annulation d'une décision de rejet d'une réclamation a pour effet de saisir le juge communautaire de l'acte faisant grief contre lequel ladite réclamation a été présentée (arrêt de la Cour du 17 janvier 1989, Vainker/Parlement, 293/87, Rec. p. 23, point 8 ; arrêts du Tribunal de première instance du 23 mars 2004, Theodorakis/Conseil, T-310/02, RecFP p. I-A-95 et II-427, point 19, et du 9 juin 2005, Castets/Commission, T-80/04, RecFP p. I-A-161 et II-729, point 15). En l'espèce, l'acte faisant grief contre lequel la réclamation a été présentée est le REC 2004. Il convient donc de considérer que la demande d'annulation du REC 2004 (premier chef de conclusions) et la demande d'annulation de la décision de l'AIPN portant rejet explicite de la réclamation (deuxième chef de conclusions) ont le même objet, en l'occurrence une demande d'annulation du REC 2004.

Sur les conclusions tendant à l'annulation du REC 2004

27 Le requérant soulève, en substance, cinq moyens, tirés, premièrement, de l'existence d'irrégularités de procédure, deuxièmement, de la violation de l'obligation de motivation, troisièmement, de l'existence d'erreurs manifestes d'appréciation, quatrièmement, de la violation du devoir de sollicitude et du principe de bonne administration, et cinquièmement, de l'existence d'un détournement de pouvoir et d'un harcèlement moral.

1. *Sur le premier moyen, tiré de l'existence d'irrégularités de procédure*

28 Le premier moyen se subdivise en six griefs, concernant respectivement l'identité de la personne ayant établi le rapport simplifié 2004, l'identité de la personne ayant établi le projet de REC 2004 en qualité d'évaluateur, le non-respect des dispositions de l'article 8, paragraphe 4, des DGE, relatives à l'autoévaluation des fonctionnaires, la composition du CPE, le non-respect de la procédure d'appel et le non-respect des droits de la défense.

Sur le premier grief, tiré de l'identité de la personne ayant réellement établi le rapport simplifié 2004

Arguments des parties

29 Le requérant soutient que le rapport simplifié 2004, quoique formellement signé par le chef de l'unité B.3, aurait en fait été établi par le directeur de la direction B, en méconnaissance des dispositions de l'article 4, paragraphe 3, premier alinéa, des DGE.

30 À l'appui de ce grief, le requérant expose que figure, à la rubrique 6.1 « Rendement » du rapport simplifié 2004, une mention selon laquelle « les discussions sur la nécessité d'une formation et d'un 'coaching' n'ont pas été suivies d'effet ». Or, le chef de l'unité B.3 n'aurait jamais pu être l'auteur d'une telle mention, puisque, lors du dialogue formel du 19 février 2004 tenu dans le cadre de l'établissement du REC pour l'exercice d'évaluation 2003, il aurait donné son accord au plan de formation que lui avait soumis le requérant, ainsi que l'établit la rubrique 4.2 « Objectifs de développement personnel » du rapport simplifié 2004, et n'aurait pas abordé la question d'un éventuel « coaching ». L'auteur de ce rapport simplifié 2004 serait en revanche le directeur de la direction B, lequel, en identifiant et en approuvant les actions de formation du requérant, se serait immiscé dans une tâche relevant de la responsabilité de l'évaluateur.

31 La Commission conclut au rejet du grief.

Appréciation du Tribunal

32 Le requérant soutient que le rapport simplifié 2004 aurait été établi par le directeur de la direction B, et non par le chef de l'unité B.3.

33 À cet égard, il convient de constater, d'une part, ainsi qu'il ressort clairement de la lecture des rubriques 1.2 « Évaluateur » et 7.1 « Visa de l'évaluateur » du rapport simplifié 2004, que le chef de l'unité B.3 a signé celui-ci en qualité d'évaluateur.

34 D'autre part, le requérant n'avance aucun élément probant tendant à établir que le rapport simplifié 2004, quoique signé par le chef de l'unité B.3, aurait eu pour véritable auteur le directeur de la direction B. En particulier, contrairement à ce que prétend le requérant, le fait que figure, à la rubrique 6.1 « Rendement » du rapport simplifié 2004, la mention selon laquelle « les discussions sur la nécessité d'une formation et d'un 'coaching' [pour permettre au requérant d'acquérir une plus grande souplesse dans l'approche des enquêtes] n'[auraie]nt pas été suivies d'effet » n'est pas de nature à constituer une telle preuve. En effet, même si, ainsi que l'atteste la rubrique 4.2 « Objectifs de développement personnel » du rapport simplifié 2004, le chef de l'unité B.3 a, lors du dialogue du 19 février 2004 tenu dans le cadre de l'établissement du REC pour l'exercice d'évaluation 2003 (ci-après le « REC 2003 »), approuvé le plan de formation proposé par le requérant et n'a pas évoqué l'hypothèse d'un « coaching », il ne saurait être exclu que, ultérieurement à ce dialogue, le requérant se soit vu suggérer par sa hiérarchie de suivre d'autres formations et de se soumettre à un « coaching » et que l'intéressé ait refusé de donner suite à de telles suggestions. Au demeurant, il convient de relever que le requérant lui-même, dans l'appel qu'il a formé contre son REC 2004, a admis avoir refusé de se soumettre à un « coaching » hors de son unité.

35 Le premier grief doit donc être rejeté.

Sur le deuxième grief, tiré de l'identité de la personne ayant établi le REC 2004 en qualité d'évaluateur

Arguments des parties

36 Le requérant soutient que le REC 2004, quoique formellement signé par le chef de l'unité B.2, aurait en fait été établi par le directeur de la direction B.

37 À l'appui d'une telle affirmation, l'intéressé avance trois arguments. Premièrement, le système informatique Sysper 2 lui-même aurait mentionné que « [le directeur de la direction B] a terminé [l']évaluation », ce qui mettrait en évidence que celui-ci aurait été son évaluateur. Deuxièmement, dans une note du 19 décembre 2003 adressée au directeur général de la DG « Commerce », le directeur de la direction B aurait demandé à ce dernier de l'aider à exclure le requérant de son poste d'enquêteur au sein de la DG « Commerce ». Or, seule une personne chargée de l'évaluation aurait pu être l'auteur d'une telle note. Troisièmement, le fait que le directeur de la direction B approuverait systématiquement les REC établis pour les fonctionnaires de cette direction tendrait à prouver qu'il en serait le véritable auteur.

38 Dans l'hypothèse où le Tribunal n'accueillerait pas la thèse selon laquelle le directeur de la direction B aurait été le véritable évaluateur, le requérant soutient que, en tout état de cause, le chef de l'unité B.2 se serait borné, dans les commentaires qu'il a apposés dans le REC 2004, à reprendre la plupart des appréciations que le chef de l'unité B.3 avait portées dans le rapport simplifié 2004, de telle sorte qu'il n'aurait pas procédé à une véritable évaluation.

39 La Commission rétorque que, contrairement aux allégations du requérant, le REC 2004 aurait été établi par le chef de l'unité B.2.

Appréciation du Tribunal

40 Le requérant soutient que le REC 2004 aurait été établi par le directeur de la direction B, alors que les dispositions de l'article 3, paragraphe 1, des DGE, prescrivaient qu'il le soit par le chef de l'unité B.2.

41 À cet égard, il convient tout d'abord de constater qu'il ressort clairement de la lecture des rubriques 1.2 « Évaluateur » et 7.1 « Visa de l'évaluateur » du REC 2004 que le chef de l'unité B.2 a signé le projet de REC 2004 en sa qualité d'évaluateur.

42 Par ailleurs, aucun des trois arguments avancés par le requérant n'est de nature à étayer l'allégation de celui-ci selon laquelle le validateur aurait, nonobstant les indications figurant dans les rubriques citées au point précédent, assuré les fonctions d'évaluateur.

43 En effet, s'agissant du premier argument tiré de ce que le système informatique Sysper 2 porterait la mention selon laquelle « [le directeur de la direction B] a terminé [l']évaluation », il convient de rappeler que, aux termes de l'article 2, paragraphe 3, des DGE, le validateur contresigne le rapport établi initialement par l'évaluateur et que, selon l'article 8, paragraphe 8, premier alinéa, desdites DGE, l'évaluateur et le validateur finalisent le REC. Il résulte de ces dispositions, ainsi que l'a d'ailleurs confirmé le Tribunal de première instance dans l'arrêt du 25 octobre 2005, Fardoom et Reinard/Commission (T-43/04, RecFP p. I-A-329 et II-1465, point 64), que le validateur doit être regardé comme un évaluateur au sens plein du terme. Par conséquent, le requérant ne saurait tirer argument de la mention susrappelée, figurant dans le système informatique Sysper 2, pour conclure que son supérieur hiérarchique direct aurait abandonné au validateur le soin d'assurer les fonctions d'évaluateur (voir, en ce sens, arrêt Sequeira Wandschneider/Commission, précité, point 51).

44 Quant au deuxième argument, fondé sur la note adressée le 19 décembre 2003 par le directeur de la direction B au directeur général de la DG « Commerce », il ne saurait non plus emporter la conviction. Certes, le directeur de la direction B a écrit dans cette note la mention suivante : « Travailler avec [le requérant] est devenu presque impossible. Ceci est aussi vrai pour pas mal de ses collègues de l'[unité B.3] qui refusent de travailler en équipe avec lui. Il n'y a qu'une solution (à part celle du [REC 2003]) : — qu'on le mute avec son poste ailleurs dans la DG ['Commerce'], dans un domaine où il n'est plus directement concerné par des décisions dans des cas précis et sensibles […] ».

45 Toutefois, il y a lieu de rappeler que, selon la jurisprudence, des difficultés relationnelles internes, lorsqu'elles causent des tensions préjudiciables au bon fonctionnement du service, peuvent justifier, dans l'intérêt du service, le transfert d'un fonctionnaire, afin de mettre fin à une situation administrative devenue intenable (voir, en ce sens, arrêts de la Cour du 12 novembre 1996, Ojha/Commission, C-294/95 P, Rec. p. I-5863, point 41 ; arrêt du Tribunal de première instance du 28 mai 1998, W/Commission, T-78/96 et T-170/96, RecFP p. I-A-239 et II-745, point 88). Or, en l'espèce, si la note du 19 décembre 2003, écrite au demeurant antérieurement à la période de référence, peut être regardée comme envoyée par le directeur de la direction B au directeur général de la DG « Commerce » afin d'informer celui-ci de la nécessité de trouver une solution permettant de mettre fin aux difficultés relationnelles existant entre le requérant et sa hiérarchie et ses collègues, elle ne saurait constituer par elle-même un indice tendant à prouver que le directeur de la direction B aurait été, en lieu et place du chef de l'unité B.2, l'évaluateur du requérant au titre du REC 2004.

46 Enfin, le troisième argument, tiré de ce que le directeur de la direction B approuverait systématiquement les REC établis par les évaluateurs, ne saurait être accueilli ; une telle circonstance, à la supposer confirmée, n'étant pas par elle-même de nature à établir la réalité des allégations du requérant selon lesquelles le directeur de la direction B aurait été l'évaluateur réel. En effet, le validateur dispose, parmi les possibilités qui lui sont offertes lorsqu'il examine les projets de REC établis par les évaluateurs, de la faculté d'approuver purement et simplement lesdits projets.

47 Le requérant n'est pas non plus fondé à soutenir à titre subsidiaire que le chef de l'unité B.2 se serait borné, dans les commentaires qu'il a apposés dans le REC 2004, à reprendre la plupart des appréciations portées par le chef de l'unité B.3 dans le rapport simplifié 2004 et que, pour ce motif, il n'aurait pas procédé à une véritable évaluation de la période couverte par le rapport simplifié 2004.

48 Certes, il ressort des pièces du dossier que le chef de l'unité B.2 a repris, dans les rubriques 6.1 « Rendement », 6.2 « Aptitudes (compétences) » et 6.3 « Conduite dans le service » du REC 2004, les commentaires que le chef de l'unité B.3 avait insérés dans le rapport simplifié 2004, relatifs aux prestations du requérant au titre de la période allant du 1er janvier au 15 septembre 2004.

49 Toutefois, d'une part, il convient de rappeler qu'il ressort des dispositions combinées de l'article 1er, paragraphes 1 et 2, et de l'article 4, paragraphes 1 et 2, des DGE que, dans le cadre de l'exercice d'évaluation organisé au début de chaque année au titre de la période d'évaluation s'étendant du 1er janvier au 31 décembre de l'année précédente, le REC établi à cette fin a pour objet d'évaluer le rendement, les compétences et la conduite dans le service dont a fait preuve le titulaire de poste au cours de l'ensemble de la période d'évaluation. L'évaluateur est donc tenu, lorsqu'il établit le projet de REC, de procéder à l'évaluation, au regard des objectifs antérieurement fixés, des prestations effectuées par le titulaire de poste au cours de l'ensemble de la période d'évaluation, alors même qu'il n'aurait pas été le supérieur hiérarchique de celui-ci pendant une fraction déterminée de ladite période. La finalité du rapport simplifié est donc de fournir à l'évaluateur les informations nécessaires à l'appréciation des fonctions que le noté a exercées lors de cette fraction déterminée de la période d'évaluation. Dès lors, la circonstance que le chef de l'unité B.2 ait repris les appréciations du chef de l'unité B.3 figurant dans le rapport simplifié 2004, n'est pas de nature à établir qu'il n'aurait pas procédé à l'évaluation du requérant.

50 D'autre part, il ressort du REC 2004 que le chef de l'unité B.2 ne s'est pas borné à reprendre les appréciations figurant dans le rapport simplifié 2004. Il a, au contraire, également procédé à l'évaluation des prestations du requérant au titre de la période allant du 16 septembre au 31 décembre 2004, soulignant notamment que, au cours de cette période, certaines améliorations avaient été constatées dans le comportement de l'intéressé.

51 Le deuxième grief doit, en conséquence, être écarté.

Sur le troisième grief, tiré de la méconnaissance des dispositions de l'article 8, paragraphe 4, des DGE, relatives à l'autoévaluation des fonctionnaires

Arguments des parties

52 Le requérant fait valoir qu'il aurait été invité, avant d'établir son autoévaluation, à en communiquer un brouillon au chef de l'unité B.2, afin que celui-ci puisse « en discuter » avec lui. Selon le requérant, une telle pratique serait contraire au droit dont dispose chaque fonctionnaire de procéder lui-même à son autoévaluation. L'intéressé ajoute que le contenu de l'autoévaluation ne saurait influencer négativement un REC.

53 La Commission ne répond pas à ce grief.

Appréciation du Tribunal

54 Si le requérant fait valoir qu'il aurait été invité à communiquer un brouillon de son autoévaluation au chef de l'unité B.2 afin que celui-ci puisse « en discuter », il convient toutefois de relever que l'intéressé n'allègue pas avoir modifié son autoévaluation à la suite de la démarche de son chef d'unité. De surcroît, à supposer même que la circonstance dénoncée par le requérant ait constitué une violation des dispositions de l'article 8, paragraphe 4, des DGE, lesquelles se bornent en effet à rappeler que « [l]e titulaire de poste établit, dans les huit jours ouvrables suivant la demande de l'évaluateur, une autoévaluation qui est intégrée dans le [REC] » et ne prévoient pas l'intervention de l'évaluateur dans l'établissement de l'autoévaluation, force est de constater qu'il n'est pas établi que, en l'absence d'une telle irrégularité, le REC 2004 aurait pu avoir un contenu différent (voir, en ce sens, arrêt du Tribunal de première instance du 9 mars 1999, Hubert/Commission, T-212/97, RecFP p. I-A-41 et II-185, point 53).

55 Le troisième grief doit, par suite, être rejeté.

Sur le quatrième grief, tiré de la composition du CPE

Arguments des parties

56 Le requérant met en cause l'indépendance du chef de l'unité A.1 « Ressources humaines, administratives et financières, service extérieur, planning » (ci-après l'« unité A.1 ») ayant assisté à la séance du 3 juin 2005 du CPE chargé d'examiner son appel. En effet, ce fonctionnaire lui aurait envoyé une note datée du 8 juin 2004, dans laquelle il lui aurait injustement reproché d'avoir fait figurer, dans sa demande de révision du REC 2003, datée du 28 avril 2004, des propos diffamatoires à l'encontre du directeur général de la DG « Commerce » et d'avoir réitéré oralement ces propos lors du dialogue avec le validateur le 5 mai 2004. Le requérant précise que, si le chef de l'unité A.1 n'a pas participé au vote, il aurait néanmoins pu influencer certains membres du CPE, en particulier son supérieur hiérarchique, le directeur de la direction A « Ressources » (ci-après la « direction A »), qui n'était entré en fonction que le 1er juin 2005. Le requérant en déduit que les dispositions de l'article 9, paragraphe 6, des DGE auraient été violées.

57 La Commission conclut au rejet du moyen, faisant observer que le chef de l'unité A.1 n'aurait pas participé au vote du CPE.

Appréciation du Tribunal

58 Il convient, à titre liminaire, de rappeler que, aux termes de l'article 9, paragraphe 6, première phrase, des DGE, « [l]e président ou tout membre du [CPE] ayant un intérêt de nature à compromettre son indépendance dans le traitement d'un dossier, doit se faire représenter par son suppléant et ne pas participer aux travaux du comité ».

59 En l'espèce, si le requérant met en cause l'indépendance du chef de l'unité A.1 qui aurait assisté à la séance du CPE ayant examiné son appel contre le projet de REC 2004, il est constant que ce fonctionnaire, qui n'était que membre suppléant dudit CPE, n'a pas participé au vote. Par ailleurs, il ne ressort d'aucune pièce du dossier que le chef de l'unité A.1 aurait pu, par sa seule présence, influer sur le sens de ce vote. En particulier, contrairement à ce que soutient le requérant, la circonstance que le directeur de la direction A, qui a siégé en tant que membre titulaire du CPE lors de la séance du 3 juin 2005, n'aurait pris ses fonctions de directeur que le 1er juin 2005, n'est pas de nature par elle-même à établir qu'il aurait pu être influencé par le chef de l'unité A.1, dont il était au demeurant le supérieur hiérarchique.

60 De plus, s'il est constant que, le 8 juin 2004, le chef de l'unité A.1 a envoyé au requérant une note dans laquelle il lui reprochait d'avoir fait figurer, dans sa demande de révision du 28 avril 2004 dirigée contre le REC 2003, des propos diffamatoires à l'encontre du directeur général de la DG « Commerce » et d'avoir réitéré oralement ces propos lors du dialogue avec le validateur le 5 mai 2004, une telle note ne saurait, par elle-même, impliquer que le chef de l'unité A.1 aurait tenté d'intimider le requérant ou d'influencer les membres du CPE chargés d'examiner l'appel de l'intéressé dirigé contre le REC 2004.

61 Le requérant n'est donc pas fondé à soutenir que la présence du chef de l'unité A.1 lors de la séance du CPE du 3 juin 2005, au cours de laquelle a été examiné son appel contre le projet de REC 2004, a vicié la procédure suivie devant cet organe.

62 Le quatrième grief doit, dès lors, être écarté.

Sur le cinquième grief, tiré de l'absence de procédure d'appel effective

63 Le grief tiré de ce que le requérant aurait été privé d'une procédure d'appel effective se subdivise en deux branches relatives, d'une part, au fait que le CPE aurait refusé d'« assumer son rôle d'instance d'appel », et d'autre part, au fait que l'évaluateur d'appel aurait signé « passivement » le REC 2004.

En ce qui concerne la première branche du grief, tirée de ce que le CPE aurait refusé d'« assumer son rôle d'instance d'appel »

— Arguments des parties

64 Pour soutenir que le CPE n'aurait pas réellement assumé son rôle d'instance d'appel, le requérant expose qu'il aurait introduit le 31 mai 2005 un appel à l'encontre de son REC 2004 et qu'il aurait, le 1er juin suivant, communiqué au CPE de nombreuses annexes contredisant les appréciations portées dans ledit REC. Or, le CPE aurait émis son avis dès le 3 juin 2005, ce qui impliquerait qu'il n'aurait pas pu examiner de manière sérieuse et approfondie les éléments précis et documentés que le requérant avait produits à l'appui de son appel. Par ailleurs, le CPE n'aurait pas estimé utile d'entendre le requérant, ni les autres personnes dont celui-ci proposait l'audition, en l'occurrence son chef de section, ainsi que deux de ses collègues, alors que ces personnes auraient pu confirmer la véracité de ses affirmations. Enfin, le CPE n'aurait assorti son avis d'aucune motivation permettant au requérant de connaître les motifs du rejet de son appel.

65 La Commission conclut au rejet du grief, pris dans sa première branche.

— Appréciation du Tribunal

66 Il convient de rappeler à titre liminaire que, en vertu de l'article 9, paragraphe 4, des DGE, le CPE ne doit se substituer ni aux évaluateurs, ni aux validateurs en ce qui concerne l'évaluation des prestations du titulaire de poste et qu'il doit s'assurer que les rapports ont été établis « équitablement, objectivement, c'est-à-dire dans la mesure du possible sur des éléments factuels ».

67 Or, il n'est nullement établi que, en l'espèce, le CPE se serait soustrait à sa mission.

68 En effet, il convient tout d'abord de relever que le CPE a satisfait aux obligations formelles auxquelles il était soumis, en exprimant, ainsi que l'atteste la rubrique 9.2 « Avis du [CPE] » du REC 2004, les raisons pour lesquelles il avait considéré que l'appel ne devait pas être accueilli.

69 Par ailleurs, aucun des trois arguments avancés par le requérant n'est de nature à établir que l'examen du CPE n'aurait pas été effectif.

70 Premièrement, la circonstance, énoncée par le requérant, selon laquelle le CPE aurait émis son avis dès le 3 juin 2005, alors que l'appel avait été formé le 31 mai 2005 et que des annexes lui avaient été communiquées le 1er juin suivant, n'implique pas que les documents, même nombreux, figurant dans lesdites annexes, n'auraient pas été pris en considération par le CPE.

71 Deuxièmement, le requérant n'est pas davantage fondé à soutenir que la procédure d'appel n'aurait pas été effective du fait que le CPE aurait refusé de l'entendre ainsi que d'entendre plusieurs autres personnes dont il avait demandé l'audition. En effet, il ressort de l'article 9, paragraphe 4, premier alinéa, dernière

phrase, des DGE, aux termes duquel « [le CPE] procède aux consultations nécessaires […] », que le CPE disposait du pouvoir d'apprécier s'il lui était utile d'entendre le fonctionnaire noté ainsi que d'autres personnes et que, en l'espèce, il a estimé que tel n'était pas le cas.

72 Troisièmement, en ce qui concerne l'argument tiré de ce que l'avis du CPE serait insuffisamment motivé, il importe de rappeler qu'un tel avis ne figure pas au nombre des actes devant faire l'objet, en vertu de la jurisprudence, d'une motivation particulière.

73 Le requérant n'est donc pas fondé à soutenir que le CPE n'aurait pas assumé son rôle d'instance d'appel.

74 La première branche du grief doit, par suite, être écartée.

En ce qui concerne la seconde branche du grief, tirée de ce que l'évaluateur d'appel aurait signé « passivement » le REC 2004

— Arguments des parties

75 Le requérant prétend que le directeur général de la DG « Commerce » et évaluateur d'appel se serait contenté de signer « passivement » le REC 2004. Une telle attitude s'expliquerait par le fait que celui-ci aurait contribué au harcèlement moral dont aurait été victime le requérant, en tentant notamment de faire obstacle à ce que, suite à la plainte introduite par l'intéressé le 20 juin 2003,

l'OLAF mène une enquête sur les pratiques de la hiérarchie de la direction B. Dans ces conditions, les fonctions d'évaluateur d'appel auraient dû, par analogie avec l'article 3, paragraphe 3, troisième alinéa, des DGE, être exercées non par le directeur général de la DG « Commerce », mais par le directeur général de la DG « Personnel et administration », ce afin d'assurer pleinement une procédure transparente et objective dans l'établissement du REC 2004.

76 La Commission conclut au rejet du grief, pris en sa seconde branche.

— Appréciation du Tribunal

77 Il convient, à titre liminaire, de constater que les écritures du requérant ne permettent pas de déterminer avec certitude si celui-ci, en relevant que l'évaluateur d'appel aurait signé le REC 2004 de manière « passive », entend lui reprocher d'avoir adopté ledit REC sans l'assortir d'une motivation, ou entend soutenir que l'évaluateur d'appel aurait violé l'exigence d'impartialité et d'intégrité.

78 Pour autant que le requérant entend reprocher à l'évaluateur d'appel d'avoir signé le REC 2004 sans le motiver, il convient de rappeler que l'article 9, paragraphe 7, deuxième alinéa, des DGE prévoit que, « [d]ans un délai de cinq jours ouvrables, l'évaluateur d'appel confirme le rapport ou le modifie » et que « [l]orsque l'évaluateur d'appel s'écarte des recommandations figurant dans un avis du CPE, il motive sa décision ». Il résulte d'une telle disposition que le rôle de l'évaluateur d'appel ne saurait être confondu avec celui de l'évaluateur ou du validateur et que l'évaluateur d'appel peut ainsi, dans le cas où, comme en l'espèce, le CPE ne lui a pas adressé de recommandations, se limiter à adopter définitivement le REC sans justifier sa décision par une motivation circonstanciée. Par suite, le fait que l'évaluateur d'appel ait définitivement adopté, sans le motiver, le REC 2004 n'implique pas que les dispositions susmentionnées des DGE aient été violées.

79 Pour autant que le requérant entende mettre en cause l'impartialité et l'intégrité de l'évaluateur d'appel, il importe de rappeler qu'une décision adoptée en violation de l'exigence d'impartialité et d'intégrité, tel un REC établi par un évaluateur d'appel partial, peut être considérée comme étant entachée d'illégalité (voir, en ce sens, arrêt du Tribunal de première instance du 12 septembre 2007, Combescot/Commission, T-249/04, RecFP p. I-A-2-181 et II-A-2-1219, point 66).

80 En l'espèce, le requérant fait référence à un événement qui serait survenu antérieurement à la période de référence. Selon l'intéressé, l'évaluateur d'appel aurait tenté de faire obstacle à ce que, suite à la plainte introduite par lui le 20 juin 2003, l'OLAF mène une enquête sur les pratiques de la hiérarchie de la direction B. Toutefois, s'il est constant que, le 14 juillet 2003, le directeur général de la DG « Commerce » a écrit un courrier au directeur général de l'OLAF, concernant la plainte introduite par le requérant, il ressort des pièces du dossier que, dans ce courrier, le directeur général de la DG « Commerce » a indiqué que, même s'il espérait et croyait que les allégations avancées par le requérant étaient infondées, il était essentiel qu'elles soient examinées soigneusement. Par ailleurs, le fait que le directeur général de la DG « Commerce » se soit, dans ledit courrier, enquis de savoir si l'OLAF entendait procéder lui-même à l'enquête ou s'il y avait lieu pour la DG « Commerce » de la diligenter, et s'il convenait de prendre immédiatement des mesures pour éviter d'éventuels actes répréhensibles, doit être regardé comme relevant de la bonne administration et ne saurait impliquer qu'il n'était plus en mesure d'apprécier objectivement et avec impartialité les mérites du requérant.

81 Enfin, le requérant ne saurait, même par analogie, se prévaloir, pour soutenir que les fonctions d'évaluateur d'appel auraient dû être exercées par le directeur général de la DG « Personnel et administration », des dispositions de l'article 3, paragraphe 3, troisième alinéa, première phrase, des DGE, aux termes desquelles « [p]our les titulaires de poste ayant formellement mis en œuvre la procédure prévue par la décision de la Commission du 4 avril 2002 […] concernant la conduite à tenir en cas de suspicion d'actes répréhensibles graves et dont la note de mérite visée à l'article 1[er,] paragraphe 2, figurant dans le [REC] établi par l'évaluateur et le validateur, est inférieure de 1 point à celle figurant dans son dernier [REC], l'évaluateur d'appel est le directeur général de la [DG 'Personnel et administration'] ». En effet, les dispositions susmentionnées ne pouvaient

s'appliquer au cas d'espèce, dès lors que la note de mérite figurant dans le REC 2004 établi par l'évaluateur et le validateur, en l'occurrence 12/20, n'était pas inférieure de 1 point, mais égale à la note de mérite figurant dans le REC 2003.

82 Il s'ensuit que le grief, pris dans sa seconde branche, doit être rejeté.

83 Il résulte de ce qui précède que le requérant n'est pas fondé à soutenir qu'il aurait été privé d'une procédure d'appel effective.

84 Le cinquième grief doit donc être écarté.

Sur le sixième grief, tiré de la violation des droits de la défense

Arguments des parties

85 Le requérant fait valoir que ses droits de la défense auraient été méconnus du fait de l'absence de procédure d'appel effective.

86 La Commission conclut au rejet du grief.

Appréciation du Tribunal

87 Il convient de rappeler que, selon une jurisprudence constante, le respect des droits de la défense, dans toute procédure ouverte à l'encontre d'une personne et susceptible d'aboutir à un acte faisant grief à celle-ci, constitue un principe fondamental du droit communautaire (voir, notamment, arrêts de la Cour du 10 juillet 1986, Belgique/Commission, 234/84, Rec. p. 2263, point 27, et du 5 octobre 2000, Allemagne/Commission, C-288/96, Rec. p. I-8237, point 99 ; arrêt du Tribunal de première instance du 8 mars 2005, Vlachaki/Commission, T-277/03, RecFP p. I-A-57 et II-243, point 64).

88 Ce principe exige que la personne concernée soit mise en mesure de faire connaître utilement son point de vue au sujet des éléments qui pourraient être retenus à sa charge dans l'acte à intervenir.

89 Cet objectif est atteint, en particulier, au moyen des dispositions des DGE qui ont pour objet d'assurer le respect du contradictoire tout au long de la procédure d'évaluation.

90 En l'espèce, force est de constater que le requérant a pu faire valoir ses griefs à chaque stade de la procédure d'évaluation, de sorte qu'il ne saurait prétendre que ses droits de la défense auraient été violés. Par ailleurs, si, à l'appui du grief tiré de la violation des droits de la défense, le requérant avance l'argument selon lequel il aurait été privé d'une procédure d'appel effective devant le CPE et l'évaluateur d'appel, un tel argument a déjà été rejeté lors de l'examen du cinquième grief.

91 Le sixième grief doit, dans ces conditions, être écarté.

92 Les six griefs avancés au soutien du premier moyen ayant été écartés, il convient de rejeter ledit moyen.

2. *Sur le deuxième moyen, tiré de la violation de l'obligation de motivation*

Arguments des parties

93 Le requérant reproche au REC 2004 l'absence et l'incohérence de sa motivation. Il relève qu'aucune des appréciations relatives au rendement, à la compétence et à la conduite dans le service ne serait motivée au sens de la jurisprudence communautaire, et ce à quelque stade que ce soit de la procédure. En particulier, aucun exemple concret ne viendrait étayer les commentaires figurant dans les rubriques du REC 2004 consacrées au rendement, à la compétence et à la conduite dans le service. Il en irait ainsi de l'appréciation de l'évaluateur relative à son prétendu manque de souplesse dans le traitement des enquêtes, ou encore des commentaires du validateur concernant la qualité « sous standard » de son travail ou son « attitude de n'accepter aucune suggestion, commentaire ou critique objective et bien fondée concernant son travail ». Or, il ressortirait du document intitulé « [CPE] — Traitement des appels — Check-List » que l'évaluateur et le validateur auraient dû mentionner des exemples concrets à l'appui de leurs jugements de valeur.

94 La Commission rétorque que le REC 2004 serait suffisamment motivé et que, en particulier, les commentaires de l'évaluateur aux rubriques 6.1 « Rendement », 6.2 « Aptitudes (compétences) » et 6.3 « Conduite dans le service » seraient circonstanciés et tiendraient compte, en la réfutant, de l'argumentation tenue par le requérant dans son autoévaluation. De plus, le validateur aurait complété, à la rubrique 8.2 « Révision du validateur et visa », la motivation de l'évaluateur en rejetant les arguments soulevés par le requérant à l'appui de sa demande de révision.

95 La Commission ajoute que la motivation serait également cohérente.

Appréciation du Tribunal

En ce qui concerne le caractère prétendument insuffisant de la motivation

96 S'agissant de la question de savoir si le REC 2004 comporte une motivation suffisante, il importe de rappeler que, selon une jurisprudence constante, l'administration a l'obligation de motiver les rapports de notation de façon suffisante et circonstanciée et de mettre l'intéressé en mesure de formuler des observations sur cette motivation (arrêts du Tribunal de première instance du 7 mai 2003, Den Hamer/Commission, T-278/01, RecFP p. I-A-139 et II-665, point 69, et du 31 janvier 2007, Aldershoff/Commission, T-236/05, RecFP p. I-A-2-13 et II-A-2-75, point 55).

97 En l'espèce, force est de constater que l'évaluateur a, de manière suffisante et circonstanciée, motivé son évaluation.

98 Ainsi, à la rubrique 6.1 « Rendement », l'évaluateur, après avoir relevé que le requérant possédait le potentiel nécessaire pour obtenir de bons résultats dans les délais impartis, a insisté sur le fait que l'intéressé prêtait une attention excessive à des points de détails dans des dossiers par nature complexes et faisait preuve d'une interprétation trop rigide de la réglementation. Une telle attitude était de nature, selon l'évaluateur, à réduire le rendement du requérant et obligeait sa hiérarchie à procéder à la révision des dossiers qui lui étaient confiés. L'évaluateur a par ailleurs noté que l'efficacité du requérant était également réduite par sa tendance à critiquer systématiquement les vues de la hiérarchie, alors que, dans des dossiers complexes susceptibles de recevoir différentes

interprétations, il était légitime que la hiérarchie ait le dernier mot. L'évaluateur a regretté qu'il n'y ait pas eu d'amélioration du requérant sur ces aspects et a noté que des discussions sur la nécessité d'une formation et d'un « coaching » étaient restées lettre morte. Enfin, l'évaluateur a indiqué que quelques améliorations avaient pu être constatées vers la fin de la période de référence, tels les efforts du requérant pour acquérir davantage de souplesse, mais que ces améliorations devaient être évaluées sur une plus longue période pour qu'il soit possible de s'assurer de leur pérennité.

99 À la rubrique 6.2 « Aptitudes (compétences) », l'évaluateur, après avoir noté que le requérant était méthodique et rigoureux dans son approche et qu'il possédait de bonnes capacités d'organisation, a souligné que sa capacité à parvenir à des solutions équilibrées était compromise par sa conviction, presque obsessionnelle, que pour chaque problème il existerait une solution idéale ou même une solution unique, qu'il serait le seul à détenir. Selon l'évaluateur, une telle rigidité expliquerait pourquoi la hiérarchie du requérant s'est vue contrainte d'exercer une supervision permanente et attentive de son travail et s'est montrée réservée à l'idée de lui confier des travaux exigeant souplesse et hauteur de vue. À cet égard, l'évaluateur a regretté que les discussions sur une éventuelle formation, qui aurait permis au requérant d'acquérir une telle hauteur de vue, n'aient pas été suivies d'effet. L'évaluateur a également noté les insuffisances du requérant en matière de rédaction, précisant à ce sujet que les écrits de celui-ci gagneraient à être mieux structurés et plus synthétiques. En conclusion de la rubrique susmentionnée, l'évaluateur a, de nouveau, indiqué avoir constaté, en fin de période d'évaluation, certaines améliorations, mais que celles-ci, encore insuffisantes, devaient être confirmées sur une période plus longue pour qu'il soit possible d'en apprécier véritablement la réalité.

100 À la rubrique 6.3 « Conduite dans le service », l'évaluateur a noté que si le requérant était motivé et fier de son travail, cette fierté pouvait toutefois le conduire à défendre à tout prix ses propres vues à l'encontre de toute personne ne partageant pas son avis. En outre, une telle approche conflictuelle, débouchant souvent sur des attaques personnelles contre la hiérarchie, était de nature à entamer sa crédibilité et à diminuer non seulement sa propre productivité mais aussi celle de sa hiérarchie.

101 Le validateur a également motivé de manière suffisante et circonstanciée l'évaluation du requérant.

102 En effet, pour rejeter, à la rubrique 8.2 « Révision du validateur et visa », la demande de révision formée par le requérant, le validateur a d'abord, de manière générale, noté que le requérant, contrairement à ce qu'il affirmait, n'était pas un fonctionnaire de très haute qualité dont les capacités auraient été mal comprises par sa hiérarchie. Le validateur a au contraire qualifié de « sous standard » la qualité du travail du requérant et de « faibles » ses capacités de rédaction, précisant même qu'il n'était pas aisé de suivre le « fil conducteur » des notes que celui-ci rédigeait. Le validateur a également relevé que l'intéressé refusait d'accepter la moindre suggestion concernant son travail et se livrait à une critique systématique des décisions de sa hiérarchie, ajoutant même qu'il avait proféré, au cours d'une réunion tenue en présence du commissaire au commerce, de « fausses accusations » contre la direction B.

103 Le validateur a ensuite souligné que le requérant ne s'était vu confier que des enquêtes ouvertes à la suite de demandes de réexamen au titre de « nouvel exportateur », au motif que ces enquêtes, qui ne concerneraient qu'une ou deux entreprises et ne viseraient qu'à déterminer l'existence éventuelle d'un dumping et non celle d'un préjudice ou d'un intérêt communautaire, étaient les plus simples à mener. En effet, selon le validateur, la qualité « sous standard » du travail du requérant faisait obstacle à ce que lui soient attribuées des affaires difficiles ou délicates.

104 Enfin, le validateur a fait observer que le chef de l'unité B.2 s'était efforcé, par son évaluation formulée dans le REC 2004, d'aider le requérant à « sortir du cercle vicieux des accusations, attaques, recours, actions juridiques[, etc.] », mais qu'il appartenait à l'intéressé de « faire un effort pour sortir de ce marais », effort qui consistait à « améliorer la qualité de son travail, [à] avoir une approche positive [de] son travail et [à] arrêter ses accusations presque diffamatoires ».

105 Il résulte de ce qui précède que l'administration a motivé le REC 2004 de façon suffisante et circonstanciée et a mis l'intéressé en mesure de formuler des observations sur cette motivation.

106 Quant à l'argument du requérant selon lequel l'évaluateur et le validateur auraient omis de fournir des exemples au soutien de leurs jugements de valeur, il doit être rejeté. En effet, l'évaluateur et le validateur n'étaient pas tenus, en l'absence de toute circonstance particulière, d'apporter une motivation plus détaillée au REC 2004 en indiquant des exemples concrets pour étayer leurs jugements de valeur (voir, en ce sens, arrêt Combescot/Commission, précité, point 86).

107 Enfin, le requérant ne saurait utilement se prévaloir du document intitulé « [CPE] — Traitement des appels — Check-List », aux termes duquel le CPE doit vérifier, lorsqu'il procède à l'examen d'un appel, si les commentaires figurant dans chaque rubrique sont « étayés par des exemples concrets ». En effet, si, selon une jurisprudence constante, les institutions sont tenues au respect des directives internes qu'elles ont volontairement édictées, sous peine d'enfreindre le principe d'égalité de traitement (arrêt du Tribunal de première instance du 21 janvier 2004, Robinson/Parlement, T-328/01, RecFP p. I-A-5 et II-23, point 50), il est constant que le CPE, dont émane le document susmentionné, n'est pas une institution au sens de la jurisprudence précitée. Dans ces conditions, ce document ne saurait être regardé comme une directive interne et ne constitue qu'un document de travail destiné à aider le CPE dans le traitement des appels qui lui sont soumis.

108 Il résulte de ce qui précède que le grief tiré d'une insuffisante motivation du REC 2004 doit être écarté comme non fondé.

En ce qui concerne le caractère prétendument incohérent de la motivation

109 S'agissant de la question du caractère prétendument incohérent de la motivation, il y a lieu de rappeler que, selon une jurisprudence constante (arrêt du Tribunal de première instance du 25 octobre 2006, Carius/Commission, T-173/04, RecFP p. I-A-2-243 et II-A-2-1269, point 106), les commentaires descriptifs figurant dans un REC ont pour objet de justifier les appréciations exprimées en points. Ces commentaires descriptifs servent d'assise à l'établissement de l'évaluation, qui en constitue la transcription chiffrée, et permettent au fonctionnaire de comprendre la note obtenue. Par conséquent, au sein d'un REC, les commentaires descriptifs doivent être cohérents par rapport aux appréciations exprimées en points. Compte tenu du très large pouvoir d'appréciation reconnu aux évaluateurs dans les jugements relatifs au travail des personnes qu'ils ont la charge d'évaluer, une éventuelle incohérence au sein d'un REC ne peut toutefois justifier son annulation que si celle-ci est manifeste.

110 En l'espèce, il n'existe aucune incohérence manifeste entre, d'une part, les commentaires, dont la teneur a été rappelée ci-dessus, et d'autre part, les notes de 6/10, 4/6 et 2/4 qui ont été attribuées au requérant au titre, respectivement, de son rendement, de ses compétences et de sa conduite dans le service.

111 Le deuxième moyen doit, dans ces conditions, être écarté.

3. *Sur le troisième moyen, tiré de l'existence d'erreurs manifestes d'appréciation*

112 À titre liminaire, il convient de rappeler que, selon une jurisprudence constante, le contrôle juridictionnel exercé par le juge communautaire sur le contenu des REC est limité au contrôle de la régularité procédurale, de l'exactitude matérielle des faits, ainsi que de l'absence d'erreur manifeste d'appréciation ou de détournement de pouvoir (arrêt du Tribunal de première instance du 26 octobre 1994, Marcato/Commission, T-18/93, RecFP p. I-A-215 et II-681, point 45).

113 Il importe également de souligner que, conformément aux principes généraux, c'est à la partie requérante d'apporter la preuve des erreurs manifestes d'appréciation dont elle se prévaut et qui seraient susceptibles d'entacher son REC (voir, en ce sens, arrêt de la Cour du 1er juin 1983, Seton/Commission, 36/81, 37/81 et 218/81, Rec. p. 1789, point 24 ; arrêts du Tribunal de première instance du 20 mai 2003, Pflugradt/BCE, T-179/02, RecFP p. I-A-149 et II-733, point 51 ; Fardoom et Reinard/Commission, précité, point 79, et Aldershoff/Commission, précité, points 83 et 84).

114 Par ailleurs, l'arrêt Sequeira Wandschneider/Commission, précité, n'est pas pertinent dans ce contexte. En effet, dans l'affaire ayant donné lieu à cet arrêt, le Tribunal de première instance s'est fondé à titre essentiel, pour estimer que le REC litigieux était entaché d'une erreur manifeste d'appréciation, sur le fait que l'évaluateur d'appel n'avait pas donné suite aux observations du CPE selon lesquelles les commentaires insérés par l'évaluateur et le validateur aux rubriques 6.3 et 8.2 dudit REC n'étaient pas assortis d'exemples concrets. Or, l'affaire qui fait l'objet du présent recours concerne une situation factuelle distincte, puisque le CPE n'y a pas formulé pareilles observations.

115 C'est à la lumière des considérations qui précèdent que doivent être examinés les arguments du requérant selon lesquels les notes et les commentaires qui lui ont été attribués au titre de son rendement, ses compétences et sa conduite dans le service, seraient entachés d'erreurs manifestes d'appréciation.

En ce qui concerne le rendement

Arguments des parties

116 Pour soutenir que la Commission aurait commis une erreur manifeste d'appréciation en lui attribuant, au titre de son rendement, la note 6/10, le requérant fait valoir, en substance, que le validateur aurait à tort qualifié de « sous standard » la qualité de son travail. Le requérant avance un indice direct et deux indices indirects qui établiraient, selon lui, le caractère erroné d'une telle appréciation.

117 En ce qui concerne l'indice direct, le requérant soutient que la qualité de son travail, loin d'avoir été « sous standard », aurait au contraire été « excellente ». À ce titre, il souligne, s'agissant du cas R 315 qu'il a été amené à traiter, que celui-ci aurait été, selon les termes mêmes de son chef de section, un « plein succès » et que les conclusions auxquelles il était parvenu n'auraient été contestées par aucune des parties intéressées. Concernant le cas R 346, le requérant indique qu'il aurait procédé à une évaluation « extrêmement méticuleuse » du dossier et identifié certaines violations de normes comptables qui n'auraient jamais été soulevées auparavant lors des investigations de la DG « Commerce ». De plus, ce cas aurait été le premier dans l'histoire des mesures de défense commerciale dans lequel il aurait été décidé d'imposer à une société qui sollicitait un réexamen au titre de nouvel exportateur un droit antidumping plus élevé que celui applicable à cette société au début de l'investigation. Enfin, le requérant souligne que, en cinq ans, il aurait conclu avec succès neuf investigations qui n'auraient jamais été contestées devant les juridictions communautaires.

118 En ce qui concerne le premier indice indirect, le requérant expose que les cas qui lui ont été confiés auraient été difficiles et « sensibles », ce qui contredirait le commentaire du validateur selon lequel il ne se serait vu attribuer que des cas simples à traiter et que, pour ce motif, son travail devrait être regardé comme « sous standard ».

119 En ce qui concerne enfin le second indice indirect, le requérant souligne qu'il aurait été surchargé de travail lors de la période de référence et que cette circonstance établirait nécessairement le caractère erroné des appréciations du validateur relatives à la qualité prétendument « sous standard » de son travail.

120 En défense, la Commission fait valoir que la note attribuée au requérant au titre du rendement ainsi que les commentaires destinés à servir d'assise à cette note ne seraient entachés d'aucune erreur manifeste.

Appréciation du Tribunal

121 Si le requérant conteste le bien-fondé du commentaire du validateur selon lequel la qualité de son travail aurait été « sous standard », aucun des trois indices avancés par l'intéressé n'est de nature à établir qu'un tel jugement de valeur procèderait d'une erreur manifeste.

122 En effet, dans un premier indice, le requérant soutient que la qualité de son travail aurait été « excellente », ce qui mettrait en évidence, de manière directe, le caractère erroné du jugement de valeur porté par le validateur. Toutefois, il convient de constater que, ce faisant, le requérant se borne à avancer son propre jugement de valeur quant à la qualité de son travail mais qu'il ne produit aucun élément concret et précis à l'appui d'un tel jugement.

123 Par ailleurs, si le requérant souligne que, en cinq ans, il aurait conclu avec succès neuf investigations qui n'auraient jamais été contestées devant les juridictions communautaires, une telle affirmation ne saurait, eu égard à son caractère général et imprécis, être de nature à mettre en doute le bien-fondé du commentaire du validateur.

124 Le requérant prétend également, s'agissant en particulier du cas R 315, que celui-ci aurait été un « plein succès » et que les conclusions auxquelles il serait parvenu dans ce cas n'auraient été contestées par aucune des parties intéressées. Toutefois, un tel argument ne saurait être accueilli, dans la mesure où, d'une part, l'intéressé n'établit pas que le prétendu « succès » de ce cas serait directement lié à la qualité de ses prestations, et où, d'autre part, et en tout état de cause, un tel « succès », à le supposer même établi, ne saurait suffire à contredire manifestement l'appréciation de la hiérarchie du requérant sur la qualité « sous standard » de son travail.

125 Le requérant avance également deux indices indirects qui, selon lui, mettraient en cause le commentaire du validateur relatif à la qualité « sous standard » de son travail.

126 Dans le premier de ces indices indirects, le requérant souligne que les cas qui lui ont été confiés auraient été difficiles et sensibles, ce qui prouverait nécessairement le caractère manifestement erroné du commentaire du validateur. L'intéressé se prévaut de deux courriers électroniques, l'un envoyé par son chef de section, l'autre par le chef de l'unité B.1. « Instruments de défense commerciale : politique générale, bureau des plaintes » (ci-après l'« unité B.1 »).

127 À cet égard, il est constant que, le 13 octobre 2003, le chef de section du requérant a envoyé à celui-ci un courrier électronique dans lequel il l'informait que le chef de l'unité B.3, qui avait dans un premier temps envisagé d'attribuer le cas R 315 à un agent nouvellement arrivé dans le service, avait décidé de ne pas le faire et de le confier plutôt à l'intéressé. C'est donc dans le contexte de cette réattribution que le chef de l'unité B.3 a indiqué que ce cas avait « une histoire compliquée ».

128 Il est également constant que le chef de l'unité B.1 a, dans un courrier électronique du 9 juin 2004, qualifié de « sensible » le réexamen intermédiaire partiel (R 347) qui a été également confié au requérant.

129 Toutefois, la teneur de ces deux courriers électroniques est contredite par le directeur de la direction B, supérieur hiérarchique à la fois des deux fonctionnaires ayant envoyé les courriers électroniques susmentionnés et du requérant, dans la mesure où il a estimé, sans être ultérieurement contesté par l'évaluateur d'appel, qu'aucun des cas confiés à l'intéressé ne pouvait être qualifié de sensible. Dans ces conditions, eu égard à l'absence de convergence des opinions émanant de fonctionnaires de la direction B, les courriers électroniques litigieux ne sauraient constituer des éléments objectifs susceptibles d'apporter la preuve que les cas confiés au requérant étaient difficiles ou sensibles. Il s'ensuit que le requérant n'est pas fondé à soutenir que le caractère erroné de l'appréciation du validateur relative à la prétendue qualité « sous standard » de son travail serait mis en évidence par le fait que celui-ci ne se serait pas vu confier que les affaires les plus simples.

130 Il convient également de répondre à l'argument du requérant, soulevé incidemment dans le cadre du précédent reproche, selon lequel, contrairement à ce que le validateur a indiqué, il ne se serait pas limité à mener deux enquêtes ouvertes à la suite de demandes de réexamen au titre de nouvel exportateur, mais qu'il aurait en outre procédé à deux autres enquêtes, l'une dans le cadre d'un réexamen intermédiaire partiel (cas R 347), l'autre dans le cadre d'un réexamen de mesures parvenant à expiration (cas R 260).

131 Il est constant que le validateur, à la rubrique 8.2 « Révision du validateur et visa » du REC 2004, a indiqué que « les cas donnés [au requérant ont été] des réexamens concernant des nouveaux exportateurs ». Toutefois, il ne ressort pas d'une manière univoque que le validateur aurait, par cette mention, entendu signaler que l'intéressé n'aurait, lors de la période de référence, exclusivement traité que des enquêtes ouvertes à la suite de demandes de réexamen au titre de nouvel exportateur. De surcroît, il ressort des pièces du dossier que ni l'évaluateur ni le validateur ne se sont fondés à titre essentiel, pour attribuer au requérant la note de 6/10 au titre du rendement, sur la circonstance que l'intéressé se serait limité à des enquêtes ouvertes à la suite de demandes de réexamen au titre de nouvel exportateur. En effet, d'une part, l'évaluateur et le

validateur n'ont pas expressément conclu qu'une telle circonstance justifiait que la note attribuée au requérant au titre de son rendement soit fixée à 6/10 (voir, en ce sens, arrêt Sequeira Wandschneider/Commission, précité, point 152), d'autre part, le validateur n'a mentionné cette circonstance qu'aux fins, selon ses propres termes, de répondre aux observations du requérant dans sa demande en révision, observations qualifiées par le validateur de « longues accusations ».

132 Dans le second indice indirect, le requérant se prévaut de la circonstance selon laquelle il aurait été surchargé de travail. Toutefois, cette seule circonstance, à la supposer établie, ne serait pas davantage de nature à établir le caractère erroné de l'appréciation du validateur.

133 Ainsi, aucun des indices avancés par le requérant n'est de nature à établir que le commentaire du validateur selon lequel la qualité du travail de l'intéressé serait « sous standard » procèderait d'une erreur manifeste.

En ce qui concerne la compétence

Arguments des parties

134 Le requérant conteste le bien-fondé du commentaire de l'évaluateur, figurant à la rubrique 6.2 « Aptitudes (compétences) », selon lequel il manquerait de souplesse dans le traitement des dossiers. D'après l'intéressé, un tel commentaire serait en contradiction avec la teneur d'un courrier électronique que son chef de section aurait envoyé le 29 avril 2005 au directeur de la direction B.

135 La Commission conclut au rejet du grief.

Appréciation du Tribunal

136 Le requérant n'apporte pas la preuve, qui lui incombe, que serait manifestement erroné le commentaire de l'évaluateur, selon lequel il manquerait de souplesse dans le traitement des dossiers et serait convaincu, de manière presque obsessionnelle, qu'il existerait pour chaque problème une solution idéale ou même une solution unique, qu'il serait le seul à détenir. De plus, contrairement à ce que soutient le requérant, un tel commentaire ne serait pas en contradiction avec la teneur d'un courrier électronique envoyé le 29 avril 2005 par son chef de section au directeur de la direction B, ce courrier se bornant à mettre en évidence que l'intéressé éprouvait des difficultés à trouver un équilibre entre « flexibilité et esprit d'initiative ».

137 Le requérant n'est donc pas fondé à soutenir que la note de 4/6 qui lui a été attribuée au titre de ses compétences serait entachée d'une erreur manifeste d'appréciation.

En ce qui concerne la conduite dans le service

Arguments des parties

138 Le requérant conteste, en premier lieu, l'appréciation du validateur relative à sa prétendue « approche conflictuelle » et à son « attitude de n'accepter aucune suggestion, commentaire ou critique objective et bien fondée concernant la qualité de son travail ».

139 Le requérant conteste, en deuxième lieu, les observations du validateur selon lesquelles il n'aurait pas hésité à porter de « fausses accusations » ainsi que des « accusations presque diffamatoires » à l'encontre de sa hiérarchie. Certes, l'intéressé ne conteste pas avoir reproché à celle-ci, lors d'une réunion tenue en présence du commissaire au commerce, de privilégier l'industrie communautaire, mais il précise que de tels reproches, qui relèveraient de la liberté d'expression, auraient été, en tout état de cause, fondés.

140 Le requérant récuse, en troisième lieu, les commentaires du validateur selon lesquels il se serait laissé enfermer dans le « cercle vicieux des accusations, attaques, recours, actions juridiques[, etc.] ». Le requérant soutient à cet égard qu'il n'aurait introduit réclamations et recours que pour préserver ses droits et que c'est à tort que le validateur le lui aurait reproché pour évaluer sa conduite.

141 La Commission conclut au rejet du grief.

Appréciation du Tribunal

142 S'agissant, en premier lieu, du grief selon lequel les évaluateurs auraient à tort reproché au requérant son refus d'accepter des critiques portant sur la qualité de son travail, il importe de rappeler qu'il incombe à celui-ci d'établir le caractère manifestement erroné de ces commentaires. Or, non seulement l'intéressé reste en défaut d'apporter une telle preuve, mais plusieurs notes échangées les 9 décembre 2003, 7 janvier 2004 et 9 janvier suivant entre le directeur de la direction B, le chef adjoint de l'unité B.1 et le chef adjoint de l'unité B.3 mettent en évidence que le requérant éprouvait des difficultés à accepter des commentaires sur la qualité de son travail et à se conformer aux instructions de sa hiérarchie lorsque celle-ci contredisait son point de vue.

143 S'agissant, en deuxième lieu, du grief tiré de ce que le validateur aurait à tort reproché au requérant d'avoir proféré de « fausses accusations » ainsi que des « accusations presque diffamatoires » à l'encontre de sa hiérarchie, il est constant que, le 2 décembre 2004, au cours d'une réunion tenue en présence du commissaire au commerce, l'intéressé a publiquement reproché à la direction B de privilégier les intérêts de l'industrie communautaire dans le traitement des dossiers. Or, outre le fait que le requérant n'apporte, dans le cadre de la présente procédure, aucun élément probant de nature à étayer les accusations selon lesquelles la hiérarchie de la direction B privilégierait l'industrie communautaire dans les enquêtes antidumping, il ressort des pièces du dossier que, antérieurement à la réunion du 2 décembre 2004, l'OLAF a, par une note du 11 août 2003, informé le requérant qu'il avait été décidé, en l'absence de toute atteinte aux intérêts financiers de la Communauté européenne, de classer la plainte que celui-ci avait déposée le 20 juin 2003 et dans laquelle il entendait dénoncer les irrégularités commises par la hiérarchie de la direction B lors des enquêtes antidumping. Enfin, le requérant ne saurait à bon droit soutenir que son intervention au cours de la réunion du 2 décembre 2004 relèverait de la liberté d'expression. En effet, si la liberté d'expression est un droit fondamental dont jouissent les fonctionnaires communautaires (arrêt de la Cour du 13 décembre 1989, Oyowe et Traore/Commission, C-100/88, Rec. p. 4285, point 16), une telle liberté ne saurait justifier qu'un fonctionnaire puisse émettre à l'encontre de ses supérieurs hiérarchiques des allégations non fondées, susceptibles de jeter le discrédit sur l'honorabilité de ces derniers (voir, en ce sens, arrêt du Tribunal de première instance du 26 novembre 1991, Williams/Cour des comptes, T-146/89, Rec. p. II-1293, points 72 et 76).

144 S'agissant, en troisième lieu, du grief selon lequel le validateur se serait à tort fondé, pour évaluer la conduite dans le service du requérant, sur la prétendue circonstance selon laquelle celui-ci se serait laissé enfermer dans le « cercle vicieux des accusations, attaques, recours, actions juridiques[, etc.] », il ressort des pièces du dossier que le validateur n'a entendu formuler ce commentaire que pour mettre en évidence les difficultés relationnelles entre le requérant et sa hiérarchie et qu'il ne s'est pas fondé à titre essentiel sur cette circonstance pour justifier la note attribuée à l'intéressé au titre de la conduite dans le service (voir, en ce sens, arrêt Sequeira Wandschneider/Commission, précité, point 152).

145 Le requérant n'est donc pas fondé à soutenir que la note de 2/4 qui lui a été attribuée au titre de sa conduite dans le service procèderait d'une erreur manifeste d'appréciation.

146 Le requérant n'ayant pas établi que les notes et les commentaires figurant dans son REC 2004 seraient entachés d'une erreur manifeste d'appréciation, le troisième moyen doit en conséquence être rejeté.

4. *Sur le quatrième moyen, tiré de la violation du devoir de sollicitude et du principe de bonne administration*

Arguments des parties

147 À l'appui du moyen susmentionné, le requérant fait valoir que la Commission n'aurait pas tenu compte de son intérêt, dans la mesure où elle aurait refusé de mettre fin dans les plus brefs délais à plusieurs irrégularités.

148 Premièrement, la Commission aurait toujours refusé de donner suite aux observations du requérant relatives au défaut de transparence dans la gestion interne des enquêtes et, en particulier, à l'absence d'établissement de procès-verbaux à la suite des réunions internes de la direction B. Deuxièmement, la Commission aurait également refusé, en dépit des demandes du requérant en ce sens, de mettre en place un système transparent d'attribution des enquêtes antidumping, destiné à éviter les inégalités flagrantes dans la répartition de la charge de travail. Troisièmement, la Commission se serait gardée pendant toute la procédure d'établissement du REC 2004 d'entendre le point de vue de l'intéressé.

149 La Commission conteste avoir méconnu le devoir de sollicitude ou le principe de bonne administration.

Appréciation du Tribunal

150 Il convient de relever que, selon une jurisprudence constante, le devoir de sollicitude de l'administration à l'égard de ses agents reflète l'équilibre des droits et des obligations réciproques que le statut a créé dans les relations entre l'autorité publique et les agents du service public. Ce devoir implique notamment que, lorsqu'elle statue à propos de la situation d'un fonctionnaire, l'autorité prenne en considération l'ensemble des éléments qui sont susceptibles de déterminer sa décision et que, ce faisant, elle tienne compte de l'intérêt du service, mais aussi de l'intérêt du fonctionnaire concerné (arrêt de la Cour du 23 octobre 1986, Schwiering/Cour des comptes, 321/85, Rec. p. 3199, point 18 ; arrêts du Tribunal de première instance du 5 février 1997, Ibarra Gil/Commission, T-207/95, RecFP p. I-A-13 et II-31, point 75, et du 6 février 2003, Pyres/Commission, T-7/01, RecFP p. I-A-37 et II-239, point 87).

151 Ce principe rejoint celui de bonne administration, qui impose à l'institution, lorsqu'elle statue à propos de la situation d'un fonctionnaire, de prendre en considération l'ensemble des éléments qui sont susceptibles de déterminer sa décision et, ce faisant, elle doit tenir compte non seulement de l'intérêt du service, mais aussi de celui du fonctionnaire concerné (arrêt du Tribunal de première instance du 16 mars 2004, Afari/BCE, T-11/03, RecFP p. I-A-65 et II-267, point 42).

152 En l'espèce, pour soutenir que le principe de sollicitude ainsi que le principe de bonne administration auraient été méconnus, le requérant reproche d'abord à la Commission de ne pas avoir pris en compte son intérêt en ayant refusé de mettre un terme dans les délais les plus brefs à plusieurs irrégularités.

153 Toutefois, aucune des prétendues irrégularités dénoncées par le requérant ne saurait établir le bien-fondé du moyen susmentionné.

154 En effet, si le requérant reproche d'abord à la Commission le défaut de transparence dans la gestion interne des enquêtes, en particulier l'absence d'établissement de procès-verbaux à la suite des réunions internes de la direction B, ainsi que le refus de cette dernière de mettre en place un système transparent d'attribution des enquêtes antidumping, destiné à éviter les inégalités dans la répartition de la charge de travail, l'intéressé ne démontre pas en quoi ces circonstances, à les supposer même établies, auraient, par elles-mêmes, influencé le contenu des appréciations figurant dans le REC 2004.

155 Par ailleurs, toujours à l'appui du moyen tiré de la méconnaissance du principe de sollicitude ainsi que du principe de bonne administration, le requérant soutient que la Commission se serait gardée pendant toute la procédure d'établissement du REC 2004 d'entendre son point de vue.

156 Toutefois, ainsi qu'il a été dit dans le cadre de l'examen du premier moyen, il n'est pas établi que le CPE aurait refusé d'examiner les arguments du requérant lors de la procédure d'établissement du REC 2004. En particulier, la circonstance que le CPE aurait refusé d'entendre le requérant ainsi que plusieurs autres personnes dont celui-ci avait demandé l'audition ne saurait être regardée comme une violation du devoir de sollicitude, dès lors qu'il ressort de l'article 9, paragraphe 4, premier alinéa, dernière phrase, des DGE que le CPE disposait du pouvoir d'apprécier s'il lui était utile d'entendre le fonctionnaire noté ainsi que d'autres personnes et que, en l'espèce, il a estimé que tel n'était pas le cas.

157 Le quatrième moyen doit en conséquence être écarté.

5. *Sur le cinquième moyen, tiré d'un détournement de pouvoir et de l'existence d'un harcèlement moral*

158 À l'appui du moyen susmentionné, le requérant soulève deux griefs, tirés, premièrement, de ce que le REC 2004 serait entaché d'un détournement de pouvoir, deuxièmement, de ce que ledit REC aurait été établi dans un contexte d'intimidation et de harcèlement moral en l'absence duquel sa note globale aurait été plus élevée.

Sur le premier grief, tiré du détournement de pouvoir

Arguments des parties

159 Pour soutenir que le REC 2004 serait entaché d'un détournement de pouvoir, le requérant fait valoir que l'administration aurait établi ledit REC afin de provoquer, en lui attribuant une note globale très basse, son départ de la DG « Commerce ». Selon le requérant, la réalité du détournement de pouvoir allégué serait mise en évidence par la note rédigée le 19 décembre 2003 par le validateur à l'attention du directeur général de la DG « Commerce », dans laquelle le premier aurait expressément fait part au second de son souhait de voir l'intéressé être muté à un autre poste que celui qu'il occupait.

160 La Commission conclut au rejet du grief.

Appréciation du Tribunal

161 Il convient de rappeler que, selon une jurisprudence constante, la notion de détournement de pouvoir se réfère à l'usage, par une autorité administrative, de ses pouvoirs dans un but autre que celui en vue duquel ils lui ont été conférés. Une décision n'est entachée de détournement de pouvoir que si elle apparaît, sur la base d'indices objectifs, pertinents et concordants, avoir été prise pour atteindre des fins autres que celles excipées (arrêt du Tribunal de première instance du 5 juillet 2000, Samper/Parlement, T-111/99, RecFP p. I-A-135 et II-611, point 64).

162 En l'espèce, le requérant reproche à la Commission d'avoir établi le REC 2004 afin non de procéder à son évaluation de manière objective mais de provoquer, en lui attribuant une note globale médiocre, son départ de la DG « Commerce ». Il se prévaut à cet effet de la note que son validateur a adressée le 19 décembre 2003 au directeur général de la DG « Commerce » et dans lequel le validateur aurait expressément manifesté le souhait de voir l'intéressé muté à un autre poste que celui qu'il occupait.

163 Toutefois, ainsi qu'il a été dit dans le cadre de l'examen du premier moyen, la note du 19 décembre 2003, écrite au demeurant antérieurement à la période de référence, peut être regardée comme ayant été envoyée par le directeur de la direction B au directeur général de la DG « Commerce » afin d'informer celui-ci de la nécessité de trouver une solution permettant de mettre fin aux difficultés relationnelles existant entre le requérant et sa hiérarchie, et ne saurait donc constituer par elle-même un indice tendant à prouver que le REC 2004 aurait été établi non pour évaluer, en application de l'article 43 du statut, le rendement la compétence et la conduite dans le service de l'intéressé, mais à la seule fin de parvenir à sa réaffectation.

164 Le détournement de pouvoir allégué n'est donc pas établi.

165 Le premier grief doit, dans ces conditions, être rejeté.

Sur le second grief, tiré de ce que le REC 2004 aurait été établi dans un contexte d'intimidation et de harcèlement moral, en l'absence duquel le requérant se serait vu attribuer une note globale plus élevée

Arguments des parties

166 Pour soutenir que le REC 2004 aurait été établi dans un climat d'intimidation et de harcèlement moral, l'intéressé avance plusieurs exemples qui tendraient, selon lui, à établir la réalité d'un tel climat.

167 Ainsi, premièrement, le validateur, à la rubrique 8.2 « Révision du validateur et visa » du REC 2004, lui aurait reproché de s'être enfermé dans le « cercle vicieux des accusations, attaques, recours, actions juridiques[, etc.] ». Or, le validateur n'aurait pas dû mentionner les différentes actions administratives et juridiques dont le requérant aurait légitimement usé pour assurer la défense de ses droits. Ainsi, le commentaire du validateur démontrerait le climat d'intimidation ayant entouré l'établissement du REC 2004.

168 Deuxièmement, le requérant aurait à plusieurs reprises été humilié par sa hiérarchie. À titre d'illustration, le chef adjoint de l'unité B.3 aurait mis en cause la durée prétendument excessive d'une mission que le requérant prévoyait d'effectuer à Taïwan dans le cadre de l'enquête sur le cas R 315, alors que ce fonctionnaire aurait auparavant approuvé tant le principe que la durée de cette mission.

169 Troisièmement, le fonctionnaire, ayant été chef de section du requérant jusqu'au 15 septembre 2004, aurait indiqué, à la rubrique 9.1 « Motifs de l'appel » de son propre REC intermédiaire, établi pour la période allant du 1er janvier au 15 septembre 2004, avoir fait l'objet de pressions afin d'établir de fausses déclarations au préjudice du requérant.

170 Quatrièmement, le requérant se serait vu attribuer le cas R 346 dans le seul but de le faire échouer.

171 Pour démontrer que le contexte d'intimidation et de harcèlement moral aurait eu une incidence sur la note globale qui lui a été attribuée, le requérant fait valoir que cette note globale serait nettement inférieure à la note globale moyenne des fonctionnaires de grade A*10 de la DG « Commerce » (15,21/20 pour l'exercice d'évaluation portant sur l'année 2004) et ferait de lui le fonctionnaire le plus mal noté de toute ladite DG.

172 La Commission conclut au rejet du grief.

Appréciation du Tribunal

173 Le requérant fait valoir que le REC 2004 aurait été établi dans un climat d'intimidation et de harcèlement moral et que ce climat aurait eu une incidence sur le niveau de sa note globale. Toutefois, si le requérant avance des exemples aux fins de prouver la réalité d'un tel climat, ces exemples ne sont pas de nature à établir l'ampleur ni même l'existence de l'incidence du prétendu climat d'intimidation et de harcèlement moral sur le niveau de sa note globale. Par ailleurs, à supposer que le requérant, en faisant observer que sa note globale serait inférieure à la note globale moyenne des fonctionnaires de grade A*10 de

la DG « Commerce » (15,21/20 pour l'exercice d'évaluation portant sur l'année 2004) et ferait de lui le fonctionnaire le plus mal noté de toute ladite DG, ait entendu soutenir qu'il se serait vu attribuer, en l'absence d'intimidation et de harcèlement moral de la part de sa hiérarchie, une note équivalente à la note globale moyenne, un tel argument ne saurait être accueilli. En effet, l'attribution d'une note globale à un fonctionnaire dépend de l'appréciation portée sur les prestations individuelles de celui-ci et la seule existence d'un écart entre la note globale moyenne et la note globale attribuée à ce dernier n'implique pas qu'il ait fait l'objet d'un harcèlement moral.

174 Le requérant n'est donc pas fondé à soutenir que le REC 2004 aurait été établi dans un contexte d'intimidation et de harcèlement moral, en l'absence duquel il se serait vu attribuer une note globale plus élevée que celle qui figure dans ledit REC.

175 Par suite, et sans qu'il soit besoin de faire droit à la demande du requérant tendant à ce que son ancien chef de section soit entendu en qualité de témoin, le Tribunal ayant été en mesure de trancher le litige sur le fondement des pièces versées aux débats, le second grief doit être écarté.

176 Il s'ensuit que le cinquième moyen doit être écarté comme non fondé.

177 L'ensemble des moyens avancés au soutien des conclusions tendant à l'annulation du REC 2004 du requérant ayant été écartés, lesdites conclusions doivent, en conséquence, être rejetées.

Sur la demande indemnitaire

1. *Arguments des parties*

178 Le requérant soutient que la Commission aurait commis plusieurs fautes de service dans l'établissement du REC 2004. Elle aurait, premièrement, refusé d'assumer ses responsabilités, deuxièmement, porté des appréciations subjectives et non fondées dans ledit REC dans le seul but de lui imputer des fautes commises par elle-même, troisièmement, menacé le requérant en raison de son intégrité et de son refus de céder aux pressions, et quatrièmement, agi en vue de l'exclure du service antidumping par l'établissement d'un REC non fondé.

179 Le requérant estime avoir subi un préjudice moral en ce que les appréciations manifestement non fondées et non motivées contenues dans le REC 2004 porteraient gravement atteinte à sa réputation professionnelle et viseraient à l'exclure de l'institution. De plus, les fautes commises par la Commission lui auraient également causé un préjudice matériel, dans la mesure où, en raison de sa note globale de 12/20, il n'a reçu aucun point de priorité et ne pourra dès lors pas bénéficier d'une promotion ni d'une augmentation de salaire dans les prochaines années.

180 Partant, le requérant considère qu'il y a lieu d'indemniser le préjudice matériel et moral qu'il a subi, celui-ci pouvant être évalué en équité, sous réserve d'ampliation, et en raison des faits particuliers de l'espèce, à 5 000 euros.

181 La Commission conclut au rejet de la demande indemnitaire.

2. *Appréciation du Tribunal*

182 Il convient de rappeler que, selon la jurisprudence, dans le système des voies de recours instauré par les articles 90 et 91 du statut, un recours en indemnité, qui constitue une voie de droit autonome par rapport au recours en annulation, n'est recevable que s'il a été précédé d'une procédure précontentieuse conforme aux dispositions statutaires. Cette procédure diffère selon que le dommage dont la réparation est demandée résulte d'un acte faisant grief au sens de l'article 90, paragraphe 2, du statut, ou d'un comportement de l'administration dépourvu de caractère décisionnel. Dans le premier cas, il appartient à l'intéressé de saisir, dans les délais impartis, l'AIPN d'une réclamation dirigée contre l'acte en cause. Dans le second cas, en revanche, la procédure administrative doit débuter par l'introduction d'une demande au sens de l'article 90, paragraphe 1, du statut, visant à obtenir un dédommagement, et se poursuivre, le cas échéant, par une réclamation dirigée contre la décision de rejet de la demande. Lorsqu'il existe un lien direct entre le recours en annulation et le recours en indemnité, ce dernier est recevable en tant qu'accessoire au recours en annulation, sans devoir être nécessairement précédé tant d'une demande invitant l'AIPN à réparer le préjudice prétendument subi que d'une réclamation contestant le bien-fondé du rejet implicite ou explicite de la demande. En revanche, lorsque le préjudice allégué ne résulte pas d'un acte dont l'annulation est poursuivie, mais de plusieurs fautes et omissions prétendument commises par l'administration, la procédure précontentieuse doit impérativement débuter par une demande invitant l'AIPN à réparer ce préjudice (arrêts du Tribunal de première instance du 6 novembre 1997, Liao/Conseil, T-15/96, RecFP p. I-A-329 et II-897, points 57 et 58 ; du 12 décembre 2002, Morello/Commission, T-378/00, RecFP p. I-A-311 et II-1497, point 102, et du 17 décembre 2003, McAuley/Conseil, T-324/02, RecFP p. I-A-337 et II-1657, point 91).

183 En l'espèce, pour autant que les conclusions indemnitaires tendent à la réparation du préjudice résultant prétendument du REC 2004, il y a lieu tout d'abord de considérer que ces conclusions sont recevables, étant donné qu'elles concernent un préjudice susceptible de se rattacher à l'acte faisant grief. Cependant, quant au

fond, il importe de rappeler que, selon une jurisprudence établie, les conclusions en réparation d'un préjudice en matière de fonction publique doivent être rejetées dans la mesure où elles présentent un lien étroit avec les conclusions en annulation qui ont elles-mêmes été rejetées comme non fondées (arrêt du Tribunal de première instance du 13 juillet 2005, Scano/Commission, T-5/04, RecFP p. I-A-205 et II-931, point 77 ; arrêt du Tribunal du 19 octobre 2006, De Smedt/Commission, F-59/05, RecFP p. I-A-1-109 et II-A-1-409, point 84). Les conclusions en annulation ayant été rejetées comme non fondées, il n'y a pas lieu, dans cette mesure, de faire droit aux conclusions indemnitaires.

184 Pour autant que les conclusions indemnitaires se rattachent à un comportement de l'administration dépourvu de caractère décisionnel, il importe de souligner que de telles conclusions auraient dû être précédées d'une demande du requérant invitant l'administration à réparer ce préjudice ainsi que, éventuellement, d'une réclamation dans laquelle l'intéressé aurait contesté le bien-fondé du rejet explicite ou implicite de sa demande. Or, en l'espèce, l'administration soutient, sans être contredite, que tel n'a pas été le cas. Les conclusions en indemnité doivent donc, dans cette mesure, être rejetées comme irrecevables.

185 L'ensemble de la demande en indemnité ne saurait donc être accueillie.

186 Il résulte de tout ce qui précède que le recours doit être rejeté dans son ensemble.

Sur les dépens

187 En vertu de l'article 122 du règlement de procédure, les dispositions du chapitre huitième du titre deuxième dudit règlement, relatives aux dépens et frais de justice, ne s'appliquent qu'aux affaires introduites devant le Tribunal à compter de l'entrée en vigueur de ce règlement de procédure, à savoir le 1er novembre 2007. Les dispositions du règlement de procédure du Tribunal de première instance pertinentes en la matière continuent à s'appliquer mutatis mutandis aux affaires pendantes devant le Tribunal avant cette date.

188 Aux termes de l'article 87, paragraphe 2, du règlement de procédure de du Tribunal de première instance, toute partie qui succombe est condamnée aux dépens, s'il est conclu en ce sens. Toutefois, en vertu de l'article 88 du même règlement, dans les litiges entre les Communautés et leurs agents, les frais exposés par les institutions restent à la charge de celles-ci. Le requérant ayant succombé en son recours, il y a lieu de décider que chaque partie supporte ses propres dépens.

Par ces motifs,

LE TRIBUNAL (deuxième chambre)

déclare et arrête :

1) Le recours est rejeté.

2) Chaque partie supporte ses propres dépens.

Van Raepenbusch Boruta Kanninen

Ainsi prononcé en audience publique à Luxembourg, le 13 décembre 2007.

Le greffier
W. Hakenberg

Le président
S. Van Raepenbusch

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JUDGMENT OF THE COURT (Third Chamber)

24 November 2011 *

In Case C-70/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the cour d'appel de Bruxelles (Belgium), made by decision of 28 January 2010, received at the Court on 5 February 2010, in the proceedings

Scarlet Extended SA

v

Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM),

intervening parties:

Belgian Entertainment Association Video ASBL (BEA Video),

* Language of the case: French.

Belgian Entertainment Association Music ASBL (BEA Music),

Internet Service Provider Association ASBL (ISPA),

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, J. Malenovský (Rapporteur), R. Silva de Lapuerta, E. Juhász and G. Arestis, Judges,

Advocate General: P. Cruz Villalón,
Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 13 January 2011,

after considering the observations submitted on behalf of:

— Scarlet Extended SA, by T. De Meese and B. Van Asbroeck, avocats,

— Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM), Belgian Entertainment Association Video ASBL (BEA Video) and Belgian Entertainment Association Music ASBL (BEA Music), by F. de Visscher, B. Michaux and F. Brison, avocats,

— Internet Service Provider Association ASBL (ISPA), by G. Somers, avocat,

— the Belgian Government, by T. Materne, J.-C. Halleux and C. Pochet, acting as Agents,

— the Czech Government, by M. Smolek and K. Havlíčková, acting as Agents,

— the Italian Government, by G. Palmieri, acting as Agent, assisted by S. Fiorentino, avvocato dello Stato,

— the Netherlands Government, by C. Wissels and B. Koopman, acting as Agents,

— the Polish Government, by M. Szpunar, M. Drwięcki and J. Goliński, acting as Agents,

— the Finnish Government, by M. Pere, acting as Agent,

— the European Commission, by J. Samnadda and C. Vrignon, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 14 April 2011,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Directives:

— 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') (OJ 2000 L 178, p. 1);

— 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10);

— 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ 2004 L 157, p. 45, and corrigendum OJ 2004 L 195, p. 16);

— 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

— 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ 2002 L 201, p. 37).

2 The reference has been made in proceedings between Scarlet Extended SA ('Scarlet') and the Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM) ('SABAM') concerning Scarlet's refusal to install a system for filtering electronic communications which use file-sharing software ('peer-to-peer'), with a view to preventing file sharing which infringes copyright.

Legal context

European Union law

Directive 2000/31

3 Recitals 45 and 47 in the preamble to Directive 2000/31 state:

'(45) The limitations of the liability of intermediary service providers established in this Directive do not affect the possibility of injunctions of different kinds; such

injunctions can in particular consist of orders by courts or administrative authorities requiring the termination or prevention of any infringement, including the removal of illegal information or the disabling of access to it.

…

(47) Member States are prevented from imposing a monitoring obligation on service providers only with respect to obligations of a general nature; this does not concern monitoring obligations in a specific case and, in particular, does not affect orders by national authorities in accordance with national legislation.'

4 Article 1 of Directive 2000/31 states:

'1. This Directive seeks to contribute to the proper functioning of the internal market by ensuring the free movement of information society services between the Member States.

2. This Directive approximates, to the extent necessary for the achievement of the objective set out in paragraph 1, certain national provisions on information society services relating to the internal market, the establishment of service providers, commercial communications, electronic contracts, the liability of intermediaries, codes of conduct, out-of-court dispute settlements, court actions and cooperation between Member States.

…'

5 Article 12 of that directive, which features in Section 4, entitled 'Liability of intermediary service providers', of Chapter II thereof, provides:

'1. Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network, Member States shall ensure that the service provider is not liable for the information transmitted, on condition that the provider:

(a) does not initiate the transmission;

(b) does not select the receiver of the transmission;

and

(c) does not select or modify the information contained in the transmission.

…

3. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement.'

6 Article 15 of Directive 2000/31, which also features in Section 4 of Chapter II, states:

'1. Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating unlawful activity.

2. Member States may establish obligations for information society service providers promptly to inform the competent public authorities of alleged unlawful activities undertaken or information provided by recipients of their service or obligations to communicate to the competent authorities, at their request, information enabling the identification of recipients of their service with whom they have storage agreements.'

Directive 2001/29

7 Recitals 16 and 59 in the preamble to Directive 2001/29 state:

'(16) … This Directive should be implemented within a timescale similar to that for the implementation of [Directive 2000/31], since that Directive provides a harmonised framework of principles and provisions relevant, inter alia, to important parts of this Directive. This Directive is without prejudice to provisions relating to liability in that Directive.

...

(59) In the digital environment, in particular, the services of intermediaries may increasingly be used by third parties for infringing activities. In many cases such intermediaries are best placed to bring such infringing activities to an end. Therefore, without prejudice to any other sanctions and remedies available, rightholders should have the possibility of applying for an injunction against an intermediary who carries a third party's infringement of a protected work or other subject-matter in a network. This possibility should be available even where the acts carried out by the intermediary are exempted under Article 5. The conditions and modalities relating to such injunctions should be left to the national law of the Member States.'

8 Article 8 of Directive 2001/29 states:

'1. Member States shall provide appropriate sanctions and remedies in respect of infringements of the rights and obligations set out in this Directive and shall take all the measures necessary to ensure that those sanctions and remedies are applied. The sanctions thus provided for shall be effective, proportionate and dissuasive.

...

3. Member States shall ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right.'

Directive 2004/48

9 Recital 23 in the preamble to Directive 2004/48 provides:

'Without prejudice to any other measures, procedures and remedies available, rightholders should have the possibility of applying for an injunction against an intermediary whose services are being used by a third party to infringe the rightholder's industrial property right. The conditions and procedures relating to such injunctions should be left to the national law of the Member States. As far as infringements of copyright and related rights are concerned, a comprehensive level of harmonisation is already provided for in Directive [2001/29]. Article 8(3) of Directive [2001/29] should therefore not be affected by this Directive.'

10 Article 2(3) of Directive 2004/48 provides as follows:

'This Directive shall not affect:

(a) the Community provisions governing the substantive law on intellectual property … or Directive [2000/31], in general, and Articles 12 to 15 of Directive [2000/31] in particular;

…'

11 Article 3 of Directive 2004/48 provides:

'1. Member States shall provide for the measures, procedures and remedies necessary to ensure the enforcement of the intellectual property rights covered by this Directive. Those measures, procedures and remedies shall be fair and equitable and shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays.

2. Those measures, procedures and remedies shall also be effective, proportionate and dissuasive and shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.'

12 Article 11 of Directive 2004/48 states:

'Member States shall ensure that, where a judicial decision is taken finding an infringement of an intellectual property right, the judicial authorities may issue against the infringer an injunction aimed at prohibiting the continuation of the infringement. Where provided for by national law, non-compliance with an injunction shall, where appropriate, be subject to a recurring penalty payment, with a view to ensuring compliance. Member States shall also ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe an intellectual property right, without prejudice to Article 8(3) of Directive [2001/29].'

National law

13 Article 87(1), first and second subparagraphs, of the Law of 30 June 1994 on copyright and related rights (*Moniteur belge* of 27 July 1994, p. 19297) states:

'The President of the Tribunal de première instance (Court of First Instance) … shall determine the existence of any infringement of a copyright or related right and shall order that it be brought to an end.

He may also issue an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right.'

14 Articles 18 and 21 of the Law of 11 March 2003 on certain legal aspects of information society services (*Moniteur belge* of 17 March 2003, p. 12962) transpose Articles 12 and 15 of Directive 2000/31 into national law.

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

15 SABAM is a management company which represents authors, composers and editors of musical works in authorising the use of their copyright-protected works by third parties.

16 Scarlet is an internet service provider ('ISP') which provides its customers with access to the internet without offering other services such as downloading or file sharing.

17 In the course of 2004, SABAM concluded that internet users using Scarlet's services were downloading works in SABAM's catalogue from the internet, without authorisation and without paying royalties, by means of peer-to-peer networks, which constitute a transparent method of file sharing which is independent, decentralised and features advanced search and download functions.

18 On 24 June 2004, SABAM accordingly brought interlocutory proceedings against Scarlet before the President of the Tribunal de première instance, Brussels, claiming that that company was the best placed, as an ISP, to take measures to bring to an end copyright infringements committed by its customers.

19 SABAM sought, first, a declaration that the copyright in musical works contained in its repertoire had been infringed, in particular the right of reproduction and the right of communication to the public, because of the unauthorised sharing of electronic music files by means of peer-to-peer software, those infringements being committed through the use of Scarlet's services.

20 SABAM also sought an order requiring Scarlet to bring such infringements to an end by blocking, or making it impossible for its customers to send or receive in any way, files containing a musical work using peer-to-peer software without the permission of the rightholders, on pain of a periodic penalty. Lastly, SABAM requested that Scarlet provide it with details of the measures that it would be applying in order to comply with the judgment to be given, on pain of a periodic penalty.

21 By judgment of 26 November 2004, the President of the Tribunal de première instance, Brussels, found that copyright had been infringed, as claimed by SABAM, but, prior to ruling on the application for cessation, appointed an expert to investigate whether the technical solutions proposed by SABAM were technically feasible, whether they would make it possible to filter out only unlawful file sharing, and whether there were other ways of monitoring the use of peer-to-peer software, and to determine the cost of the measures envisaged.

22 In his report, the appointed expert concluded that, despite numerous technical obstacles, the feasibility of filtering and blocking the unlawful sharing of electronic files could not be entirely ruled out.

23 By judgment of 29 June 2007, the President of the Tribunal de première instance, Brussels, accordingly ordered Scarlet to bring to an end the copyright infringements established in the judgment of 26 November 2004 by making it impossible for its customers to send or receive in any way files containing a musical work in SABAM's repertoire by means of peer-to-peer software, on pain of a periodic penalty.

24 Scarlet appealed against that decision to the referring court, claiming, first, that it was impossible for it to comply with that injunction since the effectiveness and permanence of filtering and blocking systems had not been proved and that the installation of the equipment for so doing was faced with numerous practical obstacles, such as problems with the network capacity and the impact on the network. Moreover, any attempt to block the files concerned was, it argued, doomed to fail in the very short term because there were at that time several peer-to-peer software products which made it impossible for third parties to check their content.

25 Scarlet also claimed that that injunction was contrary to Article 21 of the Law of 11 March 2003 on certain legal aspects of information society services, which transposes Article 15 of Directive 2000/31 into national law, because it would impose on Scarlet, *de facto*, a general obligation to monitor communications on its network, inasmuch as any system for blocking or filtering peer-to-peer traffic would necessarily require general surveillance of all the communications passing through its network.

26 Lastly, Scarlet considered that the installation of a filtering system would be in breach of the provisions of European Union law on the protection of personal data and the secrecy of communications, since such filtering involves the processing of IP addresses, which are personal data.

27 In that context, the referring court took the view that, before ascertaining whether a mechanism for filtering and blocking peer-to-peer files existed and could be effective, it had to be satisfied that the obligations liable to be imposed on Scarlet were in accordance with European Union law.

28 In those circumstances, the cour d'appel de Bruxelles decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Do Directives 2001/29 and 2004/48, in conjunction with Directives 95/46, 2000/31 and 2002/58, construed in particular in the light of Articles 8 and 10 of the European Convention on the Protection of Human Rights and Fundamental Freedoms, permit Member States to authorise a national court, before which substantive proceedings have been brought and on the basis merely of a statutory provision stating that: "They [the national courts] may also issue an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right", to order an [ISP] to install, for all its customers, in

abstracto and as a preventive measure, exclusively at the cost of that ISP and for an unlimited period, a system for filtering all electronic communications, both incoming and outgoing, passing via its services, in particular those involving the use of peer-to-peer software, in order to identify on its network the movement of electronic files containing a musical, cinematographic or audio-visual work in respect of which the applicant claims to hold rights, and subsequently to block the transfer of such files, either at the point at which they are requested or at which they are sent?

(2) If the answer to the [first] question … is in the affirmative, do those directives require a national court, called upon to give a ruling on an application for an injunction against an intermediary whose services are used by a third party to infringe a copyright, to apply the principle of proportionality when deciding on the effectiveness and dissuasive effect of the measure sought?'

Consideration of the questions referred

29 By its questions, the referring court asks, in essence, whether Directives 2000/31, 2001/29, 2004/48, 95/46 and 2002/58, read together and construed in the light of the requirements stemming from the protection of the applicable fundamental rights, must be interpreted as precluding an injunction imposed on an ISP to introduce a system for filtering

— all electronic communications passing via its services, in particular those involving the use of peer-to-peer software;

— which applies indiscriminately to all its customers;

— as a preventive measure;

— exclusively at its expense; and

— for an unlimited period,

which is capable of identifying on that provider's network the movement of electronic files containing a musical, cinematographic or audio-visual work in respect of which the applicant claims to hold intellectual property rights, with a view to blocking the transfer of files the sharing of which infringes copyright ('the contested filtering system').

30 In that regard, it should first be recalled that, under Article 8(3) of Directive 2001/29 and the third sentence of Article 11 of Directive 2004/48, holders of intellectual property rights may apply for an injunction against intermediaries, such as ISPs, whose services are being used by a third party to infringe their rights.

31 Next, it follows from the Court's case-law that the jurisdiction conferred on national courts, in accordance with those provisions, must allow them to order those intermediaries to take measures aimed not only at bringing to an end infringements already committed against intellectual-property rights using their information-society

services, but also at preventing further infringements (see, to that effect, Case C-324/09 *L'Oréal and Others* [2011] ECR I-6011, paragraph 131).

32 Lastly, it follows from that same case-law that the rules for the operation of the injunctions for which the Member States must provide under Article 8(3) of Directive 2001/29 and the third sentence of Article 11 of Directive 2004/48, such as those relating to the conditions to be met and to the procedure to be followed, are a matter for national law (see, *mutatis mutandis*, *L'Oréal and Others*, paragraph 135).

33 That being so, those national rules, and likewise their application by the national courts, must observe the limitations arising from Directives 2001/29 and 2004/48 and from the sources of law to which those directives refer (see, to that effect, *L'Oréal and Others*, paragraph 138).

34 Thus, in accordance with recital 16 in the preamble to Directive 2001/29 and Article 2(3)(a) of Directive 2004/48, those rules laid down by the Member States may not affect the provisions of Directive 2000/31 and, more specifically, Articles 12 to 15 thereof.

35 Consequently, those rules must, in particular, respect Article 15(1) of Directive 2000/31, which prohibits national authorities from adopting measures which would require an ISP to carry out general monitoring of the information that it transmits on its network.

36 In that regard, the Court has already ruled that that prohibition applies in particular to national measures which would require an intermediary provider, such as an ISP, to actively monitor all the data of each of its customers in order to prevent any future infringement of intellectual-property rights. Furthermore, such a general monitoring

obligation would be incompatible with Article 3 of Directive 2004/48, which states that the measures referred to by the directive must be fair and proportionate and must not be excessively costly (see *L'Oréal and Others*, paragraph 139).

37 In those circumstances, it is necessary to examine whether the injunction at issue in the main proceedings, which would require the ISP to install the contested filtering system, would oblige it, as part of that system, to actively monitor all the data of each of its customers in order to prevent any future infringement of intellectual-property rights.

38 In that regard, it is common ground that implementation of that filtering system would require

— first, that the ISP identify, within all of the electronic communications of all its customers, the files relating to peer-to-peer traffic;

— secondly, that it identify, within that traffic, the files containing works in respect of which holders of intellectual-property rights claim to hold rights;

— thirdly, that it determine which of those files are being shared unlawfully; and

— fourthly, that it block file sharing that it considers to be unlawful.

39 Preventive monitoring of this kind would thus require active observation of all electronic communications conducted on the network of the ISP concerned and, consequently, would encompass all information to be transmitted and all customers using that network.

40 In the light of the foregoing, it must be held that the injunction imposed on the ISP concerned requiring it to install the contested filtering system would oblige it to actively monitor all the data relating to each of its customers in order to prevent any future infringement of intellectual-property rights. It follows that that injunction would require the ISP to carry out general monitoring, something which is prohibited by Article 15(1) of Directive 2000/31.

41 In order to assess whether that injunction is consistent with European Union law, account must also be taken of the requirements that stem from the protection of the applicable fundamental rights, such as those mentioned by the referring court.

42 In that regard, it should be recalled that the injunction at issue in the main proceedings pursues the aim of ensuring the protection of copyright, which is an intellectual-property right, which may be infringed by the nature and content of certain electronic communications conducted through the network of the ISP concerned.

43 The protection of the right to intellectual property is indeed enshrined in Article 17(2) of the Charter of Fundamental Rights of the European Union ('the Charter'). There is, however, nothing whatsoever in the wording of that provision or in the Court's case-law to suggest that that right is inviolable and must for that reason be absolutely protected.

44 As paragraphs 62 to 68 of the judgment in Case C-275/06 *Promusicae* [2008] ECR I-271 make clear, the protection of the fundamental right to property, which includes the rights linked to intellectual property, must be balanced against the protection of other fundamental rights.

45 More specifically, it follows from paragraph 68 of that judgment that, in the context of measures adopted to protect copyright holders, national authorities and courts must strike a fair balance between the protection of copyright and the protection of the fundamental rights of individuals who are affected by such measures.

46 Accordingly, in circumstances such as those in the main proceedings, national authorities and courts must, in particular, strike a fair balance between the protection of the intellectual property right enjoyed by copyright holders and that of the freedom to conduct a business enjoyed by operators such as ISPs pursuant to Article 16 of the Charter.

47 In the present case, the injunction requiring the installation of the contested filtering system involves monitoring all the electronic communications made through the network of the ISP concerned in the interests of those rightholders. Moreover, that monitoring has no limitation in time, is directed at all future infringements and is intended to protect not only existing works, but also future works that have not yet been created at the time when the system is introduced.

48 Accordingly, such an injunction would result in a serious infringement of the freedom of the ISP concerned to conduct its business since it would require that ISP to install a complicated, costly, permanent computer system at its own expense, which would also be contrary to the conditions laid down in Article 3(1) of Directive 2004/48,

which requires that measures to ensure the respect of intellectual-property rights should not be unnecessarily complicated or costly.

49 In those circumstances, it must be held that the injunction to install the contested filtering system is to be regarded as not respecting the requirement that a fair balance be struck between, on the one hand, the protection of the intellectual-property right enjoyed by copyright holders, and, on the other hand, that of the freedom to conduct business enjoyed by operators such as ISPs.

50 Moreover, the effects of that injunction would not be limited to the ISP concerned, as the contested filtering system may also infringe the fundamental rights of that ISP's customers, namely their right to protection of their personal data and their freedom to receive or impart information, which are rights safeguarded by Articles 8 and 11 of the Charter respectively.

51 It is common ground, first, that the injunction requiring installation of the contested filtering system would involve a systematic analysis of all content and the collection and identification of users' IP addresses from which unlawful content on the network is sent. Those addresses are protected personal data because they allow those users to be precisely identified.

52 Secondly, that injunction could potentially undermine freedom of information since that system might not distinguish adequately between unlawful content and lawful content, with the result that its introduction could lead to the blocking of lawful communications. Indeed, it is not contested that the reply to the question whether a transmission is lawful also depends on the application of statutory exceptions to

copyright which vary from one Member State to another. Moreover, in some Member States certain works fall within the public domain or can be posted online free of charge by the authors concerned.

53 Consequently, it must be held that, in adopting the injunction requiring the ISP to install the contested filtering system, the national court concerned would not be respecting the requirement that a fair balance be struck between the right to intellectual property, on the one hand, and the freedom to conduct business, the right to protection of personal data and the freedom to receive or impart information, on the other.

54 In the light of the foregoing, the answer to the questions submitted is that Directives 2000/31, 2001/29, 2004/48, 95/46 and 2002/58, read together and construed in the light of the requirements stemming from the protection of the applicable fundamental rights, must be interpreted as precluding an injunction made against an ISP which requires it to install the contested filtering system.

Costs

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

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

Directives:

— **2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce');**

— **2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society;**

— **2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights ;**

— **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; and**

— **2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications),**

read together and construed in the light of the requirements stemming from the protection of the applicable fundamental rights, must be interpreted as precluding an injunction made against an internet service provider which requires it to install a system for filtering

— **all electronic communications passing via its services, in particular those involving the use of peer-to-peer software;**

— **which applies indiscriminately to all its customers;**

— **as a preventive measure;**

— **exclusively at its expense; and**

— **for an unlimited period,**

which is capable of identifying on that provider's network the movement of electronic files containing a musical, cinematographic or audio-visual work in respect of which the applicant claims to hold intellectual-property rights, with a view to blocking the transfer of files the sharing of which infringes copyright.

[Signatures]

Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

16 February 2012 *

(Information society — Copyright — Internet — Hosting service provider — Processing of information stored on an online social networking platform — Introducing a system for filtering that information in order to prevent files being made available which infringe copyright — No general obligation to monitor stored information)

In Case C-360/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the rechtbank van eerste aanleg te Brussel (Belgium), made by decision of 28 June 2010, received at the Court on 19 July 2010, in the proceedings

Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM)

v

Netlog NV,

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, J. Malenovský (Rapporteur), R. Silva de Lapuerta, G. Arestis and D. Šváby, Judges,

Advocate General: P. Cruz Villalón,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 7 July 2011,

after considering the observations submitted on behalf of:

— Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM), by B. Michaux, F. de Visscher and F. Brison, advocaten,

— Netlog NV, by P. Van Eecke, advocaat,

— the Belgian Government, by T. Materne and J.-C. Halleux, acting as Agents,

— the Italian Government, by G. Palmieri, acting as Agent, assisted by S. Fiorentino, avvocato dello Stato,

— the Netherlands Government, by C. Wissels, acting as Agent,

* Language of the case: Dutch.

— the United Kingdom Government, by S. Ossowski, acting as Agent,

— the European Commission, by A. Nijenhuis and J. Samnadda, acting as Agents,

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

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of:

— Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) (OJ 2000 L 178, p. 1);

— Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10);

— Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ 2004 L 157, p. 45, and corrigenda OJ 2004 L 195, p. 16, and OJ 2007 L 204, p. 27);

— 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

— Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ 2002 L 201, p. 37).

2 The reference has been made in proceedings between Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) ('SABAM') and Netlog NV ('Netlog'), the owner of an online social networking platform, concerning Netlog's obligation to introduce a system for filtering information stored on its platform in order to prevent files being made available which infringe copyright.

Legal context

European Union (EU) law

Directive 2000/31

3 Under recitals 45, 47 and 48 in the preamble to Directive 2000/31:

'(45) The limitations of the liability of intermediary service providers established in this Directive do not affect the possibility of injunctions of different kinds; such injunctions can in particular consist of orders by courts or administrative authorities requiring the termination or prevention of any infringement, including the removal of illegal information or the disabling of access to it.

…

(47) Member States are prevented from imposing a monitoring obligation on service providers only with respect to obligations of a general nature; this does not concern monitoring obligations in a specific case and, in particular, does not affect orders by national authorities in accordance with national legislation.

(48) This Directive does not affect the possibility for Member States of requiring service providers, who host information provided by recipients of their service, to apply duties of care, which can reasonably be expected from them and which are specified by national law, in order to detect and prevent certain types of illegal activities.'

4 Article 14 of Directive 2000/31, headed 'Hosting', states:

'(1) Where an information society service is provided that consists of the storage of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service, on condition that:

(a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or

(b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.

(2) Paragraph 1 shall not apply when the recipient of the service is acting under the authority or the control of the provider.

(3) This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement, nor does it affect the possibility for Member States of establishing procedures governing the removal or disabling of access to information.'

5 Under Article 15 of Directive 2000/31:

'(1) Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.

(2) Member States may establish obligations for information society service providers promptly to inform the competent public authorities of alleged illegal activities undertaken or information provided by recipients of their service or obligations to communicate to the competent authorities, at their request, information enabling the identification of recipients of their service with whom they have storage agreements.'

Directive 2001/29

6 Under recitals 16 and 59 in the preamble to Directive 2001/29:

'(16) … This Directive should be implemented within a timescale similar to that for the implementation of [Directive 2000/31], since that Directive provides a harmonised framework of principles and provisions relevant inter alia to important parts of this Directive. This Directive is without prejudice to provisions relating to liability in that Directive.

…

(59) In the digital environment, in particular, the services of intermediaries may increasingly be used by third parties for infringing activities. In many cases such intermediaries are best placed to bring such infringing activities to an end. Therefore, without prejudice to any other sanctions and remedies available, rightholders should have the possibility of applying for an injunction against an intermediary who carries a third party's infringement of a protected work or other subject-matter in a network. This possibility should be available even where the acts carried out by the intermediary are exempted under Article 5. The conditions and modalities relating to such injunctions should be left to the national law of the Member States.'

7 Under Article 3(1) of Directive 2001/29:

'Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.'

8 Article 8 of that directive provides:

'(1) Member States shall provide appropriate sanctions and remedies in respect of infringements of the rights and obligations set out in this Directive and shall take all the measures necessary to ensure that those sanctions and remedies are applied. The sanctions thus provided for shall be effective, proportionate and dissuasive.

…

(3) Member States shall ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right.'

Directive 2004/48

9 Recital 23 in the preamble to Directive 2004/48 is worded as follows:

'Without prejudice to any other measures, procedures and remedies available, rightholders should have the possibility of applying for an injunction against an intermediary whose services are being used by a third party to infringe the rightholder's industrial property right. The conditions and procedures relating to such injunctions should be left to the national law of the Member States. As far as infringements of copyright and related rights are concerned, a comprehensive level of harmonisation is already provided for in Directive [2001/29]. Article 8(3) of Directive [2001/29] should therefore not be affected by this Directive.'

10 Under Article 2(3) of Directive 2004/48:

'This Directive shall not affect:

(a) the Community provisions governing the substantive law on intellectual property, Directive 95/46/EC … or Directive 2000/31/EC, in general, and Articles 12 to 15 of Directive 2000/31/EC in particular;

…'

11 Article 3 of Directive 2004/48 states:

'(1) Member States shall provide for the measures, procedures and remedies necessary to ensure the enforcement of the intellectual property rights covered by this Directive. Those measures, procedures and remedies shall be fair and equitable and shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays.

(2) Those measures, procedures and remedies shall also be effective, proportionate and dissuasive and shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.'

12 The third sentence of Article 11 of Directive 2004/48 states:

'Member States shall also ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe an intellectual property right, without prejudice to Article 8(3) of Directive [2001/29].'

National law

13 Article 87(1), first and second subparagraphs, of the Law of 30 June 1994 on copyright and related rights (*Belgisch Staatsblad*, 27 July 1994, p. 19297), which transposes Article 8(3) of Directive 2001/29 and Article 11 of Directive 2004/48 into national law, states:

'The President of the Tribunal de première instance (Court of First Instance) … shall determine the existence of any infringement of a copyright or related right and shall order that it be brought to an end.

He may also issue an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right.'

14 Articles 20 and 21 of the Law of 11 March 2003 on certain legal aspects of information society services (*Belgisch Staatsblad*, 17 March 2003, p. 12962) transpose Articles 14 and 15 of Directive 2000/31 into national law.

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

15 SABAM is a management company which represents authors, composers and publishers of musical works. On that basis, it is responsible for, inter alia, authorising the use by third parties of copyright-protected works of those authors, composers and publishers.

16 Netlog runs an online social networking platform where every person who registers acquires a personal space known as a 'profile' which the user can complete himself and which becomes available globally.

17 The most important function of that platform, which is used by tens of millions of individuals on a daily basis, is to build virtual communities through which those individuals can communicate with each other and thereby develop friendships. On their profile, users can, inter alia, keep a diary, indicate their hobbies and interests, show who their friends are, display personal photos or publish video clips.

18 However, SABAM claimed that Netlog's social network also offers all users the opportunity to make use, by means of their profile, of the musical and audio-visual works in SABAM's repertoire, making those works available to the public in such a way that other users of that network can have access to them without SABAM's consent and without Netlog paying it any fee.

19 During February 2009, SABAM approached Netlog with a view to concluding an agreement regarding the payment of a fee by Netlog for the use of the SABAM repertoire.

20 By letter of 2 June 2009, SABAM gave notice to Netlog that it should give an undertaking to cease and desist from making available to the public musical and audio-visual works from SABAM's repertoire without the necessary authorisation.

21 On 23 June 2009, SABAM had Netlog summoned before the President of the rechtbank van eerste aanleg te Brussel (Court of First Instance, Brussels) in injunction proceedings under Article 87(1) of the Law of 30 June 1994 on copyright and related rights, requesting inter alia that Netlog be ordered immediately to cease unlawfully making available musical or audio-visual works from SABAM's repertoire and to pay a penalty of EUR 1000 for each day of delay in complying with that order.

22 In that regard, Netlog submitted that granting SABAM's injunction would be tantamount to imposing on Netlog a general obligation to monitor, which is prohibited by Article 21(1) of the Law of 11 March 2003 on certain legal aspects of information society services, which transposes Article 15(1) of Directive 2000/31 into national law.

23 In addition, Netlog claimed, without being contradicted by SABAM, that the granting of such an injunction could result in the imposition of an order that it introduce, for all its customers, *in abstracto* and as a preventative measure, at its own cost and for an unlimited period, a system for filtering most of the information which is stored on its servers in order to identify on its servers electronic files containing musical, cinematographic or audio-visual work in respect of which SABAM claims to hold rights, and subsequently that it block the exchange of such files.

24 It is possible that introducing such a filtering system would mean that personal data would have to be processed which would have to satisfy the provisions of EU law relating to the protection of personal data and the confidentiality of communications.

25 In those circumstances, the rechtbank van eerste aanleg te Brussel decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Do Directives 2001/29 and 2004/48, in conjunction with Directives 95/46, 2000/31 and 2002/58, construed in particular in the light of Articles 8 and 10 of the European Convention on the Protection of Human Rights and Fundamental Freedoms [signed in Rome on 4 November 1950], permit Member States to authorise a national court, before which substantive proceedings have been brought and on the basis merely of a statutory provision stating that "[the national courts] may also issue an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right", to order a hosting service provider to introduce, for all its customers, *in abstracto* and as a preventive measure, at its own cost and for an unlimited period, a system for filtering most of the information which is stored on its servers in order to identify on its servers electronic files containing musical, cinematographic or audio-visual work in respect of which SABAM claims to hold rights, and subsequently to block the exchange of such files?'

Consideration of the question referred

26 By its question, the referring court asks, in essence, whether Directives 2000/31, 2001/29, 2004/48, 95/46 and 2002/58, read together and construed in the light of the requirements stemming from the protection of the applicable fundamental rights, are to be interpreted as precluding a national court from issuing an injunction against a hosting service provider which requires it to install a system for filtering:

— information which is stored on its servers by its service users;

— which applies indiscriminately to all of those users;

— as a preventative measure;

— exclusively at its expense; and

— for an unlimited period,

which is capable of identifying electronic files containing musical, cinematographic or audio-visual work in respect of which the applicant for the injunction claims to hold intellectual property rights, with a view to preventing those works from being made available to the public in breach of copyright ('the contested filtering system').

27 In that regard, first, it is not in dispute that the owner of an online social networking platform - such as Netlog - stores information provided by the users of that platform, relating to their profile, on its servers, and that it is thus a hosting service provider within the meaning of Article 14 of Directive 2000/31.

28 Next, it should be borne in mind that, according to Article 8(3) of Directive 2001/29 and the third sentence of Article 11 of Directive 2004/48, holders of intellectual property rights may apply for an injunction against operators of online social networking platforms, such as Netlog, who act as intermediaries within the meaning of those provisions, given that their services may be exploited by users of those platforms to infringe intellectual property rights.

29 In addition, it follows from the Court's case-law that the jurisdiction conferred on national courts, in accordance with those provisions, must allow them to order those intermediaries to take measures aimed not only at bringing to an end infringements already committed against intellectual-property rights using their information-society services, but also at preventing further infringements (see Case C-70/10 *Scarlet Extended* [2011] ECR I-11959, paragraph 31).

30 Lastly, it follows from that same case-law that the rules for the operation of the injunctions for which the Member States must provide under Article 8(3) of Directive 2001/29 and the third sentence of Article 11 of Directive 2004/48, such as those relating to the conditions to be met and to the procedure to be followed, are a matter for national law (see *Scarlet Extended*, paragraph 32).

31 Nevertheless, the rules established by the Member States, and likewise their application by the national courts, must observe the limitations arising from Directives 2001/29 and 2004/48 and from the sources of law to which those directives refer (see *Scarlet Extended*, paragraph 33).

32 Thus, in accordance with recital 16 in the preamble to Directive 2001/29 and Article 2(3)(a) of Directive 2004/48, those rules may not affect the provisions of Directive 2000/31 and, more specifically, Articles 12 to 15 thereof (see *Scarlet Extended*, paragraph 34).

33 Consequently, those rules must, in particular, respect Article 15(1) of Directive 2000/31, which prohibits national authorities from adopting measures which would require a hosting service provider to carry out general monitoring of the information that it stores (see, by analogy, *Scarlet Extended*, paragraph 35).

34 In that regard, the Court has already ruled that that prohibition applies in particular to national measures which would require an intermediary provider, such as a hosting service provider, to actively monitor all the data of each of its customers in order to prevent any future infringement of intellectual-property rights. Furthermore, such a general monitoring obligation would be incompatible with Article 3 of Directive 2004/48, which states that the measures referred to by the directive must be fair and proportionate and must not be excessively costly (see *Scarlet Extended*, paragraph 36).

35 In those circumstances, it is necessary to examine whether the injunction at issue in the main proceedings, which would require the hosting service provider to introduce the contested filtering system, would oblige it, as part of that system, to actively monitor all the data of each of its service users in order to prevent any future infringement of intellectual-property rights.

36 In that regard, it is common ground that implementation of that filtering system would require:

— first, that the hosting service provider identify, within all of the files stored on its servers by all its service users, the files which are likely to contain works in respect of which holders of intellectual-property rights claim to hold rights;

— next, that it determine which of those files are being stored and made available to the public unlawfully; and

— lastly, that it prevent files that it considers to be unlawful from being made available.

37 Preventive monitoring of this kind would thus require active observation of files stored by users with the hosting service provider and would involve almost all of the information thus stored and all of the service users of that provider (see, by analogy, *Scarlet Extended*, paragraph 39).

38 In the light of the foregoing, it must be held that the injunction imposed on the hosting service provider requiring it to install the contested filtering system would oblige it to actively monitor almost all the data relating to all of its service users in order to prevent any future infringement of intellectual-property rights. It follows that that injunction would require the hosting service provider to carry out general monitoring, something which is prohibited by Article 15(1) of Directive 2000/31 (see, by analogy, *Scarlet Extended*, paragraph 40).

39 In order to assess whether that injunction is consistent with EU law, account must also be taken of the requirements that stem from the protection of the applicable fundamental rights, such as those mentioned by the referring court.

40 In that regard, it should be borne in mind that the injunction at issue in the main proceedings pursues the aim of ensuring the protection of copyright, which is an intellectual-property right, which may be infringed by the nature and content of certain information stored and made available to the public by means of the service offered by the hosting service provider.

41 The protection of the right to intellectual property is indeed enshrined in Article 17(2) of the Charter of Fundamental Rights of the European Union ('the Charter'). There is, however, nothing whatsoever in the wording of that provision or in the Court's case-law to suggest that that right is inviolable and must for that reason be absolutely protected (*Scarlet Extended*, paragraph 43).

42 As paragraphs 62 to 68 of the judgment in Case C-275/06 *Promusicae* [2008] ECR I-271 make clear, the protection of the fundamental right to property, which includes the rights linked to intellectual property, must be balanced against the protection of other fundamental rights.

43 More specifically, it follows from paragraph 68 of that judgment that, in the context of measures adopted to protect copyright holders, national authorities and courts must strike a fair balance between the protection of copyright and the protection of the fundamental rights of individuals who are affected by such measures.

44 Accordingly, in circumstances such as those in the main proceedings, national authorities and courts must, in particular, strike a fair balance between the protection of the intellectual property right enjoyed by copyright holders and that of the freedom to conduct a business enjoyed by operators such as hosting service providers pursuant to Article 16 of the Charter (see *Scarlet Extended*, paragraph 46).

45 In the main proceedings, the injunction requiring the installation of the contested filtering system involves monitoring all or most of the information stored by the hosting service provider concerned, in the interests of those rightholders. Moreover, that monitoring has no limitation in time, is directed at all future infringements and is intended to protect not only existing works, but also works that have not yet been created at the time when the system is introduced.

46 Accordingly, such an injunction would result in a serious infringement of the freedom of the hosting service provider to conduct its business since it would require that hosting service provider to install a complicated, costly, permanent computer system at its own expense, which would also be contrary to the conditions laid down in Article 3(1) of Directive 2004/48, which requires that measures to ensure the respect of intellectual-property rights should not be unnecessarily complicated or costly (see, by analogy, *Scarlet Extended*, paragraph 48).

47 In those circumstances, it must be held that the injunction to install the contested filtering system is to be regarded as not respecting the requirement that a fair balance be struck between, on the one hand, the protection of the intellectual-property right enjoyed by copyright holders, and, on the other hand, that of the freedom to conduct business enjoyed by operators such as hosting service providers (see, by analogy, *Scarlet Extended*, paragraph 49).

48 Moreover, the effects of that injunction would not be limited to the hosting service provider, as the contested filtering system may also infringe the fundamental rights of that hosting service provider's service users, namely their right to protection of their personal data and their freedom to receive or impart information, which are rights safeguarded by Articles 8 and 11 of the Charter respectively.

49 Indeed, the injunction requiring installation of the contested filtering system would involve the identification, systematic analysis and processing of information connected with the profiles created on the social network by its users. The information connected with those profiles is protected personal data because, in principle, it allows those users to be identified (see, by analogy, *Scarlet Extended*, paragraph 51).

50 Moreover, that injunction could potentially undermine freedom of information, since that system might not distinguish adequately between unlawful content and lawful content, with the result that its introduction could lead to the blocking of lawful communications. Indeed, it is not contested that the reply to the question whether a transmission is lawful also depends on the application of statutory exceptions to copyright which vary from one Member State to another. In addition, in some Member States certain works fall within the public domain or may be posted online free of charge by the authors concerned (see, by analogy, *Scarlet Extended*, paragraph 52).

51 Consequently, it must be held that, in adopting the injunction requiring the hosting service provider to install the contested filtering system, the national court concerned would not be respecting the requirement that a fair balance be struck between the right to intellectual property, on the one hand, and the freedom to conduct business, the right to protection of personal data and the freedom to receive or impart information, on the other (see, by analogy, *Scarlet Extended*, paragraph 53).

52 In the light of the foregoing, the answer to the question referred is that Directives 2000/31, 2001/29 and 2004/48, read together and construed in the light of the requirements stemming from the protection of the applicable fundamental rights, must be interpreted as precluding an injunction made against a hosting service provider which requires it to install the contested filtering system.

Costs

53 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 (Third Chamber)

hereby rules:

Directives:

— **2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce);**

— **2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society; and**

— **2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights,**

read together and construed in the light of the requirements stemming from the protection of the applicable fundamental rights, must be interpreted as precluding a national court from issuing an injunction against a hosting service provider which requires it to install a system for filtering:

— **information which is stored on its servers by its service users;**

— **which applies indiscriminately to all of those users;**

— **as a preventative measure;**

— **exclusively at its expense; and**

— **for an unlimited period,**

which is capable of identifying electronic files containing musical, cinematographic or audio-visual work in respect of which the applicant for the injunction claims to hold intellectual property rights, with a view to preventing those works from being made available to the public in breach of copyright.

[Signatures]

Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

4 May 2016*

(Reference for a preliminary ruling — Approximation of laws — Directive 2014/40/EU — Articles 7, 18 and 24(2) and (3) — Articles 8(3), 9(3), 10(1)(a), (c) and (g), 13 and 14 — Manufacture, presentation and sale of tobacco products — Validity — Legal basis — Article 114 TFEU — Principle of proportionality — Principle of subsidiarity — Fundamental rights of the European Union — Freedom of expression — Charter of Fundamental Rights of the European Union — Article 11)

In Case C-547/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court) (United Kingdom), made by decision of 7 November 2014, received at the Court on 1 December 2014, in the proceedings

The Queen, on the application of:

Philip Morris Brands SARL,

Philip Morris Ltd,

British American Tobacco UK Ltd

v

The Secretary of State for Health,

Interested parties and interveners:

Imperial Tobacco Ltd,

JT International SA,

Gallaher Ltd,

Tann UK Ltd,

Tannpapier GmbH,

V. Mane Fils,

Deutsche Benkert GmbH & Co. KG,

Benkert UK Ltd,

* Language of the case: English.

Joh. Wilh. von Eicken GmbH,

THE COURT (Second Chamber),

composed of R. Silva de Lapuerta, President of the First Chamber, acting as President of the Second Chamber, J.L. da Cruz Vilaça, A. Arabadjiev (Rapporteur), C. Lycourgos and J.-C. Bonichot, Judges,

Advocate General: J. Kokott,

Registrar: I. Illéssy, Administrator,

having regard to the written procedure and further to the hearing on 1 October 2015,

after considering the observations submitted on behalf of:

— Philip Morris Brands SARL and Philip Morris Ltd, by M. Demetriou QC, K. Nairn QC, D. Piccinin and J. Egerton-Peters, Barristers,

— British American Tobacco UK Ltd, by N. Pleming QC, S. Ford and D. Scannell, Barristers, and L. Van Den Hende, advocaat, instructed by A. Lidbetter, Solicitor,

— Imperial Tobacco Ltd, by D. Rose QC, B. Kennelly and J. Pobjoy, Barristers, instructed by E. Sparrow and J. Gale, Solicitors,

— JT International SA and Gallaher Ltd, by J. MacLeod QC, D. Anderson QC, J. Flynn QC and V. Wakefield, Barrister, instructed by A. Morfey, T. Snelling and T. Baildam, Solicitors,

— Tann UK and Tannpapier GmbH, by T. Johnston, Barrister, instructed by S. Singleton, Solicitor,

— V. Mane Fils, by M. Chamberlain QC and Z. Al-Rikabi, Barrister, instructed by P. Wareham and J. Robinson, Solicitors,

— Deutsche Benkert GmbH & Co. KG and Benkert UK Ltd, by A. Henshaw QC and D. Jowell QC, instructed by M. Evans and F. Liberatore, Solicitors,

— Joh. Wilh. von Eicken GmbH, by A. Howard, Barrister, instructed by A.-M. Irwin and A. Rook, Solicitors,

— the United Kingdom Government, by V. Kaye and C. Brodie, acting as Agents, and by M. Hoskins QC, I. Rogers QC and S. Abram and E. Metcalfe, Barristers,

— Ireland, by J. Quaney and A. Joyce, acting as Agents, and by E. Barrington, Senior Counsel, J. Cooke, Senior Counsel, and E. Carolan, Barrister-at-Law,

— the French Government, by D. Colas and R. Coesme, acting as Agents,

— the Italian Government, by G. Palmieri, acting as Agent, and P.G. Marrone, avvocato dello Stato,

— the Hungarian Government, by M.Z. Fehér, G. Koós and M. Bóra, acting as Agents,

— the Polish Government, by B. Majczyna, acting as Agent,

— the Portuguese Government, by L. Inez Fernandes and A. Seiça Neves, acting as Agents,

— the European Parliament, by L. Visaggio, A. Tamás and M. Sammut, acting as Agents,

— the Council of the European Union, by J. Herrmann, O. Segnana and M. Simm, acting as Agents,

— the European Commission, by M. Van Hoof, J. Tomkin and C. Cattabriga, acting as Agents,

— the Kingdom of Norway, by K. Moen and K. Kloster, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 23 December 2015,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation and validity of a number of provisions of Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC (OJ 2014 L 127, p. 1).

2 The request has been made in two sets of proceedings brought by (i) Philip Morris Brands SARL and Philip Morris Ltd ('PMI') and (ii) British American Tobacco UK Ltd ('BAT') against the Secretary of State for Health, concerning the legality of the 'intention and/or obligation' of the United Kingdom Government to implement Directive 2014/40.

Legal context

World Health Organisation Framework Convention on Tobacco Control

3 In the words of the preamble to the World Health Organisation Framework Convention on Tobacco Control ('the FCTC'), signed in Geneva on 21 May 2003, to which the European Union and its Member States are party, the Parties to that convention recognise that 'scientific evidence has unequivocally established that tobacco consumption and exposure to tobacco smoke cause death, disease and disability' and that 'cigarettes and some other products containing tobacco are highly engineered so as to create and maintain dependence, and that many of the compounds they contain and the smoke they produce are pharmacologically active, toxic, mutagenic and carcinogenic, and that tobacco dependence is separately classified as a disorder in major international classifications of diseases'.

4 Article 7 of the FCTC, which is entitled 'Non-price measures to reduce the demand for tobacco', provides:

'… Each Party shall adopt and implement effective legislative, executive, administrative or other measures necessary to implement its obligations pursuant to Articles 8 to 13 and shall cooperate, as appropriate, with each other directly or through competent international bodies with a view to their implementation. The Conference of the Parties shall propose appropriate guidelines for the implementation of the provisions of these Articles.'

5 Article 9 of the FCTC, which is entitled 'Regulation of the contents of tobacco products', provides:

'The Conference of the Parties, in consultation with competent international bodies, shall propose guidelines for testing and measuring the contents and emissions of tobacco products, and for the regulation of these contents and emissions. Each Party shall, where approved by competent national authorities, adopt and implement effective legislative, executive and administrative or other measures for such testing and measuring, and for such regulation.'

6 Article 11 of the FCTC, which is entitled 'Packaging and labelling of tobacco products', provides:

'1. Each Party shall, within a period of three years after entry into force of this Convention for that Party, adopt and implement, in accordance with its national law, effective measures to ensure that:

(a) tobacco product packaging and labelling do not promote a tobacco product by any means that are false, misleading, deceptive or likely to create an erroneous impression about its characteristics, health effects, hazards or emissions, including any term, descriptor, trademark, figurative or any other sign that directly or indirectly creates the false impression that a particular tobacco product is less harmful than other tobacco products. These may include terms such as "low tar", "light", "ultra-light" or "mild"; and

(b) each unit packet and package of tobacco products and any outside packaging and labelling of such products also carry health warnings describing the harmful effects of tobacco use, and may include other appropriate messages. These warnings and messages:

…

(iii) shall be large, clear, visible and legible,
(iv) should be 50% or more of the principal display areas but shall be no less than 30% of the principal display areas,
(v) may be in the form of or include pictures or pictograms.'

7 Under Section 1.1 of the Partial Guidelines for Implementation of Articles 9 and 10 of the World Health Organisation Framework Convention on Tobacco Control ('the Partial Guidelines for Implementation of Articles 9 and 10 of the FCTC'), the parties 'are ... encouraged to implement measures beyond those recommended by these guidelines'.

8 Section 3.1.2 of those partial guidelines, which is headed 'Ingredients (Regulation)', describes the measures that the Contracting Parties could introduce to regulate ingredients, stating as follows:

'3.1.2.1 Background Regulating ingredients aimed at reducing tobacco product attractiveness can contribute to reducing the prevalence of tobacco use and dependence among new and continuing users. ...

3.1.2.2 Tobacco Products

(i) Ingredients used to increase palatability The harsh and irritating character of tobacco smoke provides a significant barrier to experimentation and initial use. Tobacco industry documents have shown that significant effort has been put into mitigating these unfavourable characteristics. Harshness can be reduced in a variety of ways including: adding various ingredients, eliminating substances with known irritant properties, balancing irritation alongside other significant sensory effects, or altering the chemical properties of tobacco product emissions by adding or removing specific substances. … Masking tobacco smoke harshness with flavours contributes to promoting and sustaining tobacco use. Examples of flavouring substances include benzaldehyde, maltol, menthol and

vanillin. Spices and herbs can also be used to improve the palatability of tobacco products. Examples include cinnamon, ginger and mint. Recommendation Parties should regulate, by prohibiting or restricting, ingredients that may be used to increase palatability in tobacco products. …'

9 Under point 7 of the Guidelines for Implementation of Article 11 (Packaging and labelling of tobacco products) of the World Health Organisation Framework Convention on Tobacco Control (the 'Guidelines for Implementation of Article 11 of the FCTC'):

'Well-designed health warnings and messages are part of a range of effective measures to communicate health risks and to reduce tobacco use. Evidence demonstrates that the effectiveness of health warnings and messages increases with their prominence. In comparison with small, text-only health warnings, larger warnings with pictures are more likely to be noticed, better communicate health risks, provoke a greater emotional response and increase the motivation of tobacco users to quit and to decrease their tobacco consumption. Larger picture warnings are also more likely to retain their effectiveness over time and are particularly effective in communicating health effects to low-literacy populations, children and young people. Other elements that enhance effectiveness include locating health warnings and messages on principal display areas, and at the top of these principal display areas; the use of colour rather than just black and white; requiring that multiple health warnings and messages appear concurrently; and periodic revision of health warnings and messages.'

10 Point 12 of those guidelines, headed 'Size', states:

'Article 11.1(b)(iv) of the [FCTC] specifies that health warnings and messages on tobacco product packaging and labelling should be 50% or more, but no less than 30%, of the principal display areas. Given the evidence that the effectiveness of health warnings and messages increases with their size, Parties should consider using health warnings and messages that cover more than 50% of the principal display areas and aim to cover as much of the principal display areas as possible. The text of health warnings and messages should be in bold print in an easily legible font size and in a specified style and colour(s) that enhance overall visibility and legibility.'

Directive 2014/40

11 Directive 2014/40 includes the following recitals:

'(7) Legislative action at Union level is ... necessary in order to implement the [FCTC] ..., the provisions of which are binding on the Union and its Member States. The FCTC provisions on the regulation of the contents of tobacco products, the regulation of tobacco product disclosures, the packaging and labelling of tobacco products, advertising and illicit trade in tobacco products are particularly relevant. The Parties to the FCTC, including the Union and its Member States, adopted a set of guidelines for the implementation of FCTC provisions by consensus during various Conferences.

…

(15) The lack of a harmonised approach to regulating the ingredients of tobacco products affects the smooth functioning of the internal market and has a negative impact on the free movement of goods across the Union. Some Member States have adopted legislation or entered into binding agreements with the industry allowing or prohibiting certain ingredients. As a result, some ingredients are regulated in some Member States, but not in others. Member States also take differing approaches as regards additives in the filters of cigarettes as well as additives colouring the tobacco smoke. Without harmonisation, the obstacles to the smooth functioning of the internal market are expected to increase in the coming years, taking into account the implementation of the FCTC and the relevant FCTC guidelines throughout the Union and in

the light of experience gained in other jurisdictions outside the Union. The FCTC guidelines in relation to the regulation of the contents of tobacco products and regulation of tobacco product disclosures call in particular for the removal of ingredients that increase palatability, create the impression that tobacco products have health benefits, are associated with energy and vitality or have colouring properties.

(16) The likelihood of diverging regulation is further increased by concerns over tobacco products having a characterising flavour other than one of tobacco, which could facilitate initiation of tobacco consumption or affect consumption patterns. Measures introducing unjustified differences of treatment between different types of flavoured cigarettes should be avoided. However, products with characterising flavour with a higher sales volume should be phased out over an extended time period to allow consumers adequate time to switch to other products.

(17) The prohibition of tobacco products with characterising flavours does not preclude the use of individual additives outright, but it does oblige manufacturers to reduce the additive or the combination of additives to such an extent that the additives no longer result in a characterising flavour. ...

…

(22) Disparities still exist between national provisions regarding the labelling of tobacco products, in particular with regard to the use of combined health warnings consisting of a picture and a text, information on cessation services and promotional elements in and on unit packets.

(23) Such disparities are liable to constitute a barrier to trade and to impede the smooth functioning of the internal market in tobacco products, and should, therefore, be eliminated. Also, it is possible that consumers in some Member States are better informed about the health risks of tobacco products than consumers in other Member States. Without further action at Union level, the existing disparities are likely to increase in the coming years.

(24) Adaptation of the provisions on labelling is also necessary to align the rules that apply at Union level to international developments. For example, the FCTC guidelines on the packaging and labelling of tobacco products call for large picture warnings on both principal display areas, mandatory cessation information and strict rules on misleading information. ...

(25) The labelling provisions should also be adapted to new scientific evidence. For example, the indication of the emission levels for tar, nicotine and carbon monoxide on unit packets of cigarettes has proven to be misleading as it leads consumers to believe that certain cigarettes are less harmful than others. Evidence also suggests that large combined health warnings comprised of a text warning and a corresponding colour photograph are more effective than warnings consisting only of text. As a consequence, combined health warnings should become mandatory throughout the Union and cover significant and visible parts of the surface of unit packets. Minimum dimensions should be set for all health warnings to ensure their visibility and effectiveness.

…

(27) Tobacco products or their packaging could mislead consumers, in particular young people, where they suggest that these products are less harmful. This is, for example, the case if certain words or features are used, such as the words “low-tar”, “light”, “ultra-light”, “mild”, “natural”, “organic”, “without additives”, “without flavours” or “slim”, or certain names, pictures, and figurative or other signs. Other misleading elements might include, but are not limited to, inserts or other additional material such as adhesive labels, stickers, onserts, scratch-offs and sleeves or relate to the shape of the tobacco product itself. Certain packaging and tobacco

products could also mislead consumers by suggesting benefits in terms of weight loss, sex appeal, social status, social life or qualities such as femininity, masculinity or elegance. Likewise, the size and appearance of individual cigarettes could mislead consumers by creating the impression that they are less harmful. ...

(28) In order to ensure the integrity and the visibility of health warnings and maximise their efficacy, provisions should be made regarding the dimensions of the health warnings as well as regarding certain aspects of the appearance of the unit packets of tobacco products, including the shape and opening mechanism. ... Member States apply different rules on the minimum number of cigarettes per unit packet. Those rules should be aligned in order to ensure free circulation of the concerned products.

…

(33) Cross-border distance sales of tobacco products could facilitate access to tobacco products that do not comply with this Directive. There is also an increased risk that young people would get access to tobacco products. Consequently, there is a risk that tobacco control legislation would be undermined. Member States should, therefore, be allowed to prohibit cross-border distance sales. Where cross-border distance sales are not prohibited, common rules on the registration of retail outlets engaging in such sales are appropriate to ensure the effectiveness of this Directive. ...

…

(48) Moreover, this Directive does not harmonise the rules on smoke-free environments ... Member States are free to regulate such matters within the remit of their own jurisdiction and are encouraged to do so.

…

(53) Tobacco and related products which comply with this Directive should benefit from the free movement of goods. However, in light of the different degrees of harmonisation achieved by this Directive, the Member States should, under certain conditions, retain the power to impose further requirements in certain respects in order to protect public health. This is the case in relation to the presentation and the packaging, including colours, of tobacco products other than health warnings, for which this Directive provides a first set of basic common rules. Accordingly, Member States could, for example, introduce provisions providing for further standardisation of the packaging of tobacco products, provided that those provisions are compatible with the FEU [Treaty], with WTO obligations and do not affect the full application of this Directive.

(54) Moreover, in order to take into account possible future market developments, Member States should also be allowed to prohibit a certain category of tobacco or related products, on grounds relating to the specific situation in the Member State concerned and provided the provisions are justified by the need to protect public health, taking into account the high level of protection achieved through this Directive. Member States should notify such stricter national provisions to the Commission.

(55) A Member State should remain free to maintain or introduce national laws applying to all products placed on its national market for aspects not regulated by this Directive, provided they are compatible with the FEU [Treaty] and do not jeopardise the full application of this Directive. ...

…

(60) Since the objectives of this Directive, namely to approximate the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products, cannot be sufficiently achieved by the Member States, but can rather, by reason of their scale and effects, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the EU [Treaty]. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.'

12 Article 1 of Directive 2014/40, entitled 'Subject matter', provides:

'The objective of this Directive is to approximate the laws, regulations and administrative provisions of the Member States concerning:

(a) the ingredients and emissions of tobacco products and related reporting obligations, including the maximum emission levels for tar, nicotine and carbon monoxide for cigarettes;

(b) certain aspects of the labelling and packaging of tobacco products including the health warnings to appear on unit packets of tobacco products and any outside packaging as well as traceability and security features that are applied to tobacco products to ensure their compliance with this Directive;

(c) the prohibition on the placing on the market of tobacco for oral use;

(d) cross-border distance sales of tobacco products;

(e) the obligation to submit a notification of novel tobacco products;

(f) the placing on the market and the labelling of certain products, which are related to tobacco products, namely electronic cigarettes and refill containers, and herbal products for smoking;

in order to facilitate the smooth functioning of the internal market for tobacco and related products, taking as a base a high level of protection of human health, especially for young people, and to meet the obligations of the Union under the [FCTC].'

13 In accordance with points 24 and 25 of Article 2 of Directive 2014/40, entitled 'Definitions', 'flavouring' means 'an additive that imparts smell and/or taste', whilst 'characterising flavour' means 'a clearly noticeable smell or taste other than one of tobacco, resulting from an additive or a combination of additives, including, but not limited to, fruit, spice, herbs, alcohol, candy, menthol or vanilla, which is noticeable before or during the consumption of the tobacco product'.

14 Article 7 of that directive, entitled 'Regulation of ingredients', provides as follows:

'1. Member States shall prohibit the placing on the market of tobacco products with a characterising flavour.

…

7. Member States shall prohibit the placing on the market of tobacco products containing flavourings in any of their components such as filters, papers, packages, capsules or any technical features allowing modification of the smell or taste of the tobacco products concerned or their smoke intensity. Filters, papers and capsules shall not contain tobacco or nicotine.

…

14. In the case of tobacco products with a characterising flavour whose Union-wide sales volumes represent 3% or more in a particular product category, the provisions of this Article shall apply from 20 May 2020.'

15 Chapter II, entitled 'Labelling and packaging', of Title II of Directive 2014/40 contains, inter alia, rules concerning (i) the health warnings that must appear on the labelling and unit packets, (ii) the presentation of tobacco products, (iii) the appearance and content of unit packets, (iv) the traceability of those products and (v) the security features which the products must carry.

16 In particular, Article 8 of that directive, entitled 'General provisions', provides, in paragraph 3:

'Member States shall ensure that the health warnings on a unit packet and any outside packaging are irremovably printed, indelible and fully visible, including not being partially or totally hidden or interrupted by tax stamps, price marks, security features, wrappers, jackets, boxes, or other items, when tobacco products are placed on the market. On unit packets of tobacco products other than cigarettes and roll-your-own tobacco in pouches, the health warnings may be affixed by means of stickers, provided that such stickers are irremovable. The health warnings shall remain intact when opening the unit packet other than packets with a flip-top lid, where the health warnings may be split when opening the packet, but only in a manner that ensures the graphical integrity and visibility of the text, photographs and cessation information.'

17 Under Article 9 of Directive 2014/40, which is entitled 'General warnings and information messages on tobacco products for smoking':

'1. Each unit packet and any outside packaging of tobacco products for smoking shall carry one of the following general warnings:

"Smoking kills — quit now"

or

"Smoking kills"

Member States shall determine which of the general warnings referred to in the first subparagraph is to be used.

2. Each unit packet and any outside packaging of tobacco products for smoking shall carry the following information message:

"Tobacco smoke contains over 70 substances known to cause cancer."

3. For cigarette packets and roll-your-own tobacco in cuboid packets the general warning shall appear on the bottom part of one of the lateral surfaces of the unit packets, and the information message shall appear on the bottom part of the other lateral surface. These health warnings shall have a width of not less than 20 mm.

For packets in the form of a shoulder box with a hinged lid that result in the lateral surfaces being split into two when the packet is open, the general warning and the information message shall appear in their entirety on the larger parts of those split surfaces. The general warning shall also appear on the inside of the top surface that is visible when the packet is open.

The lateral surfaces of this type of packet shall have a height of not less than 16 mm.

For roll-your-own tobacco marketed in pouches the general warning and the information message shall appear on the surfaces that ensure the full visibility of those health warnings. For roll-your-own tobacco in cylindrical packets the general warning shall appear on the outside surface of the lid and the information message on the inside surface of the lid.

Both the general warning and the information message shall cover 50% of the surfaces on which they are printed.

…'

18 Article 10 of the directive, entitled 'Combined health warnings for tobacco products for smoking', provides

'1. Each unit packet and any outside packaging of tobacco products for smoking shall carry combined health warnings. The combined health warnings shall:

(a) contain one of the text warnings listed in Annex I and a corresponding colour photograph specified in the picture library in Annex II;

…

(c) cover 65% of both the external front and back surface of the unit packet and any outside packaging. Cylindrical packets shall display two combined health warnings, equidistant from each other, each covering 65% of their respective half of the curved surface;

…

(g) in the case of unit packets of cigarettes, respect the following dimensions:
(i) height: not less than 44 mm;
(ii) width: not less than 52 mm.

…'

19 Article 13 of Directive 2014/40, 'Product presentation', provides:

'1. The labelling of unit packets and any outside packaging and the tobacco product itself shall not include any element or feature that:

(a) promotes a tobacco product or encourages its consumption by creating an erroneous impression about its characteristics, health effects, risks or emissions; labels shall not include any information about the nicotine, tar or carbon monoxide content of the tobacco product;

(b) suggests that a particular tobacco product is less harmful than others or aims to reduce the effect of some harmful components of smoke or has vitalising, energetic, healing, rejuvenating, natural, organic properties or has other health or lifestyle benefits;

(c) refers to taste, smell, any flavourings or other additives or the absence thereof;

(d) resembles a food or a cosmetic product;

(e) suggests that a certain tobacco product has improved biodegradability or other environmental advantages.

2. The unit packets and any outside packaging shall not suggest economic advantages by including printed vouchers, offering discounts, free distribution, two-for-one or other similar offers.

3. The elements and features that are prohibited pursuant to paragraphs 1 and 2 may include but are not limited to texts, symbols, names, trademarks, figurative or other signs.'

20 Under Article 14 of the directive, entitled 'Appearance and content of unit packets':

'1. Unit packets of cigarettes shall have a cuboid shape. Unit packets of roll-your-own tobacco shall have a cuboid or cylindrical shape, or the form of a pouch. A unit packet of cigarettes shall include at least 20 cigarettes. A unit packet of roll-your-own tobacco shall contain tobacco weighing not less than 30 g.

2. A unit packet of cigarettes may consist of carton or soft material and shall not have an opening that can be re-closed or re-sealed after it is first opened, other than the flip-top lid and shoulder box with a hinged lid. For packets with a flip-top lid and hinged lid, the lid shall be hinged only at the back of the unit packet.'

21 Article 18 of Directive 2014/40, entitled 'Cross-border distance sales of tobacco products', is worded as follows:

'1. Member States may prohibit cross-border distance sales of tobacco products to consumers. Member States shall cooperate to prevent such sales. Retail outlets engaging in cross-border distance sales of tobacco products may not supply such products to consumers in Member States where such sales have been prohibited. Member States which do not prohibit such sales shall require retail outlets intending to engage in cross-border distance sales to consumers located in the Union to register with the competent authorities in the Member State, where the retail outlet is established, and in the Member State, where the actual or potential consumers are located. ...

…

3. The Member States of destination of tobacco products sold via cross-border distance sales may require that the supplying retail outlet nominates a natural person to be responsible for verifying — before the tobacco products reach the consumer — that they comply with the national provisions adopted pursuant to this Directive in the Member State of destination, if such verification is necessary in order to ensure compliance and facilitate enforcement.

…'

22 Article 24 of that directive, entitled 'Free movement', provides:

'1. Member States may not, for considerations relating to aspects regulated by this Directive, and subject to paragraphs 2 and 3 of this Article, prohibit or restrict the placing on the market of tobacco or related products which comply with this Directive.

2. This Directive shall not affect the right of a Member State to maintain or introduce further requirements, applicable to all products placed on its market, in relation to the standardisation of the packaging of tobacco products, where it is justified on grounds of public health, taking into account the high level of protection of human health achieved through this Directive. Such measures shall be proportionate and may not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States. Those measures shall be notified to the Commission together with the grounds for maintaining or introducing them.

3. A Member State may also prohibit a certain category of tobacco or related products, on grounds relating to the specific situation in that Member State and provided the provisions are justified by the need to protect public health, taking into account the high level of protection of human health achieved through this Directive. Such national provisions shall be notified to the Commission together with the grounds for introducing them. The Commission shall, within six months of the date of receiving the notification provided for in this paragraph, approve or reject the national provisions after having verified, taking into account the high level of protection of human health achieved through this Directive, whether or not they are justified, necessary and proportionate to their aim and whether or not they are a means of arbitrary discrimination or a disguised restriction on trade between the Member States. In the absence of a decision by the Commission within the period of six months, the national provisions shall be deemed to be approved.'

23 Article 28 of Directive 2014/40, entitled 'Report', specifies, in paragraph 2(a), that the Commission, in its report on the application of the directive, is to indicate, amongst other things, 'the experience gained with respect to the design of package surfaces not governed by this Directive taking into account national, international, legal, economic and scientific developments'.

24 The directive must, under Article 29 thereof, be transposed into the national legal orders of the Member States by 20 May 2016 and the relevant provisions must enter into force from that date.

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

25 PMI and BAT brought claims before the referring court seeking judicial review of the 'intention and/or obligation' of the United Kingdom Government to implement Directive 2014/40 in national law.

26 They argue that the directive is invalid, in whole or in part, on the ground that it infringes Articles 114 TFEU, 290 TFEU and 291 TFEU, the principles of proportionality and subsidiarity and Article 11 of the Charter of Fundamental Rights of the European Union ('the Charter').

27 The referring court considers that the arguments advanced by the claimants in the main proceedings are 'reasonably arguable'.

28 In those circumstances, the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court), decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is [Directive 2014/40] invalid in whole or in part because Article 114 TFEU does not provide an adequate legal basis? In particular:
   (a) In relation to Article 24(2) of [Directive 2014/40]:
      (i) on its proper interpretation, to what extent does it permit Member States to adopt more stringent rules in relation to matters relating to the "standardisation" of the packaging of tobacco products; and,
      (ii) in light of that interpretation, is Article 24(2) invalid because Article 114 TFEU does not provide an adequate legal basis?
   (b) Is Article 24(3) [of Directive 2014/40], which allows Member States to prohibit a category of tobacco or related products in specified circumstances, invalid because Article 114 TFEU does not provide an adequate legal basis?
   (c) Are the following provisions invalid because Article 114 TFEU does not provide an adequate legal basis:
      (i) the provisions of Chapter II of Title II [of Directive 2014/40], which relate to packaging and labelling;
      (ii) Article 7 [of Directive 2014/40], in so far as it prohibits menthol cigarettes and tobacco products with a characterising flavour;

(iii) Article 18 [of Directive 2014/40], which allows Member States to prohibit cross-border distance sales of tobacco products; and,
(iv) Articles 3(4) and 4(5) [of Directive 2014/40], which delegate powers to the Commission in relation to emission levels?

(2) In relation to Article 13 [of Directive 2014/40]:
(a) on its true interpretation, does it prohibit true and non-misleading statements about tobacco products on the product packaging; and,
(b) if so, is it invalid because it violates the principle of proportionality and/or Article 11 of the [Charter]?

(3) Are any or all of the following provisions of [Directive 2014/40] invalid because they infringe the principle of proportionality:
(a) Article 7(1) and (7), in so far as [it] prohibit[s] the placing on the market of tobacco products with menthol as a characterising flavour and the placing on the market of tobacco products containing flavourings in any of their components;
(b) Articles 8(3), 9(3), 10(1)(g) and 14, in so far as they impose various pack standardisation requirements; and,
(c) Article 10(1)(a) and (c), in so far as [it] require[s] health warnings to cover 65% of the external front and back surface of the unit packaging and any outside packaging?

(4) Are any or all of the following provisions of [Directive 2014/40] invalid because they infringe Article 290 TFEU:
(a) Article 3(2) and (4) concerning maximum emission levels;
(b) Article 4(5) relating to measurement methods for emissions;
(c) Article 7(5), (11) and (12) concerning the regulation of ingredients;
(d) Articles 9(5), 10(1)(f), 10(3), 11(6), 12(3) and 20(12) concerning health warnings;
(e) Article 20(11) concerning the prohibition of electronic cigarettes and/or refill containers; and/or,
(f) Article 15(12) concerning data storage contracts?

(5) Are Articles 3(4) and 4(5) [of Directive 2014/40] invalid because they breach the principle of legal certainty and/or impermissibly delegate powers to external bodies that are not subject to the procedural safeguards required by EU law?

(6) Are any or all of the following provisions of [Directive 2014/40] invalid because they infringe Article 291 TFEU:
(a) Article 6(1) concerning reporting obligations;
(b) Article 7(2) [to] (4) and (10) concerning implementing acts relating to the prohibition of tobacco products in certain circumstances; and/or,
(c) Articles 9(6) and 10(4) concerning health warnings?

(7) Is [Directive 2014/40] and in particular Articles 7, 8(3), 9(3), 10(l)(g), 13 and 14 invalid for failure to comply with the principle of subsidiarity?'

Consideration of the questions referred

Admissibility

29 The European Parliament, the Council of the European Union and the Commission, as well as the French Government, maintain that the request for a preliminary ruling is inadmissible in whole or in part.

Admissibility of the request for a preliminary ruling in its entirety

30 It is argued that the request for a preliminary ruling is inadmissible in its entirety on the ground (i) that there is no genuine dispute between the parties and (ii) that the claims for judicial review challenging the 'intention and/or obligation' of the United Kingdom Government to implement a directive are a means of circumventing the system of remedies established by the FEU Treaty.

31 In that regard, it should be recalled that it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. 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 (judgment in *Gauweiler and Others*, C-62/14, EU:C:2015:400, paragraph 24).

32 It follows that 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 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 (judgment in *Gauweiler and Others*, C-62/14, EU:C:2015:400, paragraph 25).

33 As regards, first, the genuine nature of the dispute in the main proceedings, it should be noted that the claims for judicial review of the 'intention and/or obligation' of the United Kingdom Government to implement Directive 2014/40, which the claimants in the main proceedings have brought before the referring court, have been held admissible by the latter, even though, when those claims were brought, the period prescribed for implementation of the directive had not yet expired and no national implementation measures had been adopted. There is, moreover, disagreement between the claimants in the main proceedings and the Secretary of State for Health as to whether or not the abovementioned claims are well founded. Given that the referring court has been asked to resolve that disagreement, it is not obvious that the dispute in the main proceedings is not genuine (see, by analogy, judgment in *British American Tobacco (Investments) and Imperial Tobacco*, C-491/01, EU:C:2002:741, paragraphs 36 and 38).

34 As regards, secondly, the argument that the claim for judicial review of the 'intention and/or obligation' of the United Kingdom Government to implement a directive is a means of circumventing the system of remedies established by the FEU Treaty, the Court has already held admissible several requests for preliminary rulings concerning the validity of secondary legislation made in judicial review claims, in particular in the cases that resulted in the judgments in *British American Tobacco (Investments) and Imperial Tobacco* (C-491/01, EU:C:2002:741); *Intertanko and Others* (C-308/06, EU:C:2008:312); and *Afton Chemical* (C-343/09, EU:C:2010:419).

35 Moreover, 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 called upon to hear a genuine dispute in which the question of the validity of such an act is raised indirectly. That condition is fulfilled in the case of the main proceedings, as is apparent from paragraph 33 of this judgment (see, by analogy, judgments in *British American Tobacco (Investments) and Imperial Tobacco*, C-491/01, EU:C:2002:741, paragraph 40, and *Gauweiler and Others*, C-62/14, EU:C:2015:400, paragraph 29).

36 Accordingly, the request for a preliminary ruling cannot be declared inadmissible in its entirety.

Admissibility of certain of the questions referred

37 The admissibility of certain of the questions referred must be examined in the light, first, of the argument that Question 1(a), (b) and (c)(iii), which concerns the interpretation and validity of Articles 18 and 24(2) and (3) of Directive 2014/40, is hypothetical and unrelated to the purpose of the main proceedings.

38 Articles 18 and 24(2) and (3) of the directive are addressed to the Member States, permitting them, in essence, to maintain or introduce in their domestic legal orders certain prohibitions or further requirements. Whilst it is true that those provisions thus grant the Member States an option, rather than laying down an obligation to act, the fact remains that those provisions may be taken into account when national measures implementing Directive 2014/40 are adopted. Indeed, the nature, content and extent of those measures may vary depending on the interpretation and validity of Articles 18 and 24(2) and (3) of the directive.

39 The fact that the order for reference contains no indication of whether the United Kingdom intends to make use of those provisions when it implements Directive 2014/40 in its domestic legal order does not mean that questions relating to their interpretation and validity are purely hypothetical. Indeed, the decision to make use of those provisions could depend upon the outcome of the main proceedings, which concern precisely the intention and/or obligation of the United Kingdom to implement the directive.

40 Accordingly, it is not obvious that the interpretation and determination of the validity of those provisions are unrelated to the purpose of the main proceedings or that the problems raised are hypothetical.

41 Points (a), (b) and (c)(iii) of Question 1 are thus admissible.

42 As regards, secondly, the admissibility of Question 1, point (c)(iv), and Questions 4 to 6, it must be noted that those questions concern the validity of Article 3(2) and (4), Article 4(5), Article 6(1), Article 7(2) to (5) and (10) to (12), Article 9(5) and (6), Article 10(1)(f), (3) and (4), Article 11(6), Article 12(3), Article 15(12) and Article 20(11) and (12) of Directive 2014/40. Those provisions empower the Commission to adopt various delegated and implementing acts.

43 Clearly, none of those provisions are addressed to the Member States. The provisions do not therefore relate to the implementation of that directive in the domestic legal systems of the Member States.

44 Moreover, it has not been argued that the invalidity of one or more of those provisions would entail the invalidity of other provisions of the directive that do entail implementation by the Member State.

45 That being so, it is obvious that Question 1, point (c)(iv), and Questions 4 to 6 bear no relation to the purpose of the main proceedings, which concern the intention and/or obligation of the United Kingdom to implement Directive 2014/40.

46 Accordingly, Question 1, point (c)(iv), and Questions 4 to 6 must be declared inadmissible.

47 With regard, thirdly, to the admissibility of Question 7, which concerns the validity of Articles 7, 8(3), 9(3), 10(1)(g), 13 and 14 of Directive 2014/40, it should be borne in mind that it follows from the spirit of cooperation which must prevail in the operation of the preliminary reference procedure that it is essential that the national court sets out in its order for reference the precise reasons why it considers a reply to its questions concerning the interpretation or validity of certain provisions of EU law to be necessary to enable it to give judgment (see to that effect, inter alia, judgments in *Bertini and Others*,

98/85, 162/85 and 258/85, EU:C:1986:246, paragraph 6; *ABNA and Others*, C-453/03, C-11/04, C-12/04 and C-194/04, EU:C:2005:741, paragraph 46; and *IATA and ELFAA*, C-344/04, EU:C:2006:10, paragraph 31).

48 It is therefore important that the national court should set out, in particular, the precise reasons which led it to question the validity of certain provisions of EU law and set out the grounds of invalidity which, consequently, appear to it capable of being upheld (see to that effect, inter alia, judgment in *Greenpeace France and Others*, C-6/99, EU:C:2000:148, paragraph 55, and order in *Adiamix*, C-368/12, EU:C:2013:257, paragraph 22). Such a requirement also arises under Article 94(c) of the Rules of Procedure of the Court.

49 Furthermore, according to settled case-law of the Court, the information provided in orders for reference not only enables the Court to give useful answers but also serves to ensure that the governments of the Member States and other interested persons are given an 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 Article 23, 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 (see, inter alia, judgments in *Holdijk and Others*, 141/81 to 143/81, EU:C:1982:122, paragraph 6; *Lehtonen and Castors Braine*, C-176/96, EU:C:2000:201, paragraph 23; and order in *Adiamix*, C-368/12, EU:C:2013:257, paragraph 24).

50 It follows from the foregoing, first, that in a reference for a preliminary ruling, the Court will examine the validity of an EU act or certain provisions thereof in the light of the grounds of invalidity set out in the order for reference. Secondly, if there is no mention of the precise reasons which led the referring court to question the validity of that act or of those provisions, the questions relating to the validity thereof will be inadmissible.

51 In the present case, the referring court does not explain the reasons why it decided, in the context of Question 7, to raise a question with the Court concerning the validity of Articles 8(3), 9(3), 10(1)(g), 13 and 14 of Directive 2014/40. All the elements in the order for reference which pertain to that question relate exclusively to Article 7 of the directive.

52 In those conditions, Question 7 is admissible only in so far as it concerns Article 7 of Directive 2014/40.

53 Having regard to all the foregoing considerations, the Court must declare inadmissible Question 1, point (c)(iv), Questions 4 to 6 and Question 7 in so far as it concerns Articles 8(3), 9(3), 10(1)(g), 13 and 14 of Directive 2014/40.

Question 1

54 By Question 1 the referring court asks, in essence, whether Directive 2014/40 is invalid in whole or in part by reason of the fact that Article 114 TFEU does not provide an adequate legal basis. In particular, that court has some doubts about the validity of Articles 7, 18 and 24(2) and (3) of the directive and that of the provisions of Chapter II of Title II thereof.

55 The Court notes that, notwithstanding the wording of Question 1, the order for reference does not give any precise ground of invalidity as regards Directive 2014/40 as a whole. The reasoning in the order for reference relates exclusively to the validity of each of the provisions set out in the previous paragraph of this judgment, taken in isolation.

56 In those circumstances, the Court, in answering Question 1, will examine the grounds of invalidity raised against each of those provisions. If, on conclusion of that examination, one of those provisions were to be declared invalid, it would be necessary to consider whether that invalidity affects the validity of Directive 2014/40 as a whole.

57 Article 114(1) TFEU establishes that the Parliament and the Council are to adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.

58 In that regard, while a mere finding of disparities between national rules is not sufficient to justify having recourse to Article 114 TFEU, it is otherwise where there are differences between the laws, regulations or administrative provisions of the Member States which are such as to obstruct the fundamental freedoms and thus have a direct effect on the functioning of the internal market (see, to that effect, judgments in *Germany* v *Parliament and Council*, C-376/98, EU:C:2000:544, paragraphs 84 and 95; *British American Tobacco (Investments) and Imperial Tobacco*, C-491/01, EU:C:2002:741, paragraphs 59 and 60; *Arnold André*, C-434/02, EU:C:2004:800, paragraph 30; *Swedish Match*, C-210/03, EU:C:2004:802, paragraph 29; *Germany* v *Parliament and Council*, C-380/03, EU:C:2006:772, paragraph 37; and *Vodafone and Others*, C-58/08, EU:C:2010:321, paragraph 32).

59 It is also settled case-law that, although recourse to Article 114 TFEU as a legal basis is possible if the aim is to prevent the emergence of future obstacles to trade as a result of divergences in national laws, the emergence of such obstacles must be likely and the measure in question must be designed to prevent them (judgments in *British American Tobacco (Investments) and Imperial Tobacco*, C-491/01, EU:C:2002:741, paragraph 61; *Arnold André*, C-434/02, EU:C:2004:800, paragraph 31; *Swedish Match*, C-210/03, EU:C:2004:802, paragraph 30; *Germany* v *Parliament and Council*, C-380/03, EU:C:2006:772, paragraph 38; and *Vodafone and Others*, C-58/08, EU:C:2010:321, paragraph 33).

60 The Court has also held that, provided that the conditions for recourse to Article 114 TFEU as a legal basis are fulfilled, the EU legislature cannot be prevented from relying on that legal basis on the ground that public health protection is a decisive factor in the choices to be made (judgments in *British American Tobacco (Investments) and Imperial Tobacco*, C-491/01, EU:C:2002:741, paragraph 62; *Arnold André*, C-434/02, EU:C:2004:800, paragraph 32; *Swedish Match*, C-210/03, EU:C:2004:802, paragraph 31; and *Germany* v *Parliament and Council*, C-380/03, EU:C:2006:772, paragraph 39).

61 The point should also be made that the first subparagraph of Article 168(1) TFEU provides that a high level of human health protection is to be ensured in the definition and implementation of all EU policies and activities, and that Article 114(3) TFEU explicitly requires that, in achieving harmonisation, a high level of protection of human health should be guaranteed (judgments in *British American Tobacco (Investments) and Imperial Tobacco*, C-491/01, EU:C:2002:741, paragraph 62; *Arnold André*, C-434/02, EU:C:2004:800, paragraph 33; *Swedish Match*, C-210/03, EU:C:2004:802, paragraph 32; and *Germany* v *Parliament and Council*, C-380/03, EU:C:2006:772, paragraph 40).

62 It follows from the foregoing that when there are obstacles to trade, or it is likely that such obstacles will emerge in the future, because the Member States have taken, or are about to take, divergent measures with respect to a product or a class of products such as to bring about different levels of protection and thereby prevent the product or products concerned from moving freely within the European Union, Article 114 TFEU authorises the EU legislature to intervene by adopting appropriate measures, in compliance with Article 114(3) TFEU and with the legal principles mentioned in the FEU Treaty or identified in the case-law, in particular the principle of proportionality (judgments in *Arnold André*, C-434/02, EU:C:2004:800, paragraph 34; *Swedish Match*, C-210/03, EU:C:2004:802, paragraph 33; and *Germany* v *Parliament and Council*, C-380/03, EU:C:2006:772, paragraph 41).

63 It is also to be observed that, by using the words 'measures for the approximation' in Article 114 TFEU, the authors of the Treaty intended to confer on the EU legislature a discretion, depending on the general context and the specific circumstances of the matter to be harmonised, as regards the method of approximation most appropriate for achieving the desired result, in particular in fields with complex technical features (judgments in *Germany* v *Parliament and Council*, C-380/03, EU:C:2006:772, paragraph 42, and *United Kingdom* v *Parliament and Council*, C-270/12, EU:C:2014:18, paragraph 102). It was thus open to the EU legislature, in the exercise of that discretion, to proceed towards harmonisation only in stages and to require only the gradual abolition of unilateral measures adopted by the Member States (judgment in *Rewe-Zentral*, 37/83, EU:C:1984:89, paragraph 20).

64 Depending on the circumstances, the measures referred to in Article 114(1) TFEU may consist in requiring all the Member States to authorise the marketing of the product or products concerned, subjecting such an obligation of authorisation to certain conditions, or even provisionally or definitively prohibiting the marketing of a product or products (judgments in *Arnold André*, C-434/02, EU:C:2004:800, paragraph 35; *Swedish Match*, C-210/03, EU:C:2004:802, paragraph 34; and *Germany* v *Parliament and Council*, C-380/03, EU:C:2006:772, paragraph 43).

65 The question whether the conditions for recourse to Article 114 TFEU as a legal basis for the provisions of Directive 2014/40 covered by Question 1 were met must be determined in the light of those principles.

Question 1(a)

66 By Question 1(a) the referring court asks, in essence, whether Article 24(2) of Directive 2014/40 must be interpreted as permitting Member States to adopt rules in relation to the standardisation of the packaging of tobacco products which are more stringent than those provided for by the directive and whether, in light of that interpretation, Article 24(2) is invalid because Article 114 TFEU does not provide an adequate legal basis for it.

67 Under Article 24(1) of Directive 2014/40, Member States may not, for considerations relating to aspects regulated by the directive, and subject to paragraphs 2 and 3 of Article 24, prohibit or restrict the placing on the market of tobacco or related products which comply with the directive. According to Article 24(2), Directive 2014/40 is not to affect the right of a Member State to maintain or introduce, under certain conditions, 'further requirements, applicable to all products placed on its market, in relation to the standardisation of the packaging of tobacco products'.

68 The claimants in the main proceedings, Ireland, the United Kingdom Government and the Norwegian Government submit that Article 24(2) of Directive 2014/40 permits the Member States to maintain or introduce further requirements in relation to all matters relating to the packaging of tobacco products, regardless of whether or not such matters are regulated by the directive. On the other hand, the Portuguese Government, the Parliament, the Council and the Commission take the view that that power can extend only to the aspects of packaging which have not been harmonised by the directive.

69 It must be observed in this regard that Article 24(2) of Directive 2014/40 may in fact lend itself to several interpretations, and consequently the precise extent of the power granted to the Member States is not entirely unambiguous. First, the directive does not contain a definition of the expressions 'further requirements' and 'standardisation', which are used in Article 24(2). Secondly, Article 24(2) does not indicate whether or not that power extends to aspects of the packaging of tobacco products which have been harmonised by Directive 2014/40.

70 The Court has consistently held that, if the wording of secondary law is open to more than one interpretation, preference should be given to the interpretation which renders the provision consistent with the Treaty rather than to the interpretation which leads to its being incompatible with the Treaty (see, inter alia, judgment in *Ordre des barreaux francophones et germanophone and Others*, C-305/05, EU:C:2007:383, paragraph 28).

71 If Article 24(2) of Directive 2014/40 were interpreted as permitting Member States to maintain or introduce further requirements in relation to all aspects of the packaging of tobacco products, including those which have been harmonised by the directive, that would amount, in essence, to undermining the harmonisation effected by the directive with regard to the packaging of those products. Indeed, the consequence of such an interpretation would be to permit Member States to replace the requirements relating to packaging which have been harmonised by the directive with other requirements, introduced at national level, and to do so in breach of the rules laid down in Article 114(4) to (10) TFEU relating to the retention and introduction of national provisions derogating from a harmonisation measure.

72 Such an interpretation would render Article 24(2) of Directive 2014/40 incompatible with Article 114 TFEU.

73 However, Article 24(2) of Directive 2014/40 may also be interpreted as meaning that it permits Member States to maintain or introduce further requirements only in relation to aspects of the standardisation of the packaging of tobacco products which have not been harmonised by the directive. Whilst it is true that the wording of Article 24(2) does not contain a specific statement to that effect, the fact remains that such an interpretation is consonant with the objective and general scheme of the directive.

74 It is clear from Article 1(b) of Directive 2014/40 that the objective of the directive is to approximate the laws, regulations and administrative provisions of the Member States concerning 'certain' aspects of the labelling and packaging of tobacco products. It follows that the directive is not intended to harmonise all aspects of the labelling and packaging of those products.

75 That conclusion is borne out by Article 28(2)(a) of Directive 2014/40, which provides that, when the Commission prepares the report referred to in Article 28(1) of the directive, it is to pay special attention to, amongst other things, the 'experience gained with respect to the design of package surfaces not governed by [the] directive'.

76 Recital 53 of Directive 2014/40 states in this connection that, in light of the different degrees of harmonisation achieved by the directive, the Member States should retain the power to impose further requirements relating, for example, to the colours of the packaging of tobacco products or to provide for the further standardisation of that packaging. There is nothing in the directive which provides for, or prohibits, such standardisation and nor is there a provision that regulates the colours of the packaging of tobacco products, without prejudice to the requirements set out in Article 13 of the directive.

77 Furthermore, it follows from the general scheme of Directive 2014/40 that the latter does not bring about full harmonisation in relation to the manufacture, presentation and sale of tobacco products and related products. That is borne out by, inter alia, recitals 47 and 48 of the directive, which refer to a number of aspects that are not governed by it. Similarly, recital 55 of the directive states that Member States should remain free to maintain or introduce national laws applying to all products placed on their national markets 'for aspects not regulated by [the] directive'.

78 Consideration must therefore thus be given to whether the interpretation of Article 24(2) of Directive 2014/40 proposed in paragraph 73 of this judgment renders that provision compatible with Article 114 TFEU.

79 Admittedly, by permitting Member States to maintain or introduce further requirements relating to aspects of packaging that have not been harmonised by Directive 2014/40, Article 24(2) does not guarantee that products whose packaging complies with the requirements of the directive may move freely on the internal market.

80 However, that is the inevitable consequence of the method of harmonisation chosen by the EU legislature in the present case. As has been recalled in paragraph 63 of this judgment, the EU legislature has a discretion, in particular with regard to the possibility of proceeding towards harmonisation only in stages and requiring only the gradual abolition of unilateral measures adopted by the Member States.

81 As the Advocate General has observed in point 119 of her Opinion, a measure for partial harmonisation in relation to the labelling and packaging of tobacco products, such as the harmonisation achieved by Directive 2014/40, undeniably offers advantages for the functioning of the internal market, since, whilst it does not eliminate all obstacles to trade, it does eliminate some.

82 In contrast to the directive at issue in the case that gave rise to the judgment in *Germany* v *Parliament and Council* (C-376/98, EU:C:2000:544), paragraph 1 of Article 24 of Directive 2014/40 read in conjunction with paragraph 2 thereof, as it has been interpreted in paragraph 73 of this judgment, forbids the Member States from preventing, on grounds relating to the aspects of packaging harmonised by that directive, the import, sale or consumption of tobacco products which comply with the requirements laid down by the directive. Those provisions thus play a part in achieving the objective of improving the conditions for the functioning of the internal market and are therefore compatible with Article 114 TFEU (see, by analogy, judgment in *British American Tobacco (Investments) and Imperial Tobacco*, C-491/01, EU:C:2002:741, paragraph 74).

83 It follows that an interpretation of Article 24(2) of Directive 2014/40 to the effect that it permits the Member States to maintain or introduce further requirements solely in relation to aspects of the packaging of tobacco products that are not harmonised by the directive renders Article 24(2) consistent with Article 114 TFEU. Therefore, applying the case-law cited in paragraph 70 of this judgment, the Court accepts that interpretation.

84 In the light of the foregoing considerations, the answer to Question 1(a) is as follows:

— Article 24(2) of Directive 2014/40 must be interpreted as permitting Member States to maintain or introduce further requirements in relation to aspects of the packaging of tobacco products which are not harmonised by that directive;

— consideration of that question has disclosed no factor of such a kind as to affect the validity of that provision.

Question 1(b)

85 By Question 1(b), the referring court asks whether Article 24(3) of Directive 2014/40 is invalid because Article 114 TFEU does not constitute an adequate legal basis for that provision.

86 Article 24(3) of Directive 2014/40 provides, inter alia, that a Member State may prohibit a ‘certain category’ of tobacco or related products, on grounds relating to the specific situation in that Member State and provided the provisions are justified by the need to protect public health, taking into account the high level of protection of human health achieved through that directive.

87 It is true that by permitting the Member States to prohibit a certain category of tobacco or related products even though they comply with the requirements of Directive 2014/40, Article 24(3) of the directive is capable of impeding the free movement of those products.

88 However, Directive 2014/40 is not intended to interfere with the policies of the Member States concerning the lawfulness of tobacco products as such.

89 Indeed, recital 48 of Directive 2014/40 makes clear that the directive 'does not harmonise the rules on smoke-free environments'. Such rules could extend from a prohibition on smoking in certain places to a prohibition on the placing on the market of an entire category of tobacco products.

90 It follows that Article 24(3) of Directive 2014/40 concerns an aspect which is not covered by the harmonisation measures in the directive and which is not, therefore, to be subject to the rules laid down in Article 114(4) to (10) TFEU relating to the introduction of national measures derogating from a harmonisation measure.

91 Article 24(3) of Directive 2014/40, read in conjunction with paragraph 1 of that article, thus seeks to delineate the scope of the directive by clarifying that tobacco and related products which comply with the requirements laid down by the directive may move freely on the internal market, provided that those products belong to a category of tobacco products or related products which is, as such, lawful in the Member State in which they are marketed.

92 It should be made clear in this regard that the EU legislature may properly decide to include, in a legislative measure adopted on the basis of Article 114 TFEU, provisions intended to set out the issues which are not the subject of the harmonising measures adopted, particularly since Article 24(3) of Directive 2014/40 lays down conditions and a mechanism intended to guard against arbitrary discrimination or disguised restrictions on trade between the Member States, in the interest of the smooth functioning of the internal market which underpins Article 114 TFEU.

93 The Court must also reject the argument based on the alleged inconsistency between Article 24(3) of Directive 2014/40 and Article 7 thereof, which is said to result from the fact that, on the one hand, the objective of the prohibition on characterising flavours laid down in Article 7 is to abolish disparities between the rules of the Member States, while, on the other, Article 24(3) facilitates the emergence of such disparities.

94 That argument is, in fact, based on a misunderstanding of the relationship between Article 7 and Article 24(3) of Directive 2014/40. Those provisions, without being in any way contradictory, are complementary. In prohibiting tobacco products with a characterising flavour, Article 7 of the directive seeks to eliminate disparities existing in that respect between the rules of the Member States, in order, in particular, to ensure the free movement of tobacco products in general. Under Article 24(1) of Directive 2014/40, those products, where they comply with, inter alia, Article 7, enjoy freedom of movement on the internal market as long as the category of tobacco products to which they belong is not — as follows from Article 24(3) of the directive — prohibited, as such, in the Member State in which they are marketed.

95 Having regard to the foregoing, consideration of Question 1(b) has disclosed no factor of such a kind as to affect the validity of Article 24(3) of Directive 2014/40.

Question 1(c)

96 By Question 1(c), the referring court asks whether the provisions of Chapter II of Title II of Directive 2014/40, and Articles 7 and 18 thereof, are invalid because Article 114 TFEU does not constitute an adequate legal basis for those provisions.

– Question 1(c)(i)

97 The grounds of invalidity raised in the order for reference with regard to the provisions of Chapter II (entitled 'Labelling and packaging') of Title II of Directive 2014/40 concern, in the first place, the alleged absence of any actual or likely divergences between national rules concerning the labelling and packaging of tobacco products which are liable to hinder the free movement of those products. Existing differences are said to be driven, not by such divergences in rules, but rather by the manufacturers' commercial strategy of tailoring the packaging and labelling of their products to consumer preferences, which vary from one Member State to another.

98 It must be noted in this regard that it is apparent from recitals 22, 23 and 28 of Directive 2014/40 and from the impact assessment of 19 December 2012, drawn up by the Commission and accompanying the Proposal for a Directive of the European Parliament and of the Council on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products (SWD(2012) 452 final, Part 1, p. 30 et seq.), that there were, when Directive 2014/40 was adopted, significant disparities between national rules on the labelling and packaging of tobacco products. Whilst, inter alia, some Member States prescribed combined health warnings consisting in a picture and text, others required text warnings only. In addition, there were disparities at national level in the size of cigarette packets, the minimum number of cigarettes per unit packet and the advertising allowed on those units.

99 Moreover, as is stated in recitals 23 and 24 of Directive 2014/40, in the absence of further action at EU level, those disparities were likely to increase in the years to come, in view in particular of the need to adapt the rules on labelling to relevant international developments, such as the developments mentioned in the FCTC guidelines on the packaging and labelling of tobacco products.

100 Given that the market for tobacco products is one in which trade between Member States represents a relatively large part, national rules laying down the requirements to be met by those products, in particular requirements relating to their designation, composition or labelling, are in themselves liable, in the absence of harmonisation at EU level, to constitute obstacles to the free movement of goods (see, to that effect, judgment in *British American Tobacco (Investments) and Imperial Tobacco*, C-491/01, EU:C:2002:741, paragraph 64).

101 In accordance with the case-law cited in paragraph 62 of this judgment, when there are obstacles to trade, or it is likely that such obstacles will emerge in the future, because the Member States have taken, or are about to take, divergent measures with respect to a product or a class of products, which bring about different levels of protection and thereby prevent the product or products concerned from moving freely within the European Union, Article 114 TFEU authorises the EU legislature to take action.

102 In the second place, the validity of the provisions of Chapter II of Title II of Directive 2014/40 is challenged on the ground that those provisions do not contribute to the elimination of obstacles to the free movement of tobacco products, since some of them require, in any event, that the manufacturers produce different packaging for each Member State. That is the case, in particular, of rules concerning tax stamps, which are different for each Member State, and of rules relating to health warnings, which must appear in the official language(s) of the Member State in which the product is marketed.

103 Whilst it is true that some provisions of Chapter II of Title II of Directive 2014/40 require that certain elements of the labelling and packaging of tobacco products are adapted to take account of, amongst other things, the official language(s) or the tax legislation of the Member State of marketing, the fact remains that the directive harmonises other elements of the labelling and packaging of those products, such as the shape of the unit packets, the minimum number of cigarettes per unit packet and the size

and combined nature of health warnings. As the Advocate General has observed in point 98 of her Opinion, those measures thus contribute to the removal of obstacles to trade, since they allow the undertakings concerned to reduce costs through economies of scale.

104 As regards, in the third place, the argument that the provisions of Chapter II of Title II of Directive 2014/40 are liable to introduce distortions of competition by reducing the ability of the manufacturers to differentiate their products, the Court finds that it relates to observance of the principle of proportionality, with which Question 3(b) and (c) is concerned.

105 It follows from the foregoing that consideration of Question 1(c)(i) has disclosed no factor of such a kind as to affect the validity of the provisions of Chapter II of Title II of Directive 2014/40.

– Question 1(c)(ii)

106 According to the order for reference, the validity of Article 7 of Directive 2014/40, which prohibits the placing on the market of tobacco products with a characterising flavour, is challenged on the ground, first, that there are no actual or likely divergences between Member States' rules as regards, in particular, the use of menthol which are such as to create obstacles to trade.

107 That argument concerns specifically the use of menthol as a characterising flavour rather than the use of all the flavours covered by that prohibition. The argument is based on the premiss that Article 114 TFEU requires the EU legislature to establish the existence of actual or likely divergences between the rules of the Member States relating to the placing on the market of tobacco products containing menthol in particular.

108 It must, however, be noted in this regard that the EU legislature decided to adopt uniform rules for all tobacco products containing a characterising flavour. It thus took the view, as can be seen from recital 16 of Directive 2014/40, that those products could facilitate initiation of tobacco consumption or affect consumption patterns.

109 In addition, the EU legislature took into account, as recital 15 of the directive confirms, the Partial Guidelines for Implementation of Articles 9 and 10 of the FCTC, which call in particular for the removal of ingredients that increase palatability, create the impression that tobacco products have health benefits, are associated with energy and vitality or have colouring properties.

110 It must be stated in this connection that those partial guidelines likewise do not draw any distinction between the various flavourings that may be added to tobacco products. On the contrary, Section 3.1.2.2 of the partial guidelines recommends that Parties should regulate, by prohibiting or restricting, ingredients that may be used to increase palatability in tobacco products. In this regard, reference is explicitly made in that section to menthol as a flavour which masks tobacco smoke harshness and contributes to promoting and sustaining tobacco use.

111 Whilst it is correct that the FCTC guidelines do not have binding force, they are intended, in accordance with Articles 7 and 9 of the FCTC, to assist the Contracting Parties in implementing the binding provisions of that convention.

112 Furthermore, those guidelines are based on the best available scientific evidence and the experience of the Parties to the FCTC, as can be seen from Section 1.1 of the guidelines, and have been adopted by consensus, including by the European Union and its Member States, as is stated in recital 7 of Directive 2014/40.

113 Accordingly, the recommendations thus drawn up are intended to have a decisive influence on the content of the rules adopted in the area under consideration, as is confirmed by the EU legislature's express decision to take those recommendations into account when adopting Directive 2014/40, mention of which is made in recitals 7 and 15 of the directive.

114 It follows that tobacco products containing a characterising flavour, whether that is menthol or another flavouring, have certain similar, objective characteristics and similar effects as regards initiating tobacco consumption and sustaining tobacco use.

115 That being so, the EU legislature could properly make all characterising flavours subject to the same set of legal rules.

116 Accordingly, for Article 114 TFEU to be capable of constituting an adequate legal basis for Article 7 of Directive 2014/40, it is sufficient to establish that divergences exist between the national rules concerning tobacco products containing a characterising flavour, as a whole, which are such as to present obstacles to the free movement of those products, or that it is likely that such divergences will emerge in the future.

117 As regards, in the second place, the argument that the prohibition laid down in Article 7 of Directive 2014/40 does not have as its object facilitation of the smooth functioning of the internal market, it should be noted that, as is apparent from both recital 15 of the directive and the impact assessment referred to in paragraph 98 of this judgment (Part 1, p. 34, and Part 4, p. 6 et seq.), there were, when the directive was adopted, significant discrepancies between the regulatory systems of the Member States, given that some of them had established different lists of permitted or prohibited flavourings, whilst others had not adopted any specific rules on the matter.

118 In addition, it seems likely that, in the absence of any measures at EU level, disparate sets of rules applying to tobacco products containing a characterising flavour, including menthol, would have been implemented at national level.

119 Indeed, as has been stated in paragraph 110 of this judgment, the Partial Guidelines for Implementation of Articles 9 and 10 of the FCTC recommend that the Parties to that framework convention 'regulate, by prohibiting or restricting, ingredients that may be used to increase palatability in tobacco products', including menthol.

120 As a result of the broad discretion thus afforded to the Contracting Parties by those partial guidelines, it is foreseeable, with a sufficient degree of probability, that in the absence of measures at EU level, the relevant national rules could develop in divergent ways, including with regard to the use of menthol.

121 Article 7 of Directive 2014/40, in prohibiting the placing on the market of tobacco products with a characterising flavour, guards precisely against such divergences in the rules of the Member States.

122 According to the case-law cited in paragraph 59 of this judgment, recourse to Article 114 TFEU as a legal basis is possible if the aim is to prevent the emergence of future obstacles to trade as a result of divergences in national laws, when the emergence of such obstacles is likely and the harmonisation measure adopted is designed to prevent them.

123 Furthermore, as has already been stated in paragraph 100 of this judgment, the market for tobacco products is one in which trade between Member States represents a relatively large part and, therefore, national rules laying down the requirements to be met by those products, in particular requirements relating to their composition, are in themselves liable, in the absence of harmonisation at EU level, to constitute obstacles to the free movement of goods.

124 It should also be recalled that, according to the case-law cited in paragraph 64 of this judgment, the measures that may be adopted on the basis of Article 114 TFEU can consist, inter alia, in prohibiting, provisionally or definitively, the marketing of a product or products.

125 It follows that removing divergences between the national rules concerning the composition of tobacco products, or preventing those rules from developing in divergent ways, including by means of an EU-wide prohibition of certain additives, is intended to facilitate the smooth functioning of the internal market for the products concerned.

126 Having regard to the foregoing, consideration of Question 1(c)(ii) has disclosed no factor of such a kind as to affect the validity of Article 7 of Directive 2014/40.

– Question 1(c)(iii)

127 According to the order for reference, the validity of Article 18 of Directive 2014/40 is challenged on the ground that the provision does not contribute to improving the functioning of the internal market but, instead, facilitates the emergence of disparities between national rules, with the result that Article 114 TFEU does not provide an adequate legal basis for Article 18 of the directive.

128 Article 18 of Directive 2014/40 provides, on the one hand, that Member States may prohibit cross-border distance sales of tobacco products to consumers and, on the other, imposes a series of common rules on Member States which permit that method of sale.

129 The rationale behind Article 18 is apparent from recital 33 of Directive 2014/40, according to which cross-border distance sales of tobacco products, first, could facilitate access to tobacco products that do not comply with the directive and, second, entail an increased risk of young people getting access to those products.

130 That provision thus seeks to ensure that the rules on conformity laid down by Directive 2014/40 are not circumvented, whilst taking as a basis a high level of human health protection, especially for young people.

131 The Court has already had occasion to point out that an EU measure adopted on the basis of Article 114 TFEU may incorporate provisions whose purpose is to ensure that requirements aimed at improving the conditions for the functioning of the internal market are not circumvented (see, to that effect, judgments in *Germany* v *Parliament and Council*, C-376/98, EU:C:2000:544, paragraph 100, and *British American Tobacco (Investments) and Imperial Tobacco*, C-491/01, EU:C:2002:741, paragraph 82).

132 As to the objection that Article 18 of Directive 2014/40 would result in the emergence of disparities between the relevant national rules because some Member States might decide to prohibit cross-border distance sales, whilst others might continue to allow them, the Court observes that the rules relating to cross-border distance sales of tobacco products had not been the subject of harmonising measures at EU level prior to the adoption of that directive. Consequently, Member States were already applying different rules in respect of this type of sale, as is shown by the impact assessment referred to in paragraphs 98 and 117 of this judgment (Part 4, p. 8). The argument that Article 18 of the directive will give rise to such disparities therefore cannot be accepted.

133 Furthermore, as has been stated in paragraph 128 of this judgment, Article 18 also sets forth a series of common rules that apply to all the Member States which do not prohibit those sales, thereby approximating their laws, regulations or administrative provisions in the matter, within the meaning of Article 114 TFEU.

134 It should be recalled in this regard that, in accordance with the case-law cited in paragraph 63 of this judgment, Article 114 TFEU confers a discretion on the EU legislature, in particular with regard to the possibility of proceeding towards harmonisation only in stages and requiring only the gradual abolition of unilateral measures adopted by the Member States.

135 Accordingly, within the bounds of that discretion, the legislature could properly harmonise certain aspects of cross-border sales of tobacco products, whilst leaving other aspects of such sales to be determined by Member States.

136 It follows from the foregoing that consideration of Question 1(c)(iii) has disclosed no factor of such a kind as to affect the validity of Article 18 of Directive 2014/40.

Question 2

137 By Question 2 the referring court asks, in essence, whether Article 13(1) of Directive 2014/40 must be interpreted as prohibiting the display on the labelling of unit packets and on the outside packaging, as well as on the tobacco product itself, of certain information, although that information is factually accurate, and, if that is the case, whether Article 13(1) is invalid because it infringes Article 11 of the Charter and the principle of proportionality.

The interpretation of Article 13(1) of Directive 2014/40

138 Article 13(1) of Directive 2014/40 prohibits, in essence, the inclusion on the labelling of unit packets and on the outside packaging, as well on the tobacco product itself, of any element or feature that is such as to promote a tobacco product or encourage its consumption.

139 It is important to point out in this regard that such promotion or encouragement may result from certain information or claims, even when these are factually accurate.

140 For example, under Article 13(1)(a) of Directive 2014/40 'labels shall not include any information about the nicotine, tar or carbon monoxide content of the tobacco product'. That provision thus clearly attributes no importance to the question of whether or not this type of information is factually accurate. That indifference is due to the fact, explained in recital 25 of the directive, that indications of this type may be misleading in that they lead consumers to believe that certain cigarettes are less harmful than others.

141 Likewise, the prohibitions of any element or feature (i) suggesting that a particular tobacco product is less harmful than others (Article 13(1)(b) of Directive 2014/40), or (ii) referring to taste, smell, any flavourings or other additive (Article 13(1)(c) of the directive), or (iii) suggesting that a certain tobacco product has improved biodegradability or other environmental advantages (Article 13(1)(e) of the directive), also apply irrespective of whether the claims in question are factually accurate.

142 As is stated in recital 27 of Directive 2014/40, certain words or expressions, such as 'low-tar', 'light', 'ultra-light', 'natural', 'organic', 'without additives', 'without flavours' or 'slim', and other elements or features could mislead consumers, in particular young people, by suggesting that the products concerned are less harmful or that they have beneficial effects.

143 That interpretation is consistent with the objective pursued by Directive 2014/40, which is, in accordance with Article 1 thereof, to facilitate the smooth functioning of the internal market for tobacco and related products, taking as a base a high level of protection of human health, especially for young people.

144 A high level of protection of that kind requires that consumers of tobacco products, who are a particularly vulnerable class of consumers because of the addictive effects of nicotine, should not be encouraged to consume those products by means of, albeit factually accurate, information, which they may interpret as meaning that the risks associated with their habits are reduced or that the products have certain benefits.

145 Consequently, Article 13(1) of Directive 2014/40 must be interpreted as prohibiting the display, on the labelling of unit packets and on the outside packaging, as well as on the tobacco product itself, of any information covered by that provision, even if the information concerned is factually accurate.

The validity of Article 13(1) of Directive 2014/40

146 The referring court asks the Court to examine the validity of Article 13(1) of Directive 2014/40 in the light of Article 11 of the Charter and the principle of proportionality.

147 Article 11 of the Charter affirms the freedom of expression and information. That freedom is also protected under Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, which applies, in particular, as is clear from the case-law of the European Court of Human Rights, to the dissemination by a business of commercial information, including in the form of advertising. Given that the freedom of expression and information laid down in Article 11 of the Charter has — as is clear from Article 52(3) thereof and the Explanations Relating to the Charter as regards Article 11 — the same meaning and scope as the freedom guaranteed by the Convention, it must be held that that freedom covers the use by a business, on the packaging and labelling of tobacco products, of indications such as those covered by Article 13(1) of Directive 2014/40 (judgment in *Neptune Distribution*, C-157/14, EU:C:2015:823, paragraphs 64 and 65).

148 The prohibition on including on the labelling of unit packets and on outside packaging, as well as on the tobacco product itself, the elements and features referred to in Article 13(1) of Directive 2014/40 constitutes, it is true, an interference with a business's freedom of expression and information.

149 In accordance with Article 52(1) of the Charter, any limitation on the exercise of the rights and freedoms laid down by the Charter must be provided for by law and respect the essence of those rights and freedoms and, in compliance with the principle of proportionality, is permissible only if it is necessary and actually meets objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others.

150 In that regard, the Court finds, first, that the interference identified in paragraph 148 of this judgment must be regarded as being provided for by law given that it results from a provision adopted by the EU legislature.

151 Secondly, the essence of a business's freedom of expression and information is not affected by Article 13(1) of Directive 2014/40 inasmuch as that provision, far from prohibiting the communication of all information about the product, merely controls, in a very clearly defined area, the labelling of those products by prohibiting only the inclusion of certain elements and features (see, by analogy, judgments in *Deutsches Weintor*, C-544/10, EU:C:2012:526, paragraph 57, and *Neptune Distribution*, C-157/14, EU:C:2015:823, paragraph 71).

152 Thirdly, the interference with the freedom of expression and information that has been found to exist meets an objective of general interest recognised by the European Union, namely, the protection of health. Given that it is undisputed that tobacco consumption and exposure to tobacco smoke are

causes of death, disease and disability, the prohibition laid down in Article 13(1) of Directive 2014/40 contributes to the achievement of that objective in that it is intended to prevent the promotion of tobacco products and incitements to use them.

153 Fourthly, as regards the proportionality of the interference found, it is important to point out that the second sentence of Article 35 of the Charter and Articles 9 TFEU, 114(3) TFEU and 168(1) TFEU require that a high level of human health protection be ensured in the definition and implementation of all the Union's policies and activities.

154 In those circumstances, the determination of the validity of Article 13(1) of Directive 2014/40 must be carried out in accordance with the need to reconcile the requirements of the protection of those various fundamental rights and legitimate general interest objectives, protected by the EU legal order, and striking a fair balance between them (see, to that effect, judgment in *Neptune Distribution*, C-157/14, EU:C:2015:823, paragraph 75).

155 It should be stated in that regard that the discretion enjoyed by the EU legislature, in determining the balance to be struck, varies for each of the goals justifying restrictions on that freedom and depends on the nature of the activities in question. In the present case, the claimants in the main proceedings rely, in essence, under Article 11 of the Charter, on the freedom to disseminate information in pursuit of their commercial interests.

156 It must, however, be stated that human health protection — in an area characterised by the proven harmfulness of tobacco consumption, by the addictive effects of tobacco and by the incidence of serious diseases caused by the compounds those products contain that are pharmacologically active, toxic, mutagenic and carcinogenic — outweighs the interests put forward by the claimants in the main proceedings.

157 Indeed, as is apparent from the second sentence of Article 35 of the Charter and Articles 9 TFEU, 114(3) TFEU and 168(1) TFEU, a high level of human health protection must be ensured in the definition and implementation of all the European Union's policies and activities.

158 The Court finds, in the light of the foregoing, (i) that the prohibition laid down in Article 13(1) of Directive 2014/40 is such as to protect consumers against the risks associated with tobacco use, as follows from paragraph 152 of this judgment, and (ii) that that prohibition does not go beyond what is necessary in order to achieve the objective pursued.

159 On this point, the Court cannot accept the argument that the prohibition concerned is not necessary because consumer protection is already adequately ensured by the mandatory health warnings mentioning the risks associated with tobacco use. In fact, awareness of those risks may, on the contrary, be diminished by information that might suggest that the product concerned is less harmful or is beneficial in some respects.

160 Nor can the Court accept the argument that the objective pursued could be achieved by other, less restrictive measures, such as regulating the use of the elements and features referred to in Article 13 of Directive 2014/40, instead of prohibiting them, or adding certain supplementary health warnings. Such measures would not be as effective for ensuring the protection of consumers' health, since the elements and features referred to in Article 13 are, by their very nature, likely to encourage smoking (see, to that effect, judgment in *British American Tobacco (Investments) and Imperial Tobacco*, C-491/01, EU:C:2002:741, paragraph 140). It cannot be accepted that those elements and features may be included for the purpose of giving consumers clear and precise information, inasmuch as they are intended more to exploit the vulnerability of consumers of tobacco products who, because of their nicotine dependence, are particularly receptive to any element suggesting there may be some kind of benefit linked to tobacco consumption, in order to vindicate or reduce the risks associated with their habits.

161 In those circumstances, it must be held that, in prohibiting the placing, on the labelling of unit packets and on the outside packaging, as well as on the tobacco product itself, of the elements and features referred to in Article 13(1) of Directive 2014/40, even when they include factually accurate information, the EU legislature did not fail to strike a fair balance between the requirements of the protection of the freedom of expression and information and those of human health protection.

162 Accordingly, Article 13(1) of Directive 2014/40 does not infringe either Article 11 of the Charter or the principle of proportionality.

163 Having regard to the foregoing, consideration of Question 2 has disclosed no factor of such a kind as to affect the validity of Article 13(1) of Directive 2014/40.

Question 3

164 By Question 3, the referring court asks whether Articles 7(1) and (7), 8(3), 9(3), 10(1)(a), (c) and (g) and 14 of Directive 2014/40 are invalid because they infringe the principle of proportionality.

165 According to settled case-law, that principle requires that acts of the EU institutions be appropriate for attaining the legitimate objectives pursued by the legislation at issue and do not exceed the limits of what is necessary in order to achieve those objectives; when there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued (see, to that effect, judgments in *British American Tobacco (Investments) and Imperial Tobacco*, C-491/01, EU:C:2002:741, paragraph 122; *ERG and Others*, C-379/08 and C-380/08, EU:C:2010:127, paragraph 86; and *Gauweiler and Others*, C-62/14, EU:C:2015:400, paragraphs 67 and 91).

166 With regard to judicial review of the conditions referred to in the previous paragraph of this judgment, the EU legislature must be allowed broad discretion in an area such as that involved in the main proceedings, which entails political, economic and social choices on its part, and in which it is called upon to undertake complex assessments. Consequently, the legality of a measure adopted in that area can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institutions are seeking to pursue (see, to that effect, judgment in *British American Tobacco (Investments) and Imperial Tobacco*, C-491/01, EU:C:2002:741, paragraph 123).

167 The question whether the provisions of Directive 2014/40 to which Question 3 refers infringe the principle of proportionality must be determined in the light of those principles.

Question 3(a)

168 Question 3(a) concerns the validity of Article 7(1) and (7) of Directive 2014/40 in the light of the principle of proportionality. Those provisions prohibit the placing on the market of tobacco products with a characterising flavour or containing flavourings in any of their components such as filters, papers, packages, capsules or any technical features allowing modification of the smell or taste of the tobacco products concerned or their smoke intensity.

169 According to the order for reference, the validity of those provisions is challenged on the ground that the prohibition on the use of menthol is neither appropriate nor necessary to achieve the directive's objective and that the impact of the prohibition is disproportionate.

170 As regards, in the first place, the suitability of the prohibition on the placing on the market of tobacco products containing menthol, it is argued, in essence, that the prohibition is not appropriate for achieving the objective of protecting human health, especially as regards young people, because menthol is not attractive to them and its use consequently does not facilitate initiation of tobacco consumption.

171 It should be recalled in this regard that the objective of Directive 2014/40 is, according to Article 1 thereof, twofold in that it seeks to facilitate the smooth functioning of the internal market for tobacco and related products, taking as a base a high level of protection of human health, especially for young people.

172 On this point, it must be stated that, as follows from paragraph 125 of this judgment, the prohibition on the placing on the market of tobacco products with a characterising flavour is capable of facilitating the smooth functioning of the internal market for tobacco and related products.

173 That prohibition is also appropriate for ensuring a high level of human health protection, especially for young people. Indeed, it is not disputed that certain flavourings are particularly attractive to young people and that they facilitate initiation of tobacco consumption.

174 As regards the argument that young people are not attracted to menthol and that the use thereof does not facilitate that initiation, it has already been stated in paragraph 115 of this judgment that the EU legislature could properly make all characterising flavours subject to the same set of legal rules. Accordingly, the appropriateness of the prohibition in question for the purpose of achieving the object of human health protection cannot be called into question solely in respect of a particular flavouring.

175 The point should also be made that, according to the Partial Guidelines for Implementation of Articles 9 and 10 of the FCTC — which should, on account of the findings made in paragraph 112 of this judgment — be recognised as being of particularly high evidential value, menthol, amongst other flavours, contributes to promoting and sustaining tobacco use and, because of its palatability, renders tobacco products more attractive to consumers.

176 Furthermore, Directive 2014/40 is aimed at ensuring a high level of health protection for consumers as a whole and consequently its ability to achieve that aim cannot be assessed solely in relation to a single category of consumers.

177 Accordingly, the prohibition laid down in Article 7 of Directive 2014/40 cannot be regarded as manifestly inappropriate for achieving the objective of facilitating the smooth functioning of the internal market for tobacco and related products, taking as a base a high level of protection of human health, especially for young people.

178 With regard, in the second place, to whether that prohibition is necessary, it should be borne in mind, first, that, as has already been stated in paragraph 110 of this judgment, the Partial Guidelines for Implementation of Articles 9 and 10 of the FCTC recommend that the Parties to the FCTC, inter alia, prohibit ingredients that may be used to increase palatability in tobacco products. In addition, in accordance with Section 1.1 of those partial guidelines, the Parties to the FCTC are encouraged to implement measures beyond those recommended by the guidelines.

179 It was thus lawful for the EU legislature — taking account of those recommendations and in the exercise of its broad discretion — to impose a prohibition on all characterising flavours.

180 Secondly, as regards the less restrictive measures advocated by some of the parties to the main proceedings, they do not appear to be equally suitable for achieving the objective pursued.

181 Raising — solely in respect of tobacco products with a characterising flavour — the age limit from which their consumption is permitted is unlikely to reduce the attractiveness of those products and thus prevent persons above that age from starting smoking. In addition, any prohibition on sale resulting from an increase in that age limit can, in any event, be easily circumvented when the products concerned are marketed.

182 The organisation of targeted information campaigns on the danger of tobacco products with characterising flavours is not, as such, likely to remove divergences between national rules relating to the placing on the market of such products and thus improve the conditions for the functioning of the internal market.

183 So far as the adoption of lists of prohibited or permitted flavourings is concerned, such a measure could result in the introduction of unjustified differences of treatment between the various types of tobacco products with a characterising flavour. Moreover, such lists may quickly become out of date because of continuing developments in the manufacturers' commercial strategies and are readily susceptible to circumvention.

184 The Court therefore finds that the prohibition on the placing on the market of tobacco products with a characterising flavour does not go manifestly beyond what is necessary to achieve the objective sought.

185 As regards, in the third place, the allegedly disproportionate effects of the prohibition on the use of menthol as a characterising flavour because of the negative economic and social consequences that such a prohibition entails, it should be borne in mind that even though, as in the present case, the EU legislature has a broad legislative power, it must base its choice on objective criteria and examine whether objectives pursued by the measure chosen are such as to justify even substantial negative economic consequences for certain operators (see, to that effect, judgment in *Luxembourg* v *Parliament and Council*, C-176/09, EU:C:2011:290, paragraph 63 and the case-law cited).

186 Indeed, under Article 5 of Protocol (No 2) on the application of the principles of subsidiarity and proportionality, annexed to the EU Treaty and to the FEU Treaty, draft legislative acts must take account of the need for any burden falling upon economic operators to be minimised and commensurate with the objective to be achieved.

187 In the present case, the EU legislature made sure that the negative economic and social consequences of the prohibition on the placing on the market of tobacco products with a characterising flavour were limited.

188 Thus, first, in order to give both the tobacco industry and consumers time to adapt, Article 7(14) of Directive 2014/40 provides that, in the case of tobacco products with a characterising flavour whose EU-wide sales volumes represent 3% or more in a particular product category, the prohibition on the placing of those products on the EU market is to apply only from 20 May 2020.

189 Second, it can be seen from the impact assessment referred to in paragraphs 98, 117 and 132 of this judgment (Part 1, p. 114, and Part 6, p. 2), which is not disputed on this point, that the prohibition in question is expected to result in a decrease in cigarette consumption in the European Union of 0.5% to 0.8% over a five-year period.

190 Those elements show that the EU legislature weighed up, on the one hand, the economic consequences of that prohibition and, on the other, the requirement to ensure, in accordance with the second sentence of Article 35 of the Charter and Articles 9 TFEU, 114(3) TFEU and 168(1) TFEU, a high level of human health protection with regard to a product which is characterised by properties that are carcinogenic, mutagenic and toxic to reproduction. The impact of the prohibition laid down in Article 7 of Directive 2014/40 thus does not appear manifestly disproportionate.

191 Having regard to the foregoing, consideration of Question 3(a) has disclosed no factor of such a kind as to affect the validity of Article 7(1) and (7) of Directive 2014/40.

Question 3(b)

192 The provisions at which Question 3(b) is directed include various rules concerning the labelling and packaging of tobacco products which relate, in essence, to the integrity of health warnings after the packet has been opened (Article 8(3) of Directive 2014/40), to the position and minimum dimensions of the general health warning and the information message (Article 9(3) of the directive), to the minimum dimensions of combined health warnings (Article 10(1)(g) of the directive) and to the shape of unit packets of cigarettes and the minimum number of cigarettes per unit packet (Article 14 of the directive).

193 It appears from the order for reference that the validity of this set of provisions is challenged, in extremely summary and general terms, on the ground, first, that the provisions are neither appropriate nor necessary to achieve the objective of public health protection. It is argued that, instead of the requirements imposed, which are considered to be very intrusive, there are less restrictive measures, such as, for example, a requirement that health warnings must be fully visible and not be distorted by packet shapes. Secondly, it is argued that the disputed requirements will prevent the differentiation of tobacco products and will cause distortions of competition. Thirdly, the requirement laid down in Article 14(1) of Directive 2014/40, pursuant to which a unit packet of cigarettes is to include at least 20 cigarettes, cannot be justified on grounds of public health protection.

194 Most of those objections call in question the proportionality of those requirements solely in relation to the objective of ensuring a high level of human health protection, while disregarding the objective of facilitating the smooth functioning of the internal market, thus failing to pay due regard to the fact that Directive 2014/40 and, in particular, the provisions covered by Question 3(b) pursue both those objectives.

195 As has been stated in paragraphs 97 to 105 of this judgment, Chapter II of Title II of Directive 2014/40, to which the provisions covered by Question 3(b) belong, contributes to improving the conditions for the functioning of the internal market for tobacco products by removing disparities on this point between the rules of the Member States.

196 The same is true of the minimum number of cigarettes per packet, prescribed in Article 14(1) of Directive 2014/40, and specifically mentioned in the order for reference. The main aim of that requirement is to remove differences between the rules of the Member States, as recital 28 of the directive confirms.

197 The requirements in question also help to achieve the objective of ensuring a high level of human health protection. As the Advocate General has stated in points 191 and 192 of her Opinion, innovative, novel or unusual shapes may help to maintain or enhance the attraction of the product and encourage its use. Similarly, certain packet shapes may obstruct the visibility of health warnings and, as a consequence, reduce their efficacy, as is stated in recitals 25 and 28 of Directive 2014/40. As regards the requirement that a unit packet must contain at least 20 cigarettes, it can be explained by the fact that smaller sales units are more of an inducement to start smoking because the consumer is inclined to think that they are cheaper, less of a constraint and psychologically more acceptable.

198 As to the less restrictive measure mentioned in paragraph 193 of this judgment, it is sufficient to observe that it is not aimed at removing differences between the Member States' rules on the labelling and packaging of tobacco products and it is therefore not appropriate for the purpose of achieving the objective of improving the functioning of the internal market.

199 Although those requirements may, by their very nature, to some extent increase the similarity between tobacco products, the fact remains that they concern only certain aspects of the labelling and packaging of those products and therefore still allow for adequate opportunities for product differentiation.

200 In view of the foregoing considerations, it cannot be accepted that the requirements laid down in Articles 8(3), 9(3), 10(1)(g) and 14 of Directive 2014/40 are manifestly inappropriate or manifestly go beyond what is necessary to attain the objective of improving the conditions for the functioning of the internal market for tobacco and related products, taking as a base a high level of protection of human health, especially for young people.

201 Accordingly, the Court finds that consideration of Question 3(b) has disclosed no factor of such a kind as to affect the validity of those provisions.

Question 3(c)

202 Article 10(1)(a) and (c) of Directive 2014/40, with which Question 3(c) is concerned, provides, in substance, that each unit packet and the outside packaging must carry combined health warnings taking the form of one of the messages listed in Annex I to the directive and a corresponding colour photograph as set out in Annex II thereto. The combined health warning must cover 65% of the external front and back surface of each unit packet.

203 The validity of those provisions is challenged, in essence, on account of the size of the area reserved for those warnings. Thus, it is alleged (i) that an area of that extent is neither appropriate nor necessary to achieve the objective of public health protection, (ii) that the figure of 65% is arbitrary and cannot be justified by the FCTC recommendations and (iii) that its impact is manifestly disproportionate.

204 As regards (i) the appropriateness of large combined health warnings, the Guidelines for Implementation of Article 11 of the FCTC explain, in point 7, that, in comparison with small, text-only health warnings, larger warnings with pictures are more likely to be noticed, better communicate health risks, provoke a greater emotional response and increase the motivation of tobacco users to quit and to decrease their tobacco consumption. Such warnings are also more likely to retain their effectiveness over time and are particularly effective in communicating health effects to low-literacy populations, children and young people.

205 The affixing of large combined health warnings thus does not appear manifestly inappropriate for achieving the objective sought.

206 As regards (ii) the allegedly arbitrary nature of the size of the area which Article 10(1)(a) and (c) of Directive 2014/40 reserves for the combined health warnings, the Court notes that, in accordance with Article 11(1)(b)(iv) of the FCTC, these warning should cover ‘50% or more’ of the principal display areas of the unit packets, but not less than 30%.

207 On this point, the Guidelines for Implementation of Article 11 of the FCTC recommend, in point 12, that the Contracting Parties consider using health warnings and messages that cover ‘more than 50%’ of the principal display areas and aim to cover ‘as much of the principal display areas as possible’, since according to existing evidence, ‘the effectiveness of health warnings and messages increases with their size’.

208 Against that background the EU legislature cannot be accused of having acted arbitrarily in selecting a figure of 65% for the area reserved for combined health warnings pursuant to Article 10(1)(a) and (c) of Directive 2014/40. Indeed, that selection is based on criteria deriving from the FCTC recommendations and, in making it, the EU legislature acted within the bounds of its broad discretion, to which reference is made in paragraph 166 of this judgment.

209 Concerning (iii) the necessity of the measure in question and its allegedly disproportionate impact on the ability of manufacturers to communicate information about the product concerned to consumers, it should be pointed out, first, that the area reserved for those warnings allows for a sufficient space for that type of information on the unit packets.

210 Secondly, the restrictions thereby imposed must be weighed up against the requirement to ensure a high level of human health protection in an area characterised by the toxicity of the product concerned and its addictive effects.

211 Having regard to the foregoing considerations, it does not appear that, in adopting Article 10(1)(a) and (c) of Directive 2014/40, the EU legislature manifestly went beyond the limits of what is appropriate and necessary to attain the objective of improving the conditions for the functioning of the internal market for tobacco and related products, taking as a base a high level of protection of human health, especially for young people.

212 Accordingly, the Court finds that consideration of Question 3(c) has disclosed no factor of such a kind as to affect the validity of Article 10(1)(a) and (c) of Directive 2014/40.

Question 7

213 In view of the finding made in paragraph 52 of this judgment, Question 7 should be addressed only in so far as it concerns the validity of Article 7 of Directive 2014/40 in the light of the principle of subsidiarity.

214 The Court notes in this regard that the order for reference does not mention any ground of invalidity based on that principle and concerning Directive 2014/40 as a whole. Only the validity of Article 7 of the directive is challenged in so far as that article prohibits the placing on the EU market of tobacco products containing menthol as a characterising flavour. It is claimed that the EU legislature merely asserted, using a standard formula, that the principle of subsidiarity was complied with, without showing that the internal market benefits deriving from that prohibition are sufficient to justify action on the part of the European Union. It is argued that public health protection could have been sufficiently achieved at the level of Member States.

215 The principle of subsidiarity is set out in Article 5(3) TEU, under which the European Union, in areas which do not fall within its exclusive competence, is to act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved at EU level. Furthermore, Article 5 of Protocol (No 2) on the application of the principles of subsidiarity and proportionality, annexed to the EU Treaty and to the FEU Treaty, lays down guidelines for the purpose of determining whether those conditions are met (judgment in *Estonia* v *Parliament and Council*, C-508/13, EU:C:2015:403, paragraph 44).

216 An initial review of compliance with the principle of subsidiarity is undertaken, at a political level, by national parliaments in accordance with the procedures laid down for that purpose by Protocol (No 2).

217 Subsequently, responsibility for that review lies with the EU judicature, which must verify both compliance with the substantive conditions set out in Article 5(3) TEU and compliance with the procedural safeguards provided for by that protocol.

218 As regards, in the first place, the judicial review of compliance with the substantive conditions laid down in Article 5(3) TEU, the Court must determine whether the EU legislature was entitled to consider, on the basis of a detailed statement, that the objective of the proposed action could be better achieved at EU level.

219 Since the present case concerns an area — the improvement of the functioning of the internal market — which is not among those in respect of which the European Union has exclusive competence, it must be determined whether the objective of Directive 2014/40 could be better achieved at EU level (see, to that effect, judgment in *British American Tobacco (Investments) and Imperial Tobacco*, C-491/01, EU:C:2002:741, paragraphs 179 and 180).

220 In this regard, as has been mentioned in paragraph 143 of this judgment, Directive 2014/40 has two objectives in that it seeks to facilitate the smooth functioning of the internal market for tobacco and related products, while ensuring a high level of protection of human health, especially for young people.

221 Even if the second of those objectives might be better achieved at the level of Member States, the fact remains that pursuing it at that level would be liable to entrench, if not create, situations in which some Member States permit the placing on the market of tobacco products containing certain characterising flavours, whilst others prohibit it, thus running completely counter to the first objective of Directive 2014/40, namely the improvement of the functioning of the internal market for tobacco and related products.

222 The interdependence of the two objectives pursued by the directive means that the EU legislature could legitimately take the view that it had to establish a set of rules for the placing on the EU market of tobacco products with characterising flavours and that, because of that interdependence, those two objectives could best be achieved at EU level (see, by analogy, judgment in *Vodafone and Others*, C-58/08, EU:C:2010:321, paragraph 78, and *Estonia* v *Parliament and Council*, C-508/13, EU:C:2015:403, paragraph 48).

223 Moreover, as has been stated in paragraph 115 of this judgment, the EU legislature could properly make all characterising flavours subject to the same set of legal rules.

224 Consequently, the Court must reject the arguments seeking to establish that the objective of human health protection could have been better achieved at national level as regards specifically the prohibition on the placing on the market of tobacco products with characterising flavours.

225 As regards, in the second place, compliance with formal requirements and, in particular, the statement of reasons for Directive 2014/40 in the light of the principle of subsidiarity, it should be borne in mind that, according to the Court's case-law, observance of the obligation to state reasons must be evaluated not only by reference to the wording of the contested act, but also by reference to its context and the circumstances of the individual case (see, to that effect, judgment in *Estonia* v *Parliament and Council*, C-508/13, EU:C:2015:403, paragraph 61).

226 In the present case, it is undisputed that the Commission's proposal for a directive and its impact assessment include sufficient information showing clearly and unequivocally the advantages of taking action at EU level rather than at Member State level.

227 Accordingly, it is established to the requisite legal standard that that information enabled both the EU legislature and national parliaments to determine whether the proposal complied with the principle of subsidiarity, whilst also enabling individuals to understand the reasons relating to that principle and the Court to exercise its power of review.

228 Having regard to the foregoing, consideration of Question 7 has disclosed no factor of such a kind as to affect the validity of Article 7 of Directive 2014/40.

Costs

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

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

1. **Article 24(2) of Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC must be interpreted as permitting Member States to maintain or introduce further requirements in relation to aspects of the packaging of tobacco products which are not harmonised by that directive.**

2. **Article 13(1) of Directive 2014/40 must be interpreted as prohibiting the display, on the labelling of unit packets and on the outside packaging, as well as on the tobacco product itself, of any information covered by that provision, even if the information concerned is factually accurate.**

3. **Consideration of the questions referred for a preliminary ruling by the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court) has disclosed no factor of such a kind as to affect the validity of Articles 7, 18 and 24(2) and (3) of Directive 2014/40 or that of the provisions of Chapter II of Title II of that directive.**

[Signatures]

Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

17 December 2015*

(Reference for a preliminary ruling — Regulation (EC) No 1924/2006 — Directive 2009/54/EC — Articles 11(1) and 16 of the Charter of Fundamental Rights of the European Union — Consumer protection — Nutrition and health claims — Natural mineral waters — Sodium/salt content — Calculation — Sodium chloride (table salt) or total amount of sodium — Freedom of expression and information — Freedom to conduct a business)

In Case C-157/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Conseil d'État (Council of State, France), made by decision of 26 March 2014, received at the Court on 4 April 2014, in the proceedings

Neptune Distribution SNC

v

Ministre de l'Économie et des Finances (Minister for Economic Affairs and Finance),

THE COURT (Fourth Chamber),

composed of L. Bay Larsen, President of the Third Chamber acting as President of the Fourth Chamber, J. Malenovský, M. Safjan (Rapporteur), A. Prechal and K. Jürimäe, Judges,

Advocate General: N. Jääskinen,

Registrar: V. Tourrès, Administrator,

having regard to the written procedure and further to the hearing on 26 February 2015,

after considering the observations submitted on behalf of:

— Neptune Distribution SNC, by D. Bouthors, M. Fayat and A. Vermersch, avocats,

— the French Government, by S. Menez, D. Colas and S. Ghiandoni, acting as Agents,

— the Greek Government, by I. Chalkias, E. Leftheriotou and A. Vasilopoulou, acting as Agents,

— the Italian Government, by G. Palmieri, acting as Agent, and M. Santoro, avvocato dello Stato,

— the European Parliament, by A. Tamás and J. Rodrigues, acting as Agents,

— the Council of the European Union, by J. Herrmann and O. Segnana, acting as Agents,

* Language of the case: French.

— the European Commission, by K. Herbout-Borczak and S. Grünheid, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 9 July 2015,

gives the following

Judgment

1 This request for a preliminary ruling concerns, first, the interpretation of the annex to Regulation (EC) No 1924/2006 of the European Parliament and of the Council of 20 December 2006 on nutrition and health claims made on foods (OJ 2006 L 404, p. 9, and corrigendum OJ 2007 L 12, p. 3), as amended by Regulation (EC) No 107/2008 of the European Parliament and of the Council of 15 January 2008 (OJ 2008 L 39, p. 8) ('Regulation No 1924/2006') and, second, the validity of Article 2(1) of Directive 2000/13/EC of the European Parliament and of the Council of 20 March 2000 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs (OJ 2000 L 109, p. 29), Article 9(1) and (2) of Directive 2009/54/EC of the European Parliament and of the Council of 18 June 2009 on the exploitation and marketing of natural mineral waters (OJ 2009 L 164, p. 45), and Annex III thereto, read in the light of the annex to Regulation No 1924/2006.

2 The request has been made in proceedings between Neptune Distribution SNC ('Neptune Distribution') and the Minister for Economic Affairs and Finance concerning the legality of the implementing decision of 5 February 2009 taken by the Head of the Departmental Unit for Allier of the Regional Directorate for Competition, Consumption and Suppression of Fraud for the Auvergne, and the decision of the Minister for the Economy, Industry and Employment of 25 August 2009 rejecting the appeal through the appropriate channels brought by Neptune Distribution.

Legal context

The ECHR

3 Under the heading 'Freedom of expression', Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR'), provides:

'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 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 health …, for the protection of the … rights of others …'

EU law

The Charter

4 Article 11 of the Charter of Fundamental Rights of the European Union ('the Charter'), entitled 'Freedom of expression and information', states in paragraph 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.'

5 Under Article 16 of the Charter, entitled 'Freedom to conduct a business':

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

6 Article 52 of the Charter, entitled 'Scope and interpretation of rights and principles', provides:

'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.

…

3. 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.

…

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.'

7 The Explanations Relating to the Charter of Fundamental Rights (OJ 2007 C 303, p. 17) ('the Explanations Relating to the Charter') state, as regards Article 11 of the Charter, that pursuant to Article 52(3) of the Charter, the meaning and scope of this right are the same as those guaranteed by the ECHR.

Regulation No 1924/2006

8 Recitals 1 and 9 in the preamble to Regulation No 1924/2006 state:

'(1) An increasing number of foods labelled and advertised in the Community bear nutrition and health claims. In order to ensure a high level of protection for consumers and to facilitate their choice, products put on the market, including imported products, should be safe and adequately labelled. A varied and balanced diet is a prerequisite for good health and single products have a relative importance in the context of the total diet.

…

(9) There is a wide range of nutrients and other substances including, but not limited to … minerals including trace elements … with a nutritional or physiological effect that might be present in a food and be the subject of a claim. Therefore, general principles applicable to all claims made on foods should be established in order to ensure a high level of consumer protection, give the consumer the necessary information to make choices in full knowledge of the facts, as well as creating equal conditions of competition for the food industry.'

9 Article 1 of that regulation provides:

'1. This Regulation harmonises the provisions laid down by law, regulation or administrative action in Member States which relate to nutrition and health claims in order to ensure the effective functioning of the internal market whilst providing a high level of consumer protection.

2. This Regulation shall apply to nutrition and health claims made in commercial communications, whether in the labelling, presentation or advertising of foods to be delivered as such to the final consumer.

…

5. This Regulation shall apply without prejudice to the following Community provisions:

…

(b) Directive [2009/54]

…'

10 According to Article 2(2) of that regulation:

'The following definitions shall also apply:

…

4. "nutrition claim" means any claim which states, suggests or implies that a food has particular beneficial nutritional properties due to:

…

(b) the nutrients or other substances it

(i) contains,

(ii) contains in reduced or increased proportions, or

(iii) does not contain;

5. "health claim" means any claim that states, suggests or implies that a relationship exists between a food category, a food or one of its constituents and health;

…'

11 Article 8(1) of that regulation provides:

'Nutrition claims shall only be permitted if they are listed in the Annex and are in conformity with the conditions set out in this Regulation.'

12 Article 13 of Regulation No 1924/2006 provides:

'1. Health claims describing or referring to:

(a) the role of a nutrient or other substance in growth, development and the functions of the body …

…

which are indicated in the list provided for in paragraph 3 may be made without undergoing the procedures laid down in Articles 15 to 19, if they are:

(i) based on generally accepted scientific evidence; and

(ii) well understood by the average consumer.

…

3. After consulting the [European Food Safety] Authority [EFSA], the Commission shall adopt, … a Community list designed to amend non-essential elements of the Regulation by supplementing it, of permitted claims as referred to in paragraph 1, and all necessary conditions for the use of these claims by 31 January 2010 at the latest.

…'

13 The annex to that regulation, entitled 'Nutrition claims and conditions applying to them', contains, inter alia, the following provisions:

'Low sodium/salt

A claim that a food is low in sodium/salt, and any claim likely to have the same meaning for the consumer, may only be made where the product contains no more than 0.12 g of sodium, or the equivalent value for salt, per 100 g or per 100 ml. For waters, other than natural mineral waters falling within the scope of Directive [2009/54], this value should not exceed 2 mg of sodium per 100 ml.

Very low sodium/salt

A claim that a food is very low in sodium/salt, and any claim likely to have the same meaning for the consumer, may only be made where the product contains no more than 0.04 g of sodium, or the equivalent value for salt, per 100 g or per 100 ml. This claim shall not be used for natural mineral waters and other waters.'

Directive 2000/13

14 According to Article 2 of Directive 2000/13:

‘1. The labelling and methods used must not:

(a) be such as could mislead the purchaser to a material degree, particularly:

(i) as to the characteristics of the foodstuff and, in particular, as to its nature, identity, properties, composition, quantity, durability, origin or provenance, method of manufacture or production;

(ii) by attributing to the foodstuff effects or properties which it does not possess;

(iii) by suggesting that the foodstuff possesses special characteristics when in fact all similar foodstuffs possess such characteristics;

(b) subject to Community provisions applicable to natural mineral waters and foodstuffs for particular nutritional uses, attribute to any foodstuff the property of preventing, treating or curing a human disease, or refer to such properties.

…

3. The prohibitions or restrictions referred to in paragraphs 1 and 2 shall also apply to:

(a) the presentation of foodstuffs, in particular their shape, appearance or packaging, the packaging materials used, the way in which they are arranged and the setting in which they are displayed;

(b) advertising.’

Directive 2009/54

15 Recitals 5, 8 and 9 in the preamble to Directive 2009/54 state:

‘(5) The primary purposes of any rules on natural mineral waters should be to protect the health of consumers, to prevent consumers from being misled and to ensure fair trading.

…

(8) In respect of labelling, natural mineral waters are subject to the general rules laid down by [Directive 2000/13]. Accordingly, this Directive may be limited to laying down the additions and derogations which should be made to those general rules.

(9) The inclusion of the statement of the analytical composition of a natural mineral water should be compulsory in order to ensure that consumers are informed.’

16 According to Article 7(2)(a) of Directive 91/414:

‘Labels on natural mineral waters shall also give the following mandatory information:

(a) a statement of the analytical composition, giving its characteristic constituents.’

17 Article 9 of that directive provides:

‘1. It shall be prohibited, both on packaging or labels and in advertising in any form whatsoever, to use indications, designations, trade marks, brand names, pictures or other signs, whether figurative or not, which:

(a) in the case of a natural mineral water, suggest a characteristic which the water does not possess, in particular as regards its origin, the date of the authorisation to exploit it, the results of analyses or any similar references to guarantees of authenticity;

…

2. All indications attributing to a natural mineral water properties relating to the prevention, treatment or cure of a human illness shall be prohibited.

However, the indications listed in Annex III shall be authorised if they meet the relevant criteria laid down in that Annex or, in the absence thereof, criteria laid down in national provisions and provided that they have been drawn up on the basis of physico-chemical analyses and, where necessary, pharmacological, physiological and clinical examinations carried out according to recognised scientific methods, in accordance with Annex I, Section I, point 2.

Member States may authorise the indications “stimulates digestion”, “may facilitate the hepato-biliary functions” or similar indications. They may also authorise the inclusion of other indications, provided that the latter do not conflict with the principles provided for in the first subparagraph and are compatible with those provided for in the second subparagraph.

…’

18 Annex III to Directive 2009/54, entitled ‘Indications and Criteria laid down in Article 9(2)’, includes the indication ‘[s]uitable for a low-sodium diet’ accompanied by the criterion ‘[s]odium content less than 20 mg/l’.

French law

19 Under Article R. 112-7, first and final subparagraphs, of the Consumer Code, which is intended to transpose Article 2 of Directive 2000/13:

‘The labels and labelling methods used must not be such as to give rise to confusion in the mind of the purchaser or the consumer, particularly as to the characteristics of the foodstuff and, specifically, as to its nature, identity, properties, composition, quantity, durability, method of conservation, origin or provenance, method of manufacture or production.

…

The prohibitions or restrictions referred to above … shall also apply to the presentation of foodstuffs and … advertising.’

20 Articles R. 1322-44-13 and R. 1322-44-14 of the Public Health Code are intended to transpose Article 9 of Directive 2009/54.

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

21 Neptune Distribution sells and distributes the natural sparkling mineral waters denominated 'Saint-Yorre' and 'Vichy Célestins'.

22 By decision of 5 February 2009, the Head of the Departmental Unit of Allier of the Regional Directorate for Competition, Consumption and Suppression of Fraud for the Auvergne served formal notices on Neptune Distribution to remove the following indications from labels and advertising for those waters:

— 'The sodium in St-Yorre is essentially sodium bicarbonate. St-Yorre contains only 0.53 g of salt (or sodium chloride) per litre, that is to say less than a litre of milk!!!';

— 'Salt and sodium must not be confused — the sodium in Vichy Célestins is essentially from sodium bicarbonate. Above all, it must not be confused with table salt (sodium chloride). Vichy Célestins contains only 0.39 g of salt per litre or 2 to 3 times less than is contained in a litre of milk!', and generally,

— any statement leading the consumer to believe that the waters in question are low or very low in salt or in sodium.

23 By decision of 25 August 2009, the Minister for the Economy, Industry and Employment dismissed the appeal through appropriate channels brought by Neptune Distribution against that decision.

24 By judgment of 27 May 2010, the Tribunal administrative de Clermont-Ferrand (Administrative Court, Clermont-Ferrand) dismissed Neptune Distribution's application for the annulment of the formal notice and the decision.

25 The appeal brought by Neptune Distribution against that judgment was rejected by judgment of the Cour administrative d'appel de Lyon (Administrative Court of Appeal, Lyons) of 9 June 2011.

26 Neptune Distribution then brought an appeal against that judgment before the referring court. In support of that appeal, Neptune Distribution relied, inter alia, on a plea that the Cour administrative d'appel de Lyon (Administrative Court of Appeal, Lyons) had erred in law with regard to Articles R. 112-7 of the Consumer Code and Articles R. 1322-44-13 and R. 1322-44-14 of the Public Health Code.

27 The referring court states that the response to be given to that plea depends on whether the annex to Regulation No 1924/2006 provides, as a basis for calculation of the 'equivalent value for salt' of the amount of sodium present in a foodstuff, only that amount which, associated with chloride ions, forms sodium chloride or table salt or the total amount of sodium contained in that foodstuff in all its forms.

28 In the latter case, water rich in sodium bicarbonate cannot be regarded as being 'low in sodium or salt', even though it is low or very low in sodium chloride.

29 Thus, the distributor of a natural mineral water rich in sodium bicarbonate cannot display on its labels and in its advertising slogans an indication, even if correct, relating to the low salt or sodium chloride content, since that wording is likely to mislead the purchaser as to the total sodium content of the mineral water concerned.

30 In that context, the referring court adds that, as is clear in particular from the opinion of the EFSA of 21 April 2005, the increase in arterial tension is the main undesirable effect identified in relation to a high sodium intake. Although sodium is mainly responsible for this, chloride ions also play a role in

the increase in arterial tension. A number of studies show that a diet high in sodium bicarbonate does not have the same undesirable effect as a diet high in sodium chloride for persons suffering from high blood pressure. It is true that the EFSA, in an opinion published in June 2011, refused to include in the list of authorised health claims laid down in Article 13(3) of Regulation No 1924/2006, the claim that sodium bicarbonate does not have an undesirable effect on arterial tension, on the ground that the study produced in support of that claim did not present sufficient methodological guarantees that would permit definitive conclusions to be drawn from them. However, that circumstance alone does not support a claim that sodium bicarbonate must be regarded as capable of bringing about or aggravating arterial hypertension in the same way and in the same proportions as sodium chloride.

31 Thus, according to the referring court, there is uncertainty as to the equivalence, in terms of risks to the health of consumers, between the consumption of water high in sodium bicarbonate and water high in sodium chloride. Therefore, it must be determined whether the restrictions on the freedom of expression and advertising information and Neptune Distribution's freedom to conduct a business are necessary and proportionate, in particular, in the light of the requirement to ensure a high level of protection for the health of consumers.

32 In those circumstances, the Conseil d'État (Council of State) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is the basis for calculating the "equivalent value for salt" of the quantity of sodium present in a foodstuff, for the purposes of the annex to [Regulation No 1924/2006], constituted only by the quantity of sodium which, when associated with chloride ions, forms sodium chloride, or table salt, or does it include the total quantity of sodium in all its forms contained in the foodstuff?

(2) In the latter case, do Article 2(1) of [Directive 2000/13] and Article 9(1) and (2) of [Directive 2009/54], together with Annex III to the latter directive, read in the light of the equivalence established between sodium and salt in the annex to [Regulation No 1924/2006], infringe the first subparagraph of Article 6(1) [TEU], read with Article 11(1) (freedom of expression and information) and Article 16 (freedom to conduct a business) of the Charter and Article 10 of the ECHR, by prohibiting a distributor of mineral water from displaying on his labels and advertising slogans any indication as to the low salt content or sodium chloride content, which could be that of his product that is high in sodium bicarbonate, inasmuch as that indication would be likely to mislead the purchaser in regard to the total sodium content of the water?'

Consideration of the questions referred for a preliminary ruling

The first question

33 It should be observed as a preliminary point that, in the context of the procedure laid down by Article 267 TFEU providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to determine the case before it. To that end, the Court may have to reformulate the questions referred to it. The Court has a duty to interpret all provisions of EU law which national courts require in order to decide the actions pending before them, even if those provisions are not expressly indicated in the questions referred to the Court of Justice by those courts (judgment in *Doc Generici*, C-452/14, EU:C:2015:644, paragraph 33 and the case-law cited).

34 Consequently, even if, formally, the referring court has limited its first question to the interpretation of the expression 'equivalent value for salt' in the annex to Regulation No 1924/2006, that does not prevent this Court from providing the referring court with all the elements for the interpretation of EU law that may be of assistance in adjudicating in the case pending before it, whether or not the

referring court has referred to them in the wording of its question. It is, in this regard, for the Court to extract from all the information provided by the national court, in particular from the grounds of the decisions to make the reference, the points of EU law which require interpretation in view of the subject-matter of the dispute (see, to that effect, judgment in *Doc Generici*, C-452/14, EU:C:2015:644, paragraph 34 and the case-law cited).

35 In the present case, it must be observed that, in the grounds for its request for a preliminary ruling, the referring court also mentions the provisions of Directive 2009/54.

36 Furthermore, it is apparent from those grounds that, in order to reach a decision on the appeal before it, the referring court wishes to know whether the packaging, labels or advertising of natural mineral waters may suggest that those waters have a low sodium or salt content, in particular by indicating the content of those waters of only one chemical compound containing sodium, in this case sodium chloride, or table salt, without stating the total sodium content of all the chemical forms present, if that total content may exceed the limits for the quantities of sodium or the equivalent in salt provided for in the EU legislation applicable to the claims and wording used with regard to natural mineral waters.

37 Therefore, the first question should be understood as asking essentially whether EU law must be interpreted as meaning that it precludes packaging, labels or advertising for natural mineral waters from containing claims or indications leading consumers to believe that the waters concerned are low or very low in sodium or salt, or are suitable for a low-sodium diet, where the total sodium content in all the chemical forms present exceeds the limits for the amounts of sodium or the equivalent value for salt laid down by the relevant EU legislation.

38 In order to provide a useful answer to that question, the provisions of Regulation No 1924/2006 and Directive 2009/54 must be examined.

39 According to Article 1(5) of Regulation No 1924/2006, the regulation is to apply without prejudice to the provisions of Directive 2009/54.

40 Whereas that regulation governs, in a general manner, the use of nutrition and health claims concerning foodstuffs, the directive lays down specific rules as to the indications which may appear on packaging, labels and in the advertising of natural mineral waters.

41 Article 8(1) of Regulation No 1924/2006 permits nutrition claims only if they are listed in the annex to that regulation and are in conformity with the conditions set out therein.

42 As regards nutrition claims referring to the sodium or salt content, that annex allows a foodstuff to be described as ‘low in sodium/salt’ or ‘very low in sodium/salt’ or the use of any claim likely to have the same meaning for the consumer, provided that that foodstuff does not contain more than 0.12 g of sodium or the equivalent value of salt per 100 g or by 100 ml, with respect to the first of those claims, or not more than 0.04 g of the same substances with respect to the second of those claims.

43 Waters are, however, subject to specific rules in that regard.

44 More specifically, in the first place, the annex to Regulation No 1924/2006 prohibits use of the claim ‘very low in sodium/salt’ and any claim likely to have the same meaning for the consumer as regards natural mineral waters and other waters.

45 In the second place, the claim ‘low in sodium/salt’, like any claim likely to have the same meaning for the consumer is permitted, in accordance with that annex, with respect to waters, other than natural mineral waters falling within the scope of Directive 2009/54, provided that the relevant value does not exceed 2 mg of sodium per 100 ml or 20 mg per litre.

46 Under Article 9(2), second subparagraph, of Directive 2009/54, the indications listed in Annex III thereto are authorised if they meet the relevant criteria laid down in that annex or, in the absence thereof, the criteria laid down in national provisions, provided that certain technical conditions are observed.

47 That annex contains an indication '[s]uitable for a low-sodium diet', accompanied by the criterion '[s]odium content less than 20 mg/l'.

48 By specifying, in Directive 2009/54, the maximum amount of sodium in cases in which the packaging, labels or advertising for natural mineral waters contain an indication referring to a low sodium content, the EU legislature does not differentiate according to the chemical compounds of which sodium is a component, or from which it originates.

49 As regards the objectives both of Regulation No 1924/2006 and of Directive 2009/54, it should be recalled, as Article 1 of that regulation states, that the latter aims to ensure the effective functioning of the internal market whilst providing a high level of consumer protection. In that regard, recitals 1 and 9 in the preamble to that regulation state that it is necessary, in particular, to give the consumer the necessary information to make choices in full knowledge of the facts (judgment in *Ehrmann*, C-609/12, EU:C:2014:252, paragraph 40).

50 Recital 5 in the preamble to Directive 2009/54 specifies that the primary purposes of any rules on natural mineral waters should be to protect the health of consumers, to prevent consumers from being misled and to ensure fair trading. Recital 9 thereto states that the inclusion of the statement of the analytical composition of a natural mineral water should be compulsory in order to ensure that consumers are informed (see judgment in *Hotel Sava Rogaška*, C-207/14, EU:C:2015:414, paragraph 40).

51 Thus, it must be held that, by adopting the provisions of Regulation No 1924/2006 and Directive 2009/54, the EU legislature deemed it necessary to ensure that the consumer receives appropriate and transparent information as to the sodium content of drinking waters.

52 Those guarantees must also be assessed in the light of the significance of the level of sodium consumption for human health.

53 Since it is common ground that sodium is a component of various chemical compounds, such as, inter alia, sodium chloride or table salt and sodium bicarbonate, the quantity present in natural mineral waters must be determined, in the light of the provisions of Directive 2009/54, by taking account of the total amount present in the natural mineral waters concerned, whatever its chemical form.

54 It is true that under Article 7(2)(a) of Directive 2009/54, it is mandatory for the labelling of natural mineral waters to provide a statement of the analytical composition, giving its characteristic constituents.

55 However, it must be observed that packaging, labels and advertising for natural mineral waters which, regardless of the indication of the total sodium content of those waters on the label, in accordance with the provision referred to in the preceding paragraph of the present judgment, contain an indication referring to a low sodium content of the waters may also mislead the consumer if they suggest that those waters are low in sodium or salt or are suitable for a low-sodium diet, whereas, in reality, they contain 20 mg/l or more of sodium (see, by analogy, judgment in *Teekanne*, C-195/14, EU:C:2015:361, paragraphs 38 to 41).

56 Having regard to the foregoing considerations, the answer to the first question is as follows:

— Article 8(1) of Regulation No 1924/2006, read in conjunction with the annex thereto, must be interpreted as meaning that it prohibits the use of the claim 'very low in sodium/salt' and any claim likely to have the same meaning for the consumer as regards natural mineral waters and other waters.

— Article 9(2) of Directive 2009/54, read in conjunction with Annex III thereto, must be interpreted as meaning that it precludes packaging, labels or advertising for natural mineral waters from displaying claims or indications suggesting to the consumer that the waters concerned are low in sodium or salt or are suitable for a low-sodium diet where the total sodium content, in all the chemical forms present, is equal to or more than 20 mg/l.

The second question

57 By its second question, the referring court asks essentially whether Article 2(1) of Directive 2000/13, and Article 9(1) and (2) of Directive 2009/54, read together with Annex III to the latter directive and the annex to Regulation No 1924/2006, are valid in so far as they prohibit the display on packaging, labels and in advertising for natural mineral waters of any claim or indication that those waters are low in sodium chloride or table salt which is likely to mislead the consumer as to the total sodium content of the waters in question.

58 The referring court asks the Court to determine the validity of those provisions in the light of Article 6(1), first paragraph, TEU, read together with Articles 11(1) and 16 of the Charter and with Article 10 of the ECHR.

59 As a preliminary point, it must be observed that, even though, by its second question, the referring court asks the Court to determine the validity of a provision of Directive 2000/13, that directive is not at issue in the case in the main proceedings.

60 Articles 2(1)(a) and 3 of Directive 2000/13 merely provide that labelling, presentation and advertising must not mislead the purchaser as to the characteristics of the foodstuff.

61 Thus, unlike the provisions of Regulation No 1924/2006 and Directive 2009/54, the provisions of Directive 2000/13 do not contain any specific requirements with respect to producers and distributors of natural mineral waters concerning the use of claims or indications which may suggest that the water concerned is low or very low in sodium or salt or is suitable for a low-sodium diet.

62 Consequently, only the validity of Article 9(1) and (2) of Directive 2009/54, read together with Annex III thereto and the annex to Regulation No 1924/2006 need to be examined in the present case.

63 In that regard, it must be recalled that the freedom of expression and information is enshrined in Article 11 of the Charter, which Article 6(1) TEU recognises as having the same legal value as the Treaties.

64 That freedom is also protected in accordance with Article 10 of the ECHR, which applies, inter alia, as is clear from the case-law of the European Court of Human Rights, to the circulation by an entrepreneur of commercial information in particular in the form of an advertising slogan (see European Court of Human Rights judgments in *Casado Coca v. Spain*, 24 February 1994, Series A no. 285-A, §§ 35 and 36, and *Krone Verlag GmbH & Co. KG (No. 3) v. Austria*, no. 39069/97, ECHR 2003-XII, §§ 19 and 20).

65 Since the freedom of expression and information laid down in Article 11 of the Charter has, as is clear from Article 52(3) thereof and the Explanations Relating to the Charter as regards Article 11, the same meaning and scope as the freedom guaranteed by the ECHR, it must be held that that freedom covers the use by a business, on packaging, labels and in advertising for natural mineral waters, of claims and indications referring to the sodium or salt content of such waters.

66 Furthermore, it must be observed that the freedom to conduct a business protected, in accordance with Article 16 of the Charter, must be considered in relation to its social function (see, to that effect, judgment in *Deutsches Weintor*, C-544/10, EU:C:2012:526, paragraph 54).

67 The prohibition on the displaying on the packaging, labels and in the advertising for natural mineral waters of any claim or indication referring to the fact that such waters have a low sodium content which may mislead the consumer as to that content is an interference with the freedom of expression and information of the person carrying on that business and with his freedom to conduct that business.

68 While those freedoms may nevertheless be limited, any limitation on their exercise must, in accordance with Article 52(1) of the Charter, be provided for by law and respect the essence of those rights and freedoms. Furthermore, as is clear from that provision, 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 European Union or the need to protect the rights and freedoms of others.

69 In that connection, it must be observed, first, that the interference referred to in paragraph 67 of the present judgment is provided for by law, namely by Article 8(1) of Regulation No 1924/2006, read together with the annex thereto and Article 9(2) of Directive 2009/54, read together with Annex III thereto.

70 Second, the actual content of the freedom of expression and information of the person carrying on the business is not affected by those provisions, since they merely make the information which may be communicated to the consumer regarding the sodium or salt content of natural mineral waters subject to certain conditions, such as those set out in paragraphs 44 to 56 of the present judgment.

71 Furthermore, far from prohibiting the production and marketing of natural mineral waters, the legislation at issue in the main proceedings merely controls, in a very clearly defined area, the associated labelling and advertising. Thus, it does not affect in any way the actual content of the freedom to conduct a business (see, to that effect, judgment in *Deutsches Weintor*, C-544/10, EU:C:2012:526, paragraphs 57 and 58).

72 Thus, as set out in paragraphs 49 to 52 of the present judgment, the provisions of Regulation No 1924/2006 and Directive 2009/54, in particular those which lay down limitations on the use of the claims and indications at issue in the main proceedings, aim to ensure a high level of consumer protection, to guarantee adequate and transparent information for the consumer relating to the sodium content of drinking water, to ensure fair trading and to protect human health.

73 As the Advocate General noted in point 46 of his Opinion, a high level of human health protection and consumer protection are legitimate objectives of general interest, the achievement of which is sought by the European Union, in accordance in particular with Articles 9 TFEU, 12 TFEU, 114(3) TFEU, 168(1) TFEU, 169(1) TFEU and Articles 35 and 38 of the Charter.

74 The need to ensure that the consumer has the most accurate and transparent information possible concerning the characteristics of goods is closely related to the protection of human health and is a question of general interest (see, to that effect, judgments of the European Court of Human Rights in *Hertel v. Switzerland*, 25 August 1998, *Reports of Judgments and Decisions* 1998-VI, § 47, and *Bergens*

Tidende and Others v. Norway, no. 26132/95, ECHR 2000-IV, § 51) which may justify limitations on the freedom of expression and information of a person carrying on a business or his freedom to conduct a business.

75 In those circumstances, the determination of the validity of the contested provisions must be carried out in accordance with the need to reconcile the requirements of the protection of those various fundamental rights protected by the EU legal order, and striking a fair balance between them (see, to that effect, judgment in *Deutsches Weintor*, C-544/10, EU:C:2012:526, paragraph 47).

76 With regard to judicial review of the conditions of the implementation of the principle of proportionality, the EU legislature must be allowed a broad discretion in an area such as that involved in the present case, which entails political, economic and social choices on its part, and in which it is called upon to undertake complex assessments (see, to that effect, judgments in *British American Tobacco (Investments) and Imperial Tobacco*, C-491/01, EU:C:2002:741, paragraph 123, and *Alliance for Natural health and Others*, C-154/04 and C-155/04, EU:C:2005:449, paragraph 52).

77 In that connection, it must be observed, first, that, even if a claim or indication referring to the sodium content of natural mineral waters associated with chloride ions can be regarded as being substantively correct, the fact remains that it is incomplete if it suggests that the waters are low in sodium whereas, in reality, their total sodium content exceeds the limits provided for by EU legislation (see, to that effect, judgment in *Deutsches Weintor*, C-544/10, EU:C:2012:526, paragraph 51).

78 In such a situation, the information displayed on the packaging, labels and in advertising containing that claim or indication may mislead the consumer as to the sodium content of the mineral waters at issue in the main proceedings.

79 Second, Neptune Distribution's arguments, according to which the provisions under review go beyond what is necessary to protect the health of consumers, since they apply indiscriminately to sodium in all its chemical forms, including sodium bicarbonate, whereas the latter molecule is not dangerous to human health, as sodium chloride is the cause of arterial hypertension, cannot be accepted.

80 Without there being any need to decide the question whether the harmful nature, as regards the risk of developing arterial hypertension, of a high level of consumption of sodium associated with chloride ions is comparable to the risk related to the consumption of sodium present in another chemical compound, in particular sodium bicarbonate, it must be held that the risk is determined by the EU legislature in the light of the need to protect human health and, second, of the precautionary principle in that area.

81 As the Advocate General noted in point 49 of his Opinion, the EU legislature must take account of the precautionary principle, according to which, where there is uncertainty as to the existence or extent of risks to human health, protective measures may be taken without having to wait until the reality and seriousness of those risks become fully apparent (see judgment in *Acino* v *Commission*, C-269/13 P, EU:C:2014:255, paragraph 57).

82 Where it proves to be impossible to determine with certainty the existence or extent of the alleged risk because of the insufficiency, inconclusiveness or imprecision of the results of studies conducted, but the likelihood of real harm to public health persists should the risk materialise, the precautionary principle justifies the adoption of restrictive measures (see, to that effect, judgment in *Acino* v *Commission*, C-269/13 P, EU:C:2014:255, paragraph 58).

83 In the light of the documents before the Court and, in particular, the opinion of the EFSA of 21 April 2005 referred to in paragraph 30 of the present judgment, it does not appear that a risk for human health from a high level of consumption of sodium present in various chemical compounds, in particular sodium bicarbonate, may be excluded.

84 In those circumstances, it must be held that the EU legislature were legitimately entitled to consider that limitations and restrictions, such as those at issue in the provisions which are the subject of the first question, as regards the use of claims or indications referring to the low sodium content of natural mineral waters were appropriate and necessary to ensure the protection of human health in the European Union.

85 In the light of the foregoing considerations, it must be concluded that the interference with freedom of expression and information of a person carrying on a business and his freedom to conduct a business is, in the present case, proportionate to the objectives pursued.

86 Having regard to all of the foregoing considerations, it must be held that the examination of the second question has not revealed any information capable of affecting the validity of Article 9(1) and (2) of Directive 2009/54, read in conjunction with Annex III thereto and with the annex to Regulation No 1924/2006.

Costs

87 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:

1. **Article 8(1) of Regulation (EC) No 1924/2006 of the European Parliament and of the Council of 20 December 2006 on nutrition and health claims made on foods, as amended by Regulation (EC) No 107/2008 of the European Parliament and of the Council of 15 January 2008, read in conjunction with the annex thereto, must be interpreted as meaning that it prohibits the use of the claim 'very low in sodium/salt' and any claim likely to have the same meaning for the consumer as regards natural mineral waters and other waters.**

   Article 9(2) of Directive 2009/54/EC of the European Parliament and of the Council of 18 June 2009 on the exploitation and marketing of natural mineral waters, read in conjunction with Annex III thereto, must be interpreted as meaning that it precludes packaging, labels or advertising for natural mineral waters from displaying claims or indications suggesting to the consumer that the waters concerned are low in sodium or salt or are suitable for a low-sodium diet where the total sodium content, in all the chemical forms present, is equal to or more than 20 mg/l.

2. **The examination of the second question has not revealed any information capable of affecting the validity of Article 9(1) and (2) of Directive 2009/54, read in conjunction with Annex III thereto and with the annex to Regulation No 1924/2006.**

[Signatures]

Reports of Cases

JUDGMENT OF THE GENERAL COURT (Seventh Chamber)

28 April 2016*

(Common foreign and security policy — Restrictive measures against Iran with the aim of preventing nuclear proliferation — Freezing of funds — Support to the Government of Iran — Research and technology development in military or military-related fields — Rights of the defence — Right to effective judicial protection — Error of law and error of assessment — Right to property — Proportionality — Misuse of powers — Claim for damages)

In Case T-52/15,

Sharif University of Technology, established in Tehran (Iran), represented by M. Happold, Barrister,

applicant,

v

Council of the European Union, represented by V. Piessevaux and M. Bishop, acting as Agents,

defendant,

ACTION for, first, annulment of Council Decision 2014/776/CFSP of 7 November 2014 amending Decision 2010/413/CFSP concerning restrictive measures against Iran (OJ 2014 L 325, p. 19), in so far as it includes the applicant's name on the list in Annex II to Council Decision 2010/413/CFSP of 26 July 2010 concerning restrictive measures against Iran and repealing Common Position 2007/140/CFSP (OJ 2010 L 195, p. 39), and of Council Implementing Regulation (EU) No 1202/2014 of 7 November 2014 implementing Regulation (EU) No 267/2012 concerning restrictive measures against Iran (OJ 2014 L 325, p. 3), in so far as it includes the applicant's name on the list in Annex IX to Council Regulation (EU) No 267/2012 of 23 March 2012 concerning restrictive measures against Iran and repealing Regulation (EU) No 961/2010 (OJ 2012 L 88, p. 1) and, secondly, a claim for damages,

THE GENERAL COURT (Seventh Chamber),

composed of M. van der Woude (Rapporteur), President, I. Wiszniewska-Białecka and I. Ulloa Rubio, Judges,

Registrar: M. Junius, Administrator,

having regard to the written part of the procedure and further to the hearing on 3 December 2015,

gives the following

* Language of the case: English.

Judgment

Background to the dispute

1 The applicant, Sharif University of Technology, is an institution of higher education and research located in Tehran, Iran. Founded in 1966, it specialises in technology, engineering and the physical sciences.

2 The present case has been brought in connection with the restrictive measures introduced in order to apply pressure on the Islamic Republic of Iran to end proliferation-sensitive nuclear activities and the development of nuclear weapon delivery systems.

3 On 9 June 2010 the United Nations Security Council ('the Security Council') adopted United Nations Security Council Resolution 1929 (2010) ('UNSCR 1929'), which aimed to extend the scope of the restrictive measures imposed by UNSCR 1737 (2006), UNSCR 1747 (2007) and UNSCR 1803 (2008) and to introduce additional restrictive measures against the Islamic Republic of Iran.

4 On 17 June 2010, the European Council underlined its deepening concern about Iran's nuclear programme and welcomed the adoption of UNSCR 1929. The European Council invited the Council of the European Union to adopt measures implementing those contained in UNSCR 1929 as well as accompanying measures, with a view to supporting the resolution of all outstanding concerns regarding the Islamic Republic of Iran's development of sensitive technologies in support of its nuclear and missile programmes, through negotiation. Those measures were to focus on the areas of trade, the financial sector, the Iranian transport sector, key sectors in the oil and gas industry and additional designations, in particular for the Islamic Revolutionary Guards Corps ('the IRGC').

5 On 26 July 2010 the Council adopted Decision 2010/413/CFSP concerning restrictive measures against Iran and repealing Common Position 2007/140/CFSP (OJ 2010 L 195, p. 39), Annex II to which lists the persons and entities — other than those designated by the Security Council or by the Sanctions Committee created by UNSCR 1737 (2006) mentioned in Annex I — whose assets are to be frozen. Recital 22 of that decision refers to UNSCR 1929 and states that that resolution notes the potential connection between the revenues derived by Iran from its energy sector and the funding of its proliferation-sensitive nuclear activities.

6 On 23 January 2012 the Council adopted Decision 2012/35/CFSP amending Decision 2010/413 (OJ 2012 L 19, p. 22). Recital 8 of that decision reproduces, in essence, the content of recital 22 of Decision 2010/413 (see paragraph 5 above). Furthermore, according to recital 13 of Decision 2012/35, the restrictions on admission and the freezing of funds and economic resources should be applied to additional persons and entities providing support to the Government of Iran allowing it to pursue proliferation-sensitive nuclear activities or the development of nuclear weapon delivery systems, in particular persons and entities providing financial, logistical or material support to the Government of Iran.

7 Article 1(7)(a)(ii) of Decision 2012/35 added the following provision to Article 20(1) of Decision 2010/413:

> '(c) other persons and entities not covered by Annex I that provide support to the Government of Iran, and persons and entities associated with them, as listed in Annex II.'

8 Consequently, under the FEU Treaty, on 23 March 2012 the Council adopted Regulation (EU) No 267/2012 concerning restrictive measures against Iran and repealing Regulation (EU) No 961/2010 (OJ 2012 L 88, p. 1). In order to implement Article 1(7)(a)(ii) of Decision 2012/35, Article 23(2) of that regulation provides for the freezing of funds of persons, entities and bodies listed in Annex IX thereto, identified as:

'...

(d) being other persons, entities or bodies that provide support, such as material, logistical or financial support, to the Government of Iran, and persons and entities associated with them;

...'

9 On 15 October 2012 the Council adopted Decision 2012/635/CFSP amending Decision 2010/413 (OJ 2012 L 282 p. 58). According to recital 6 of Decision 2012/635, it is appropriate to review the prohibition on the sale, supply or transfer to the Islamic Republic of Iran of additional dual-use goods and technology listed in Annex I to Council Regulation (EC) No 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items (OJ 2009 L 134, p. 1), with a view to including items which might be relevant to industries controlled directly or indirectly by the IRGC or which might be relevant to Iran's nuclear, military and ballistic missile programme, while taking into account the need to avoid unintended effects on the civilian population of Iran. Furthermore, recital 9 of Decision 2012/635 states that the sale, supply or transfer to the Islamic Republic of Iran of key naval equipment and technology for ship-building, maintenance or refit, should be prohibited. In addition, according to recital 16 of that decision, additional persons and entities should be included on the list of persons and entities subject to restrictive measures as set out in Annex II to Decision 2010/413, in particular Iranian State-owned entities engaged in the oil and gas sector, since they provide a substantial source of revenue for the Government of Iran.

10 Article 1(8)(a) of Decision 2012/635 amended Article 20(1)(c) of Decision 2010/413, which consequently provides that restrictive measures are to be imposed on:

'(c) other persons and entities not covered by Annex I that provide support to the Government of Iran and entities owned or controlled by them or persons and entities associated with them, as listed in Annex II.'

11 On 21 December 2012, the Council adopted Regulation (EU) No 1263/2012 amending Regulation No 267/2012 (OJ 2012 L 356, p. 34). Article 1(11) of Regulation No 1263/2012 amended Article 23(2)(d) of Regulation No 267/2012, which thus provides for the freezing of funds of persons, entities and bodies listed in Annex IX, identified as:

'(d) being other persons, entities or bodies that provide support, such as material, logistical or financial support, to the Government of Iran and entities owned or controlled by them, or persons and entities associated with them.'

12 The applicant's name was included for the first time on the lists in Table I of Annex II to Decision 2010/413 by Decision 2012/829/CFSP of 21 December 2012 amending Decision 2010/413 (OJ 2012 L 356, p. 71), and the lists in Table I of Annex IX to Regulation No 267/2012 by Implementing Regulation (EU) No 1264/2012 of 21 December 2012 implementing Regulation No 267/2012 (OJ 2012 L 356, p. 55).

13 That listing was based on the following grounds:

'Sharif University of Technology (SUT) is assisting designated entities to violate the provisions of UN and EU sanctions on Iran and is providing support to Iran's proliferation sensitive nuclear activities. As of late 2011 SUT had provided laboratories for use by UN-designated Iranian nuclear entity Kalaye Electric Company (KEC) and EU-designated Iran Centrifuge Technology Company (TESA).'

14 By judgment of 3 July 2014 in *Sharif University of Technology* v *Council* (T-181/13, EU:T:2014:607), the General Court annulled Decision 2012/829 and Regulation No 1264/2012 in so far as they concern the applicant.

15 By letter of 4 September 2014, the Council informed the applicant of its intention to re-list it on the basis of new grounds and invited it to submit its observations before 15 September 2014. In that letter, the Council expressed the view that the applicant provided support to the Government of Iran by means of cooperation agreements concluded with Iranian governmental organisations designated by the United Nations and the European Union. The Council enclosed with that letter the documents contained in its file on which that re-listing was based.

16 By letter of 15 September 2014, the applicant requested the Council to reconsider its decision.

17 On 7 November 2014 the Council adopted Decision 2014/776/CFSP amending Decision 2010/413 (OJ 2014 L 325 p. 19). By that decision, the applicant's name was once again included in Table I of Annex II to Decision 2010/413 containing the list of 'persons and entities involved in nuclear or ballistic missile activities and persons and entities providing support to the Government of Iran'.

18 As a consequence, on the same day, the Council adopted Implementing Regulation (EU) No 1202/2014 implementing Regulation No 267/2012 (OJ 2014 L 325, p. 3), which included once again the applicant's name in Table I of Annex IX to Regulation No 267/2012, containing the list of 'persons and entities involved in nuclear or ballistic missile activities and persons and entities providing support to the Government of Iran'.

19 In Decision 2014/776 and Implementing Regulation No 1202/2014 (together 'the contested acts'), the following reasons are given for inclusion of the applicant's name on the lists:

'Sharif University of Technology (SUT) has a number of cooperation agreements with Iranian Government organisations which are designated by the UN and/or the EU and which operate in military or military-related fields, particularly in the field of ballistic missile production and procurement. This includes: an agreement with the EU-designated Aerospace Industries Organisation for inter alia the production of satellites; co-operating with the Iranian Ministry of Defence and the Iranian Revolutionary Guards Corps (IRGC) on smart boat competitions; a broader agreement with the IRGC Air Force which covers developing and strengthening the University's relations, organisational and strategic cooperation; SUT is part of a 6-university agreement which supports the Government of Iran through defence-related research; and SUT teaches graduate courses in unmanned aerial vehicle (UAV) engineering which were designed by the Ministry of Science among others. Taken together, these show a significant record of engagement with the Government of Iran in military or military-related fields that constitutes support to the Government of Iran.'

20 The Aerospace Industries Organisation ('AIO') is included on the lists for the following reasons:

'AIO oversees Iran's production of missiles, including Shahid Hemmat Industrial Group, Shahid Bagheri Industrial Group and Fajr Industrial Group, which were all designated under UNSCR 1737 (2006). The head of AIO and two other senior officials were also designated under UNSCR 1737 (2006).'

21 IRGC is included on the lists for the following reasons:

'Responsible for Iran's nuclear programme. Has operational control for Iran's ballistic missile programme. Has undertaken procurement attempts to support Iran's ballistic missiles and nuclear programmes.'

22 By letter of 10 November 2014, the Council informed the applicant of its decision to re-list it.

23 By letter of 2 February 2015, the applicant requested the Council to provide it with all the information and evidence on the basis of which it had decided to include the applicant's name of the lists for a second time, and the identity of the Member State which had proposed its re-listing.

Procedure and forms of order sought

24 By application lodged at the Registry of the General Court on 4 February 2015, the applicant brought the present action.

25 By document lodged at the Court Registry on 17 September 2015, the applicant submitted a request for a hearing, stating the reasons for which it wished to be heard, in accordance with the provisions of Article 106(2) of the Rules of Procedure of the General Court. The Council did not express a view as to whether there should be a hearing within the period prescribed. Acting on a proposal of the Judge-Rapporteur, the General Court (Seventh Chamber) granted the applicant's request.

26 The applicant claims that the Court should:

— annul the contested acts, in so far as they concern it;

— order the Council to pay the applicant compensation to make good the damage to its reputation caused by the contested acts;

— order the Council to pay the costs.

27 The Council contends that the Court should:

— dismiss the action as unfounded;

— order the applicant to pay the costs.

Law

1. *The application for annulment*

28 In support of its application for annulment, the applicant puts forward four pleas in law: the first alleging infringement of the rights of the defence and the right to effective judicial protection; the second alleging an error of law and manifest errors of assessment; the third alleging infringement of the right to property and the principle of proportionality; and the fourth alleging misuse of powers.

First plea in law, alleging infringement of the rights of the defence and of the right to effective judicial protection

29 In the first place, the applicant criticises the Council for failing to indicate, in its letter of 10 November 2014 (see paragraph 22 above), the date of adoption of the decision re-listing its name. In that context, it recalls that it submitted an application for review in its letter of 15 September 2014.

30 In that regard, it is sufficient to note that the Council enclosed with its letter of 10 November 2014 referred to above, which was received by the applicant on 25 November 2014, a copy of the publication of the contested acts in the *Official Journal of the European Union*, which refers expressly, in the title of those acts, to their date of adoption, namely 7 November 2014.

31 In the second place, the applicant criticises the Council for failing to grant its request for access to the file made by letter of 2 February 2015. The Council did not provide the relevant internal documents, contrary to its practice in other cases relating to restrictive measures. Furthermore, there are some signs that suggest that the contested acts were adopted on the basis of information not contained in the documents provided by the Council's letter of 4 September 2014. The applicant claims in that regard that those documents do not contain the slightest evidence substantiating one the reasons for listing referred to in the contested acts, namely it 'teaches graduate courses in unmanned aerial vehicle (UAV) engineering which were designed by the Ministry of Science among others'.

32 Accordingly, the applicant maintains that, by not giving it full access to the file, including access to information concerning the identity of the Member State that proposed that its name be re-listed, the Council infringed the applicant's rights of defence and its right to effective judicial protection.

33 It must be noted that the Council, by its letter of 4 September 2014, notifying the applicant of its intention to re-list the applicant's name (see paragraph 15 above), sent the evidence and information available to it which served as the basis on which its decision to adopt the contested acts was made. In its defence, the Council submitted that, apart from that evidence, its file contained only the proposal and the revised proposal for re-listing the applicant's name, which were presented by a Member State, and the note submitted by the General Secretariat of the Council to the Permanent Representatives Committee (Coreper) and the Council with a view to the adoption of the contested acts. By document lodged at the Court Registry on 4 September 2015, the Council produced those documents.

34 It follows from those documents, in which the identity of the Member State that proposed the re-listing and all the information not concerning the applicant were redacted, that they contain no additional relevant information as compared with the information provided to the applicant by letter of 4 September 2014 and the documents annexed to that letter.

35 Accordingly, first, it must be held that the applicant's claims that the contested acts were adopted on the basis of information which was not contained in the documents sent to it by letter of 4 September 2014 (see paragraph 31 above) are unfounded.

36 Secondly, it must be noted that the identity of the Member State which made the proposal for inclusion on the lists, is, in itself, confidential, with the result that it cannot, on account of overriding considerations concerning the security of the European Union or its Member States or the conduct of their international relations, be communicated to the person concerned. The fact that that information was not disclosed to the applicant cannot, however, infringe its rights of defence or its right to effective judicial protection, in so far as it has no effect on the opportunity available to the applicant to submit its observations on the grounds for listing its name and the evidence on which those grounds are based.

37 It follows from the above that the first plea in law must be rejected.

Second plea in law, alleging an error of law and manifest errors of assessment

38 The applicant submits that the Council incorrectly interpreted the legal criterion relating to the provision of support to the Government of Iran set out in Article 20(1)(c) of Decision 2010/413 and Article 23(2)(d) of Regulation No 267/2012 ('the contested criterion') and on which the re-listing of its name in the contested acts is based. The applicant claims, essentially, that that criterion does not cover research and technology development in military or military-related fields relied on in the grounds for the inclusion of its name on the lists, in the absence of any connection between those activities and the nuclear proliferation programme of the Islamic Republic of Iran. Furthermore, the applicant claims that the documents provided by the Council as evidence do not substantiate the grounds put forward for the listing of its name.

Interpretation of the contested criterion in respect of the activities in the military or military-related fields referred to in the grounds of the contested acts

39 In the first place, the applicant criticises the Council for having interpreted the contested criterion literally, thereby allowing it to include a vast group of persons, including Iranian taxpayers. In the applicant's view, that criterion refers only to support allowing the Government of Iran to pursue proliferation-sensitive nuclear activities, which implies that there is a causal link between the conduct constituting 'support' and the pursuit of such activities. The requirement of a causal link derives from recital 13 of Decision 2012/35, Article 215(1) TFEU and the judgment of 13 March 2012 in *Tay Za* v *Council* (C-376/10 P, ECR, EU:C:2012:138, paragraphs 61 and 67).

40 According to the applicant, the case-law confirms that, first, the contested criterion refers only to the provision of support to the Government of Iran enabling it to pursue nuclear proliferation activities. Secondly, that material, logistical or financial support must have specific 'quantitative or qualitative significance'. Thirdly, the aim of the contested criterion is to deprive the Government of Iran of its sources of revenue, in order to oblige it to end the development of its nuclear proliferation programme. The applicant also refers, inter alia, to the judgments of 16 July 2014 in *National Iranian Oil Company* v *Council* (T-578/12, EU:T:2014:678, paragraphs 119 and 120), 25 March 2015 in *Central Bank of Iran* v *Council* (T-563/12, ECR, EU:T:2015:187, paragraph 66) and 25 June 2015 in *Iranian Offshore Engineering & Construction* v *Council* (T-95/14, ECR (Extracts), EU:T:2015:433, paragraph 53).

41 In the second place, the applicant submits that its alleged collaboration with various ministries of the Government of Iran did not constitute support in the sense of the contested criterion, since the qualitative or quantitative significance of the activities in question was not sufficient to permit the assumption that it provided financial or logistical support to the Government of Iran encouraging the pursuit of nuclear proliferation activities.

42 In that respect, the applicant claims that it is a public university funded by the Iranian State. Accordingly, unlike the large financial institutions or undertakings active in the oil and gas sector, which were previously included on the lists on the basis of the contested criterion, the applicant does not provide financial resources to the Government of Iran which could be presumed to encourage the pursuit of the nuclear proliferation activities of the Islamic Republic of Iran.

43 In those circumstances, the applicant infers from the above that the Council must show that, on account of their qualitative significance, the activities which the Council claims it is engaged in enabled the Government of Iran to pursue its nuclear proliferation activities.

44 The Council disputes those arguments.

45 It is clear from the statement of reasons for the contested acts (see paragraph 19 above) that the Council re-listed the applicant on the ground that its 'significant record of engagement with the Government of Iran in military or military-related fields' constituted support to the Government of Iran, for the purposes of the contested criterion.

46 In order to establish the existence of such engagement, the Council relied, in the contested acts, on a number of factors:

— the existence of cooperation agreements with Iranian Government organisations designated by the UN or the EU and operating in military or military-related fields, particularly in the field of ballistic missile production and procurement, namely:

  — an agreement with the AIO for the production of satellites;

  — cooperation with the Iranian Ministry of Defence and the IRGC on smart boat competitions;

  — a broader agreement with the IRGC Air Force which covers the developing and strengthening of their relations and organisational and strategic cooperation;

— the applicant's participation in a six-university agreement which supports the Government of Iran through defence-related research;

— the fact that the applicant provides graduate courses in unmanned aerial vehicle (UAV) engineering which were designed by the Ministry of Science, Research and Technology.

47 The grounds of the contested acts, which are set out in paragraphs 45 and 46 above, clearly show that the Council criticises the applicant, in essence, for providing support to the Government of Iran in respect of military or military-related research and technology, inter alia through cooperation agreements with the AIO and the IRGC, which also appear on the lists and operate in those fields (see paragraphs 20 and 21 above).

48 It is therefore necessary to examine the applicant's argument that research and technology development in military or military-related fields, in cooperation with the Ministry of Defence or State entities which are themselves listed, is not covered by the contested criterion where the Council fails to establish that those activities have sufficient quantitative or qualitative significance to allow for a finding that they encourage the pursuit of the proliferation-sensitive Iranian nuclear programme (see paragraph 41 above).

49 In the first place, contrary to the applicant's claims (see paragraph 39 above), the contested criterion does not involve establishing a causal link between the conduct constituting the provision of support to the Government of Iran and the pursuit of nuclear proliferation activities.

50 It is true that, according to case-law, the contested criterion does not concern any form of support to the Government of Iran, but covers forms of support which, by their quantitative or qualitative significance, contribute to the pursuit of Iran's nuclear activities. Interpreted, subject to review by the European Union Courts, by reference to the objective of applying pressure on the Government of Iran to end activities posing a risk of nuclear proliferation, the contested criterion thus objectively defines a limited category of persons and entities which may be subject to fund-freezing measures (judgment in *National Iranian Oil Company* v *Council*, cited in paragraph 40 above, EU:T:2014:678, paragraph 119).

51 In the light of the purpose of the fund-freezing measures referred to in paragraph 50 above, it is unequivocally clear from the contested criterion that it is aimed in a targeted and selective manner at the relevant person's or entity's own activity, which, even if it has no actual direct or indirect connection with nuclear proliferation, is nevertheless capable of encouraging it by providing the

Government of Iran with resources or facilities of, inter alia, a material, financial or logistic nature which allow it to pursue proliferation activities (see, to that effect, judgments in *National Iranian Oil Company* v *Council*, cited in paragraph 40 above, EU:T:2014:678, paragraph 120, and of 29 April 2015 in *National Iranian Gas Company* v *Council*, T-9/13, EU:T:2015:236, paragraph 62).

52 However, contrary to the interpretation proposed by the applicant, it does not follow from the case-law set out in paragraphs 50 and 51 above that the concept of 'support to the Government of Iran' involves proof of a connection between that support and the nuclear activities of the Islamic Republic of Iran. In that regard, the Council rightly states that the applicant is confusing, first, the criterion relating to the provision of support to the Government of Iran set out in Article 20(1)(c) of Decision 2010/413 and Article 23(2)(d) of Regulation No 267/2012, which is the only relevant criterion in the present case, and, secondly, the criterion relating to the provision of support 'for … Iran's proliferation-sensitive nuclear activities or for the development of nuclear weapon delivery systems' set out in Article 20(1)(b) of that decision and Article 23(2)(a) of that regulation (see, to that effect, judgment in *National Iranian Oil Company* v *Council*, cited in paragraph 40 above, EU:T:2014:678, paragraph 139). The application of the first criterion does not imply a certain degree of connection, even indirect connection, with Iran's nuclear activities, required for the purposes of the application of the second criterion referred to above relating to the provision of support for Iran's nuclear activities (see, to that effect, judgments of 28 November 2013 in *Council* v *Manufacturing Support & Procurement Kala Naft*, C-348/12 P, ECR, EU:C:2013:776, paragraph 80, and in *Central Bank of Iran* v *Council*, cited in paragraph 40 above, EU:T:2015:187, paragraph 66).

53 As regards the contested criterion, it is apparent from recital 13 of Decision 2012/35 (see paragraph 6 above), which inserted that criterion into Article 20(1)(c) of Decision 2010/413, that the Council, considering that the provision of support to the Government of Iran was capable of encouraging the pursuit of proliferation-sensitive nuclear activities or the development of nuclear weapon delivery systems, intended to expand the criteria for listing by extending the adoption of fund-freezing measures to persons and entities providing support to that government, without requiring a direct or indirect link between that support and such activities (see, to that effect, judgment in *National Iranian Oil Company* v *Council*, cited in paragraph 40 above, EU:T:2014:678, paragraph 118).

54 Thus, the existence of a connection between the provision of support to the Government of Iran and the pursuit of nuclear proliferation activities is expressly established by the applicable legislation. In that context, the contested criterion must be construed as being aimed at any support which, even though it has no direct or indirect connection with the development of nuclear proliferation, is nevertheless capable, as a result of its quantitative or qualitative significance, of encouraging such development, by providing the Government of Iran with resources or facilities of, inter alia, a material, financial or logistic nature. Accordingly, the Council is not required to establish that there is a connection between the conduct constituting support and the facilitation of nuclear proliferation activities, since such a connection is established by the general rules applicable (see, to that effect, judgments in *National Iranian Oil Company* v *Council*, cited in paragraph 40 above, EU:T:2014:678, paragraph 140; *Central Bank of Iran* v *Council*, cited in paragraph 40 above, EU:T:2015:187, paragraph 81, and *National Iranian Gas Company* v *Council*, cited in paragraph 51 above, EU:T:2015:236, paragraph 65).

55 Accordingly, it is necessary to reject the applicant's claim that the interpretation of the contested criterion referred to in paragraphs 53 and 54 above is purely literal and leads to the inclusion on the lists of a vast group of persons (see paragraph 39 above). That interpretation of the contested criterion, in the light of its legal context, concerns a limited category of persons in a targeted manner (see paragraphs 50 and 51 above) and cannot cover the mere fact of discharging one's legal obligations, including tax obligations (judgment in *National Iranian Oil Company* v *Council*, cited in paragraph 40 above, EU:T:2014:678, paragraph 121).

56 Article 215(1) TFEU and the judgment in *Tay Za* v *Council*, cited in paragraph 39 above (EU:C:2012:138), on which the applicant also relies, are irrelevant in the present case, in so far as Regulation No 267/2012, implemented by Implementing Regulation No 1202/2014, is based on Article 215(2) TFEU and in so far as the measures examined by the Court in that judgment were adopted on the basis of Articles 60 EC and 301 EC and form part of the entirely separate legal framework of restrictive measures against the Republic of the Union of Myanmar.

57 In the second place, it is also necessary to reject the applicant's argument that, since the support which it is claimed it provides to the Government of Iran is not financial, unlike that provided by the financial institutions or undertakings operating in the oil and gas sector which were previously listed on the basis of the contested criterion, the Council must establish that the support provided encourages the pursuit of nuclear proliferation activities (see paragraphs 42 and 43 above).

58 It is true that in the judgments relied on by the applicant (see paragraph 40 above), relating, inter alia, to the oil and gas sector in Iran, the Court considered that the activity of State undertakings operating in that sector (judgment in *National Iranian Oil Company* v *Council*, cited in paragraph 40 above, EU:T:2014:678, paragraph 141) or of undertakings providing logistical support to the Government of Iran in that sector (see, to that effect, judgment in *Iranian Offshore Engineering & Construction* v *Council*, cited in paragraph 40 above, EU:T:2015:433, paragraph 54) satisfied the contested criterion, highlighting, in essence, the fact that the applicable rules, in particular recital 22 of Decision 2010/413 (see paragraph 5 above), recital 8 of Decision 2012/35 (see paragraph 6 above) and recital 16 of Decision 2012/635 (see paragraph 9 above), had established a connection between the source of revenue that the Islamic Republic of Iran drew from that sector and the funding of proliferation-sensitive nuclear activities.

59 However, the contested criterion cannot be interpreted as aiming solely to deprive the Government of Iran of its sources of revenue and thus to compel it to end its nuclear proliferation activities. That criterion refers to any support which, as a result of its quantitative or qualitative significance, is capable of encouraging the pursuit of those activities and that assessment must be made in the light of all relevant provisions of the applicable legislation (see paragraph 54 above). Recital 13 of Decision 2012/35 and Article 23(2)(d) of Regulation No 267/2012 indicate by way of example that support may be material, logistical or financial.

60 In the third place, it is therefore necessary to ascertain whether, in the context of the applicable legislation, research and technology development in military or military-related fields, which does not correspond to any of the three types of support — material, financial or logistical — referred to by way of example in that legislation (see paragraph 59 above), is capable of falling within the scope of the contested criterion.

61 In that regard, it must be noted that it follows from Decision 2010/413 and Regulation No 267/2012 that restrictive measures may be adopted in respect of persons or entities involved in procurement by the Islamic Republic of Iran, in military or military-related fields, of prohibited goods and technology or providing technical assistance in relation to such goods and technology. The connection between the latter and nuclear proliferation is established by the EU legislature in the general rules of the relevant provisions (see, by analogy, judgment in *Council* v *Manufacturing Support & Procurement Kala Naft*, cited in paragraph 52 above, EU:C:2013:776, paragraph 76).

62 In particular, Article 1(1)(c) of Decision 2010/413 prohibits the supply, sale or transfer to the Islamic Republic of Iran of arms and related material of all types, including military vehicles and equipment. Moreover, by virtue of Article 5(1)(a) of Regulation No 267/2012, it is prohibited to provide, directly or indirectly, technical assistance relating to the goods and technology listed in the Common Military List of the European Union adopted by the Council on 17 March 2014 (OJ 2014 C 107, p. 1) (the 'Common Military List'), or associated with the provision, manufacture, maintenance and use of goods on that list to any Iranian person, entity or body or for use in Iran.

63 Thus, by providing for such a ban in so far as concerns certain military equipment, within the framework of Regulation No 267/2012, the legislature established a connection between procurement by the Islamic Republic of Iran of that type of equipment and pursuit by the Government of Iran of proliferation-sensitive nuclear activities or the development of nuclear weapon delivery systems.

64 That interpretation is confirmed by UNSCR 1737 (2006) and UNSCR 1929, adopted on 23 December 2006 and 9 June 2010 respectively, and referred to in recitals 1 and 4 of Decision 2012/35 respectively. The general rules of the European Union providing for the adoption of restrictive measures must be interpreted in the light of the wording and purpose of the Security Council resolutions which they implement (judgments of 16 November 2011 in *Bank Melli Iran* v *Council*, C-548/09 P, ECR, EU:C:2011:735, paragraph 104, and 25 April 2012 in *Manufacturing Support & Procurement Kala Naft* v *Council*, T-509/10, ECR, EU:T:2012:201, paragraph 83). The abovementioned two resolutions refer to the adoption of suitable measures to constrain the Islamic Republic of Iran's development of sensitive technologies in support of its nuclear and missile programmes. In particular, satellites and UAVs, inter alia, feature on the lists of equipment and technology whose provision to the Islamic Republic of Iran is prohibited by those resolutions, lists to which UNSCR 1929 more specifically refers.

65 Accordingly, the provision of support to the Government of Iran in respect of research and technology development in military or military-related fields satisfies the contested criterion where it relates to equipment or technology on the Common Military List, the procurement of which by the Islamic Republic of Iran is prohibited (see paragraph 62 above).

66 It must be noted in that respect that the Common Military List concerns, inter alia, the following equipment:

'ML 9 Vessels of war (surface or underwater), special naval equipment, accessories, components and other surface vessels, as follows:

…

a. Vessels and components, as follows:

1. Vessels (surface or underwater) specially designed or modified for military use, regardless of current state of repair or operating condition, and whether or not they contain weapon delivery systems or armour, and hulls or parts of hulls for such vessels, and components therefor specially designed for military use;

…

ML 10 "Aircraft", "lighter-than-air vehicles", Unmanned Aerial Vehicles ("UAVs"), aero-engines and "aircraft" equipment, related equipment, and components, as follows, specially designed or modified for military use:

…

c. Unmanned aircraft and related equipment, as follows, and specially designed components therefor:

1. "UAVs", Remotely Piloted Air Vehicles (RPVs), autonomous programmable vehicles and unmanned "lighter-than-air vehicles";

…

ML 11 Electronic equipment, [satellite], as follows:

…

c. [satellite] specially designed or modified for military use, and "spacecraft" components specially designed for military use.'

67 It follows that the provision of support to the Government of Iran in so far as concerns, inter alia, the design, production or development of satellites, ships or UAVs which meet the specifications of the Common Military List satisfies the contested criterion, without the Council being required to demonstrate that the extent of that support encourages the pursuit of nuclear proliferation activities.

68 In the fourth place, it must however be stressed that, in any event, the question of whether conduct falls within the scope of the contested criterion must be examined in the light of the legal and factual context as a whole. Accordingly, where the Council is not able to establish that the activities in question relate to satellites or smart boats which in fact meet the specifications of the Common Military List, the fact that those activities are conducted in cooperation with the AIO, as regards the production of satellites, or with the Iranian Ministry of Defence and the IRGC in the context of the smart boat competition permits the view that, if the Council's claims relating to that cooperation are sufficiently substantiated, the extent of the support thus provided to the Government of Iran is sufficient to satisfy the contested criterion.

69 The AIO, which, the contested acts indicate, is designated by the European Union 'for inter alia the production of satellites' is itself included on the lists on the ground that it 'oversees Iran's production of missiles', including three industrial groups referred to in UNSCR 1737 (2006). The IRGC is included on the lists for the following reasons:

'Responsible for Iran's nuclear programme. Has operational control for Iran's ballistic missile programme. Has undertaken procurement attempts to support Iran's ballistic missiles and nuclear programmes.'

70 In those circumstances, the direct involvement of the AIO as regards the production of missiles and of the IRGC in Iran's nuclear programme and in the operational control of Iran's ballistic missile programme, which is not contested in the present case by the applicant, permits the assumption that the activities conducted in cooperation with those entities of the Government of Iran in relation to the production of satellites and the development of smart boats, are of clear benefit, in so far as concerns the pursuit of the proliferation-sensitive nuclear programme or the development of nuclear weapon delivery systems.

71 In the present case, it must be confirmed whether the Council's claims relating to the exercise of such activities by the applicant are sufficiently substantiated.

Evidence relied on by the Council

72 The applicant maintains that the Council failed to establish that the activities mentioned in the documents it has produced, taken as a whole, show 'a significant record of engagement with the Government of Iran in military or military-related fields'. In particular, the Council failed to specify which type of support the Government of Iran would have derived from the applicant's cooperation with the AIO and the IRGC. The fact that the applicant may have cooperated with the government of its country, like other Iranian universities, is normal for any research institute in the field of science and technology in any country in the world.

73 Furthermore, the Council did not verify the accuracy of the information in the documents that the Council produced, which are, for the most part, merely translations by the Council of news reports, that is to say second-hand information. Moreover, the original versions of those documents were drafted in Farsi and some of those original texts were not provided by the Council.

74 According to the Council, the applicant's cooperation, which is demonstrated by the documents produced, with, first, the Ministry of Defence, and secondly, the AIO and the IRGC, which are bodies controlled by the Iranian State and included on the lists because of their involvement in the Islamic Republic of Iran's ballistic missile programme, constitutes support for the Government of Iran for the purpose of the contested criterion.

75 In the present case, it is necessary to assess the probative value of the evidence relied on by the Council in support of each of the grounds for re-listing the applicant's name set out in the contested acts (see paragraph 46 above), in order to ascertain whether, having regard to the content and scope of the contested criterion, which are set out in particular in paragraphs 54 and 67 to 70 above, those grounds are sufficiently substantiated to the requisite legal standard (see paragraphs 77 to 103 below). That examination will make it possible to establish whether, taken as a whole, those grounds therefore justify the re-listing of the applicant's name (see paragraph 104 below).

76 As a preliminary point, it is necessary to reject the argument relied on by the applicant at the hearing to the effect that the documents put forward by the Council in support of the grounds for listing it in the contested acts were too old. As regards the development of satellites and smart boats, most of the documents relied on by the Council date from 2012 and show cooperation with no specific end date (MD 176/14 RELEX, MD 177/14 RELEX, MD 178/14 RELEX). Furthermore, document MD 179/14 RELEX, relating to a statement by the Commander of the IRGC Navy from the applicant's website dates from January 2014. As regards the cooperation agreement between the applicant and the IRGC Air Force, it must be noted that document MD 180/14 RELEX was still on that site when the contested acts were adopted.

– Agreement with the AIO for the production of satellites

77 In support of its claims relating to the applicant's agreement with the AIO for the production of satellites, the Council produced documents MD 176/14 RELEX and MD 177/14 RELEX from its file (see paragraph 15 above). Those documents consist of copies of web pages from a BBC reports archive, which are drafted in English and include the text of two reports of the press agency of the Islamic Republic of Iran, the Islamic Republic News Agency (IRNA). As the applicant notes, the IRNA's own reports were not produced. However, the applicant does not dispute the accuracy of the information in the BBC documents. The applicant submits, in essence, that that information does not justify its re-listing.

78 The first of those documents (MD 176/14 RELEX), dated 3 February 2012 and entitled 'Iran to have greater achievements in space industry — defence minister', reports on the announcement by the Iranian Minister for Defence of the launch by the AIO of a satellite designed and built by the applicant's students, under the supervision of a member of the High Council of Space. In the same document, the director of the AIO states that it is a remote-testing satellite which films the earth with greater accuracy. Weighing 50 kg, that micro-satellite has different applications in various fields, such as meteorology, management of natural disasters and measuring temperature and air humidity.

79 The second document (MD 177/14 RELEX), dated 2 October 2012 and entitled 'Iran to launch more satellites this year', refers to the announcement by the director of the AIO of the launch of another satellite, equipped with solar panels, to be built by the applicant, whose mission will be to photograph the earth at an altitude of 250 to 370 km.

80 The applicant maintains that document MD 176/14 RELEX concerns a micro-satellite designed for peaceful purposes. Furthermore, it did not participate in the design and construction of the delivery system or the launching of that satellite or of the satellite referred to in document MD 177/14 RELEX. Those documents contain no evidence to substantiate the claim that the design and construction of the satellites to which they refer encourage the Government of Iran to pursue its nuclear proliferation activities.

81 It must be noted that documents MD 176/14 RELEX and MD 177/14 RELEX contain no evidence permitting the inference that the two satellites concerned were specially designed or modified for military use, for the purposes of the Common Military List (see paragraph 66 above). Furthermore, these documents do not refer to any agreement between the applicant and the AIO in respect of satellite production.

82 However, the fact that the launch of the first satellite by the AIO was announced by the Iranian Ministry of Defence (see paragraph 78 above) demonstrates the relevance of that satellite in military or military-related fields. Furthermore, that analysis is confirmed by the fact that the AIO, which is responsible for the launch of the satellites, is itself included on the lists on account of its involvement in missile production (see paragraph 70 above). In that context, the applicant's claim that it was not involved in the design and production of the launch delivery systems is irrelevant, since the Council criticises the applicant only in respect of its activities relating to the design and production of satellites.

83 Accordingly, the applicant's activities relating to the production of satellites may be regarded as the provision of support to the Government of Iran, for the purposes of the contested criterion.

– Cooperation with the Iranian Ministry of Defence and the IRGC concerning smart boat competitions

84 In order to demonstrate that the applicant is cooperating with the Iranian Ministry of Defence and the IRGC in the context of smart boat competitions, the Council produced, first, documents MD 178/14 RELEX and MD 179/14 RELEX, which are contained in its file (see paragraph 15 above), and, secondly, as an annex to the rejoinder, an article published on the website of the *Iran Daily Brief* newspaper, dated 30 January 2014.

85 Document MD 178/14 RELEX is a press article published by the Fars News Agency dated 12 May 2012. That article, which is entitled 'Close cooperation between Sharif University and the Ministry of Defence/Navy issues neglected in Iran', relates to an interview given by the head of the applicant's Marine Engineering Group to that agency in which that senior official refers to an agreement concluded by a scientific committee of the applicant's and the Defence Ministry's Marine Industries Organisation in respect of smart boat competitions. Under the terms of that agreement, there is no financial or operational restriction on approved projects. The article states that that close cooperation between the applicant and the Ministry of Defence organisation had begun two years earlier.

86 Document MD 179/14 RELEX contains, inter alia, an article from the applicant's website, dated 21 January 2014, entitled 'Navy support for the winners of the smart boat competitions'. That article relates to a statement made by the Commander of the IRGC Navy at the opening ceremony of the third smart boat competition, who refers to the strategic importance of the technological development of that type of boat and to the cooperation of the IRGC Navy and Iranian research centres.

87 The applicant maintains that it is clear from document MD 178/14 RELEX that at the time of the interview to which it refers no project had been agreed. Moreover, that document does not contain any information concerning potential projects. In its reply, the applicant stated that it had organised only one smart boat competition. Document MD 179/14 RELEX, which does not mention the applicant, therefore refers to a competition that the applicant did not organise. Moreover, it does not

follow from the statement of the IRGC naval commander that the boats in question were intended for military use. In any event, the Council did not explain why the applicant's involvement in the design of boats, even those for military use, would encourage the pursuit by the Government of Iran of nuclear proliferation activities.

88 In the rejoinder, the Council maintained that the applicant's claim that it did not organise the third smart boat competition is contradicted by an article published on the *Iran Daily Brief* website, which was submitted as an annex to the rejoinder.

89 That article, dated 30 January 2014, is entitled: 'IRGCN commander: Organisation of Smart Combat Vessels established'. It indicates that, in his speech at the opening ceremony of the third Autonomous Surface Vehicles (ASV) competition, which took place at Sharif University of Technology, the Commander of the IRGC Navy stated that 'a combat department of smart boats' had been established by the IRGC.

90 It follows from that article, first, that, in the absence of any other explanation from the applicant, the third smart boat competition concerned boats likely to be used for military purposes. Secondly, the fact that the opening ceremony of that competition was held on the applicant's premises suggests that, in the absence of evidence to the contrary, it was involved in its organisation.

91 The abovementioned article of 30 January 2014 therefore constitutes supplementary evidence corroborating the evidence contained in documents MD 178/14 RELEX and MD 179/14 RELEX relating to the applicant's cooperation with the Ministry of Defence and the IRGC in the context of smart boat competitions (see paragraphs 85 and 86 above). It contains no new factual evidence in support of the applicant's listing and merely substantiates the claims already made by the Council in its letter of 4 September 2014 (see paragraph 15 above) and addresses the arguments raised by the applicant during the proceedings before the Court. It may therefore be taken into consideration, even though it was not included in the Council's file, without any infringement of the applicant's rights of defence and right to an effective remedy.

92 It follows that the Council has established to the requisite legal standard that the applicant's activity concerning smart boat competitions satisfied the contested criterion.

– Agreement between the applicant and the IRGC Air Force

93 The Council submitted the text of an 'Agreement to Assign Space in Sharif's Technology House' between the applicant's Research and Technology Department and the IRGC Aerospace Force — represented by the head of the SAK Research Institute of the Aerospace Force ('the Research Institute') — contained in its file under reference MD 180/14 RELEX.

94 The applicant maintains that this is a mere letter of intent, which was not signed. Furthermore, that letter sets out only general heads of cooperation and would have to be followed by specific operational agreements.

95 The Council submits that document MD 180/14 RELEX comes from the applicant's website. It maintains that, even if the agreement was not signed by the parties, it reveals, in any event, a real intent to develop a certain level of cooperation between the applicant and the Research Institute.

96 In that regard, it must be noted that, according to document MD 180/14 RELEX, the agreement was planned for a period running from the date of signing to 20 March 2013, with the possibility of extension, depending on the level of activity, by agreement between the parties. Furthermore, the text

of the agreement was still on the applicant's website when the contested acts were adopted, on 7 November 2014. Those facts permit the assumption that the applicant had connections with the IRGC Air Force with a view to scientific and technological cooperation.

97 It is true, as the applicant notes, that that agreement does not refer expressly to activities in military or military-related fields. However, the provisions of the agreement show the decisive influence of the Research Institute and, accordingly, of the IRGC on the applicant's relationships with industry and on the choice and follow-up of its research projects. It is clear from that agreement that, in general, it aims to develop and organise relations between the applicant and industry and seeks to fulfil the requirements of the industry with the applicant's existing resources. The Research Institute undertakes, inter alia, to conclude a contract with the applicant to implement research projects required by industry, in particular the proposals submitted by that institute (paragraph 5.1 of the agreement). That institute defines specific areas of interest to companies and presents them to the applicant with a view to concluding a contract (paragraph 5.11 of the agreement). For its part, the applicant undertakes, inter alia, to submit periodic reports on the results of its industry-related research (paragraph 6.1 of the agreement) and to provide industry-related university resources (paragraph 6.4 of the agreement).

98 The matters referred to above do not make it possible to establish, in themselves, that the applicant provides support to the Government of Iran in respect of equipment on the Common Military List (see paragraph 67 above). However, it must be stressed that the abovementioned agreement with the IRGC Air Force provided for close and systematic cooperation between the applicant and the Research Institute in respect of the applicant's research activities, according to the requirements of Iranian industry. That agreement therefore applies to all industrial fields, including military and related fields referred to in the grounds for listing the applicant. In the light of the IRGC's involvement in the nuclear programme and operational control of Iran's ballistic missile programme (see paragraph 70 above) and in several key sectors of the economy, the agreement confirms that the support thus provided by the applicant to the Government of Iran falls, on account of its extent, within the scope of the contested criterion (see paragraph 68 above).

– Agreement between the applicant and six other universities concerning defence-related research

99 In order to establish the existence of an agreement between the applicant and six other universities to provide the Government of Iran with defence-related research, the Council relied on document MD 181/14 RELEX, which is contained in its file and includes a compilation of information from websites of Iranian press agencies, in particular the IRNA, in respect of military developments in Iran from 15 June to 11 July 2012.

100 That document shows that an IRNA article of 23 June 2012 indicates that a cooperation agreement was signed by the applicant and six other universities concerning education, joint research and the establishment of centres of excellence. The Minister for Science, Research and Technology highlighted, in that regard, the universities' role in 'neutralising the enemies' plots and plans targeted at the country's university community'. He announced that the Ministry would provide financial support for research and activities in defence-related matters.

101 However, contrary to the Council's claims, that agreement cannot constitute evidence of the support provided by the applicant to the Government of Iran, for the purposes of the contested criterion. It is a cooperation agreement between universities, which refers in general to the usual teaching and research activities normally carried out by universities. In that context, the general statements made by the Minister for Science, Research and Technology contained in document MD 181/14 RELEX are not sufficient for it to be presumed, in the absence of any specific information concerning the content

of that agreement, that it relates more particularly to research and technological development activities in the field of defence or related fields and that accordingly the agreement contributes to the provision of support to the Government of Iran.

– University courses in unmanned aerial vehicle (UAV) design

102 The applicant rightly notes that the documents produced by the Council contain no proof that it teaches courses designed by the Ministry of Science, Research and Technology in UAV design.

103 Accordingly, since that ground for the inclusion of the applicant's name on the lists is not substantiated, it cannot serve to justify the adoption of the contested acts.

– Conclusion

104 It follows from all the foregoing that the grounds for inclusion of the applicant's name on the lists relating to its activity, first, in the field of satellites and, secondly, in the field of smart boats, are sufficiently substantiated, as was found in paragraphs 83 and 92 above. Furthermore, the agreement between the applicant and the IRGC confirms the applicant's commitment to the Government of Iran in military or military-related fields (see paragraph 98 above). All of those reasons therefore justify the inclusion of the applicant's name, in the contested acts, on the basis of the contested criterion.

105 Consequently, the second plea in law must be rejected.

Third plea in law, alleging breach of the right to property and of the principle of proportionality

106 The applicant submits, first of all, that, since there is no justification for its re-listing, the contested acts infringe the right to property and are contrary to the principle of proportionality.

107 Next, the applicant criticises the Council for failing to take account of the fact that it is not a commercial undertaking, but a university. Therefore, the inclusion of its name on the lists affects not only its own rights, but also those of its teaching staff and its students. That listing is also disproportionate because it undermines the rights of the applicant's scientific staff, the right to education enshrined in Article 2 of Protocol No 1 to the Convention on the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950, Article 14 of the Charter of Fundamental Rights of the European Union, as well as the freedom of expression and information enshrined in Article 10 of that convention and in Article 11 of the Charter of Fundamental Rights.

108 Finally, the applicant claims that the contested acts had a negative effect on its research and teaching activities, in particular, in so far as, since the initial listing, publishers have ceased to publish articles by Iranian authors and cancelled contracts with the applicant for the publication of five English-language books. The applicant also ceased to receive scientific reviews, publications and catalogues published in Europe, is no longer able to procure research and laboratory materials in EU Member States, no longer has access to certain internet research sites and its members are no longer granted visas to go to EU Member States.

109 It is settled case-law that the principle of proportionality is one of the general principles of European Union law and requires that measures implemented through provisions of European Union law be appropriate for attaining the legitimate objectives pursued by the legislation at issue and do not go beyond what is necessary to achieve them (see judgment of 13 September 2013 in *Makhlouf* v *Council*, T-383/11, ECR, EU:T:2013:431, paragraph 98 and the case-law cited).

110 In the present case, it should be noted that the fact that the contested acts affect not only the applicant's right to property but also its research and teaching activities, not to mention the other rights referred to in paragraph 107 above, does not justify the view that those acts are disproportionate. In so far as, through its research and development activities referred to in the contested acts, the applicant provided support to the Government of Iran prohibited by the applicable rules, as established in paragraph 104 above, the Council was entitled to take the view, without exceeding the limits of its discretion, that the re-listing of the applicant constituted an appropriate and necessary measure for the purposes of combating nuclear proliferation.

111 It follows that the third plea in law must be rejected.

Fourth plea in law, alleging misuse of powers

112 First, the applicant submits that the fact that the documents produced by the Council do not support the grounds put forward for its re-listing shows that the Council actually based its decision on grounds other than those set out in the initial decision to list it, which was annulled by the judgment in *Sharif University of Technology* v *Council*, cited in paragraph 14 above (EU:T:2014:607).

113 That argument merely reiterates, in support of the present plea in law, the argument already relied on by the applicant in the first plea, to the effect that the Council failed to notify it of certain information contained in its file on which the contested acts relied. That argument must, accordingly, be rejected on the grounds set out in paragraphs 33 to 35 above, to which reference should be made.

114 Secondly, the applicant alleges that, of the three universities included on the lists, it is the only one whose inclusion is based on the contested criterion. The two other universities were included on the basis of the criterion of involvement in Iran's nuclear programme. In that context, the applicant takes the view that the fact that the other five universities which are, with the applicant, parties to the six-university agreement providing support to the Government of Iran through defence-related research mentioned in one of the grounds of the contested acts were not listed shows that the applicant's re-listing is in fact based on another ground.

115 In that regard, it must be noted that the claim concerning the listing on other grounds of the two other universities, which is referred to in paragraph 114 above, is irrelevant in the present case. Moreover, the fact that the five other universities which are parties to the agreement referred to in one of the grounds for the applicant's re-listing were not subject to restrictive measures on the basis of the contested criterion cannot constitute evidence of misuse of powers.

116 It is clear from the statement of reasons for the contested acts that the applicant's participation in that agreement is only one of five grounds for its re-listing. Three other grounds listed in the contested acts relate, respectively, to cooperation agreements with Iranian Government organisations relating to the production of satellites, the organisation of smart boat competitions and strategic and organisational cooperation with the IRGC (see paragraph 46 above). As was held in paragraph 104 above, those three other grounds, viewed as a whole, justify the applicant's re-listing, while the ground relating to the abovementioned agreement between six universities in respect of defence-related research was considered to be unsubstantiated (see paragraph 101 above).

117 For all those reasons, the fourth plea in law must be rejected.

118 It follows that the application for annulment of the contested acts must be rejected.

2. *The claim for damages*

119 The applicant claims that its unjustified re-listing has caused damage to its reputation. The annulment of that re-listing could not be sufficient to compensate it for that damage.

120 In accordance with settled case-law, in order for the European Union to incur non-contractual liability under the second paragraph of Article 340 TFEU for unlawful conduct by its institutions, a number of conditions must be satisfied: the institution's conduct must be unlawful, actual damage must have been suffered and there must be a causal link between the conduct complained of and the damage pleaded (see judgments of 9 September 2008 in *FIAMM and Others* v *Council and Commission*, C-120/06 P and C-121/06 P, ECR, EU:C:2008:476, paragraph 106 and the case-law cited, and 25 November 2014 in *Safa Nicu Sepahan* v *Council*, T-384/11, ECR, EU:T:2014:986, paragraph 47 and the case-law cited).

121 The cumulative nature of those three conditions governing the establishment of non-contractual liability means that, if one of them is not satisfied, the action for damages must be dismissed in its entirety, and there is no need to examine the other conditions (judgments of 8 May 2003 in *T. Port* v *Commission*, C-122/01 P, ECR, EU:C:2003:259, paragraph 30, and *Safa Nicu Sepahan* v *Council*, cited in paragraph 120 above, EU:T:2014:986, paragraph 48).

122 Since the condition relating to the unlawfulness of the listing of the applicant has not been satisfied in the present case, as noted in paragraph 118 above, the applicant's claim for damages must be rejected and, accordingly, the action must be dismissed in its entirety.

Costs

123 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

124 Since the applicant has been unsuccessful in all of its pleas in law and the Council has applied for costs, the applicant must be ordered to pay all the costs.

On those grounds,

THE GENERAL COURT (Seventh Chamber)

hereby:

1. Dismisses the action;

2. Orders Sharif University of Technology to bear its own costs and to pay those incurred by the Council of the European Union.

Van der Woude Wiszniewska-Białecka Ulloa Rubio

Delivered in open court in Luxembourg on 28 April 2016.

[Signatures]

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Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

4 May 2016*

(Reference for a preliminary ruling — Approximation of laws — Directive 2014/40/EU — Articles 7, 18 and 24(2) and (3) — Articles 8(3), 9(3), 10(1)(a), (c) and (g), 13 and 14 — Manufacture, presentation and sale of tobacco products — Validity — Legal basis — Article 114 TFEU — Principle of proportionality — Principle of subsidiarity — Fundamental rights of the European Union — Freedom of expression — Charter of Fundamental Rights of the European Union — Article 11)

In Case C-547/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court) (United Kingdom), made by decision of 7 November 2014, received at the Court on 1 December 2014, in the proceedings

The Queen, on the application of:

Philip Morris Brands SARL,

Philip Morris Ltd,

British American Tobacco UK Ltd

v

The Secretary of State for Health,

Interested parties and interveners:

Imperial Tobacco Ltd,

JT International SA,

Gallaher Ltd,

Tann UK Ltd,

Tannpapier GmbH,

V. Mane Fils,

Deutsche Benkert GmbH & Co. KG,

Benkert UK Ltd,

* Language of the case: English.

Joh. Wilh. von Eicken GmbH,

THE COURT (Second Chamber),

composed of R. Silva de Lapuerta, President of the First Chamber, acting as President of the Second Chamber, J.L. da Cruz Vilaça, A. Arabadjiev (Rapporteur), C. Lycourgos and J.-C. Bonichot, Judges,

Advocate General: J. Kokott,

Registrar: I. Illéssy, Administrator,

having regard to the written procedure and further to the hearing on 1 October 2015,

after considering the observations submitted on behalf of:

— Philip Morris Brands SARL and Philip Morris Ltd, by M. Demetriou QC, K. Nairn QC, D. Piccinin and J. Egerton-Peters, Barristers,

— British American Tobacco UK Ltd, by N. Pleming QC, S. Ford and D. Scannell, Barristers, and L. Van Den Hende, advocaat, instructed by A. Lidbetter, Solicitor,

— Imperial Tobacco Ltd, by D. Rose QC, B. Kennelly and J. Pobjoy, Barristers, instructed by E. Sparrow and J. Gale, Solicitors,

— JT International SA and Gallaher Ltd, by J. MacLeod QC, D. Anderson QC, J. Flynn QC and V. Wakefield, Barrister, instructed by A. Morfey, T. Snelling and T. Baildam, Solicitors,

— Tann UK and Tannpapier GmbH, by T. Johnston, Barrister, instructed by S. Singleton, Solicitor,

— V. Mane Fils, by M. Chamberlain QC and Z. Al-Rikabi, Barrister, instructed by P. Wareham and J. Robinson, Solicitors,

— Deutsche Benkert GmbH & Co. KG and Benkert UK Ltd, by A. Henshaw QC and D. Jowell QC, instructed by M. Evans and F. Liberatore, Solicitors,

— Joh. Wilh. von Eicken GmbH, by A. Howard, Barrister, instructed by A.-M. Irwin and A. Rook, Solicitors,

— the United Kingdom Government, by V. Kaye and C. Brodie, acting as Agents, and by M. Hoskins QC, I. Rogers QC and S. Abram and E. Metcalfe, Barristers,

— Ireland, by J. Quaney and A. Joyce, acting as Agents, and by E. Barrington, Senior Counsel, J. Cooke, Senior Counsel, and E. Carolan, Barrister-at-Law,

— the French Government, by D. Colas and R. Coesme, acting as Agents,

— the Italian Government, by G. Palmieri, acting as Agent, and P.G. Marrone, avvocato dello Stato,

— the Hungarian Government, by M.Z. Fehér, G. Koós and M. Bóra, acting as Agents,

— the Polish Government, by B. Majczyna, acting as Agent,

— the Portuguese Government, by L. Inez Fernandes and A. Seiça Neves, acting as Agents,

— the European Parliament, by L. Visaggio, A. Tamás and M. Sammut, acting as Agents,

— the Council of the European Union, by J. Herrmann, O. Segnana and M. Simm, acting as Agents,

— the European Commission, by M. Van Hoof, J. Tomkin and C. Cattabriga, acting as Agents,

— the Kingdom of Norway, by K. Moen and K. Kloster, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 23 December 2015,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation and validity of a number of provisions of Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC (OJ 2014 L 127, p. 1).

2 The request has been made in two sets of proceedings brought by (i) Philip Morris Brands SARL and Philip Morris Ltd ('PMI') and (ii) British American Tobacco UK Ltd ('BAT') against the Secretary of State for Health, concerning the legality of the 'intention and/or obligation' of the United Kingdom Government to implement Directive 2014/40.

Legal context

World Health Organisation Framework Convention on Tobacco Control

3 In the words of the preamble to the World Health Organisation Framework Convention on Tobacco Control ('the FCTC'), signed in Geneva on 21 May 2003, to which the European Union and its Member States are party, the Parties to that convention recognise that 'scientific evidence has unequivocally established that tobacco consumption and exposure to tobacco smoke cause death, disease and disability' and that 'cigarettes and some other products containing tobacco are highly engineered so as to create and maintain dependence, and that many of the compounds they contain and the smoke they produce are pharmacologically active, toxic, mutagenic and carcinogenic, and that tobacco dependence is separately classified as a disorder in major international classifications of diseases'.

4 Article 7 of the FCTC, which is entitled 'Non-price measures to reduce the demand for tobacco', provides:

'… Each Party shall adopt and implement effective legislative, executive, administrative or other measures necessary to implement its obligations pursuant to Articles 8 to 13 and shall cooperate, as appropriate, with each other directly or through competent international bodies with a view to their implementation. The Conference of the Parties shall propose appropriate guidelines for the implementation of the provisions of these Articles.'

5 Article 9 of the FCTC, which is entitled 'Regulation of the contents of tobacco products', provides:

'The Conference of the Parties, in consultation with competent international bodies, shall propose guidelines for testing and measuring the contents and emissions of tobacco products, and for the regulation of these contents and emissions. Each Party shall, where approved by competent national authorities, adopt and implement effective legislative, executive and administrative or other measures for such testing and measuring, and for such regulation.'

6 Article 11 of the FCTC, which is entitled 'Packaging and labelling of tobacco products', provides:

'1. Each Party shall, within a period of three years after entry into force of this Convention for that Party, adopt and implement, in accordance with its national law, effective measures to ensure that:

(a) tobacco product packaging and labelling do not promote a tobacco product by any means that are false, misleading, deceptive or likely to create an erroneous impression about its characteristics, health effects, hazards or emissions, including any term, descriptor, trademark, figurative or any other sign that directly or indirectly creates the false impression that a particular tobacco product is less harmful than other tobacco products. These may include terms such as "low tar", "light", "ultra-light" or "mild"; and

(b) each unit packet and package of tobacco products and any outside packaging and labelling of such products also carry health warnings describing the harmful effects of tobacco use, and may include other appropriate messages. These warnings and messages:

…

(iii) shall be large, clear, visible and legible,
(iv) should be 50% or more of the principal display areas but shall be no less than 30% of the principal display areas,
(v) may be in the form of or include pictures or pictograms.'

7 Under Section 1.1 of the Partial Guidelines for Implementation of Articles 9 and 10 of the World Health Organisation Framework Convention on Tobacco Control ('the Partial Guidelines for Implementation of Articles 9 and 10 of the FCTC'), the parties 'are ... encouraged to implement measures beyond those recommended by these guidelines'.

8 Section 3.1.2 of those partial guidelines, which is headed 'Ingredients (Regulation)', describes the measures that the Contracting Parties could introduce to regulate ingredients, stating as follows:

'3.1.2.1 Background Regulating ingredients aimed at reducing tobacco product attractiveness can contribute to reducing the prevalence of tobacco use and dependence among new and continuing users. ...

3.1.2.2 Tobacco Products

(i) Ingredients used to increase palatability The harsh and irritating character of tobacco smoke provides a significant barrier to experimentation and initial use. Tobacco industry documents have shown that significant effort has been put into mitigating these unfavourable characteristics. Harshness can be reduced in a variety of ways including: adding various ingredients, eliminating substances with known irritant properties, balancing irritation alongside other significant sensory effects, or altering the chemical properties of tobacco product emissions by adding or removing specific substances. … Masking tobacco smoke harshness with flavours contributes to promoting and sustaining tobacco use. Examples of flavouring substances include benzaldehyde, maltol, menthol and

vanillin. Spices and herbs can also be used to improve the palatability of tobacco products. Examples include cinnamon, ginger and mint. Recommendation Parties should regulate, by prohibiting or restricting, ingredients that may be used to increase palatability in tobacco products. …'

9 Under point 7 of the Guidelines for Implementation of Article 11 (Packaging and labelling of tobacco products) of the World Health Organisation Framework Convention on Tobacco Control (the 'Guidelines for Implementation of Article 11 of the FCTC'):

'Well-designed health warnings and messages are part of a range of effective measures to communicate health risks and to reduce tobacco use. Evidence demonstrates that the effectiveness of health warnings and messages increases with their prominence. In comparison with small, text-only health warnings, larger warnings with pictures are more likely to be noticed, better communicate health risks, provoke a greater emotional response and increase the motivation of tobacco users to quit and to decrease their tobacco consumption. Larger picture warnings are also more likely to retain their effectiveness over time and are particularly effective in communicating health effects to low-literacy populations, children and young people. Other elements that enhance effectiveness include locating health warnings and messages on principal display areas, and at the top of these principal display areas; the use of colour rather than just black and white; requiring that multiple health warnings and messages appear concurrently; and periodic revision of health warnings and messages.'

10 Point 12 of those guidelines, headed 'Size', states:

'Article 11.1(b)(iv) of the [FCTC] specifies that health warnings and messages on tobacco product packaging and labelling should be 50% or more, but no less than 30%, of the principal display areas. Given the evidence that the effectiveness of health warnings and messages increases with their size, Parties should consider using health warnings and messages that cover more than 50% of the principal display areas and aim to cover as much of the principal display areas as possible. The text of health warnings and messages should be in bold print in an easily legible font size and in a specified style and colour(s) that enhance overall visibility and legibility.'

Directive 2014/40

11 Directive 2014/40 includes the following recitals:

'(7) Legislative action at Union level is ... necessary in order to implement the [FCTC] ..., the provisions of which are binding on the Union and its Member States. The FCTC provisions on the regulation of the contents of tobacco products, the regulation of tobacco product disclosures, the packaging and labelling of tobacco products, advertising and illicit trade in tobacco products are particularly relevant. The Parties to the FCTC, including the Union and its Member States, adopted a set of guidelines for the implementation of FCTC provisions by consensus during various Conferences.

…

(15) The lack of a harmonised approach to regulating the ingredients of tobacco products affects the smooth functioning of the internal market and has a negative impact on the free movement of goods across the Union. Some Member States have adopted legislation or entered into binding agreements with the industry allowing or prohibiting certain ingredients. As a result, some ingredients are regulated in some Member States, but not in others. Member States also take differing approaches as regards additives in the filters of cigarettes as well as additives colouring the tobacco smoke. Without harmonisation, the obstacles to the smooth functioning of the internal market are expected to increase in the coming years, taking into account the implementation of the FCTC and the relevant FCTC guidelines throughout the Union and in

the light of experience gained in other jurisdictions outside the Union. The FCTC guidelines in relation to the regulation of the contents of tobacco products and regulation of tobacco product disclosures call in particular for the removal of ingredients that increase palatability, create the impression that tobacco products have health benefits, are associated with energy and vitality or have colouring properties.

(16) The likelihood of diverging regulation is further increased by concerns over tobacco products having a characterising flavour other than one of tobacco, which could facilitate initiation of tobacco consumption or affect consumption patterns. Measures introducing unjustified differences of treatment between different types of flavoured cigarettes should be avoided. However, products with characterising flavour with a higher sales volume should be phased out over an extended time period to allow consumers adequate time to switch to other products.

(17) The prohibition of tobacco products with characterising flavours does not preclude the use of individual additives outright, but it does oblige manufacturers to reduce the additive or the combination of additives to such an extent that the additives no longer result in a characterising flavour. ...

…

(22) Disparities still exist between national provisions regarding the labelling of tobacco products, in particular with regard to the use of combined health warnings consisting of a picture and a text, information on cessation services and promotional elements in and on unit packets.

(23) Such disparities are liable to constitute a barrier to trade and to impede the smooth functioning of the internal market in tobacco products, and should, therefore, be eliminated. Also, it is possible that consumers in some Member States are better informed about the health risks of tobacco products than consumers in other Member States. Without further action at Union level, the existing disparities are likely to increase in the coming years.

(24) Adaptation of the provisions on labelling is also necessary to align the rules that apply at Union level to international developments. For example, the FCTC guidelines on the packaging and labelling of tobacco products call for large picture warnings on both principal display areas, mandatory cessation information and strict rules on misleading information. ...

(25) The labelling provisions should also be adapted to new scientific evidence. For example, the indication of the emission levels for tar, nicotine and carbon monoxide on unit packets of cigarettes has proven to be misleading as it leads consumers to believe that certain cigarettes are less harmful than others. Evidence also suggests that large combined health warnings comprised of a text warning and a corresponding colour photograph are more effective than warnings consisting only of text. As a consequence, combined health warnings should become mandatory throughout the Union and cover significant and visible parts of the surface of unit packets. Minimum dimensions should be set for all health warnings to ensure their visibility and effectiveness.

…

(27) Tobacco products or their packaging could mislead consumers, in particular young people, where they suggest that these products are less harmful. This is, for example, the case if certain words or features are used, such as the words “low-tar”, “light”, “ultra-light”, “mild”, “natural”, “organic”, “without additives”, “without flavours” or “slim”, or certain names, pictures, and figurative or other signs. Other misleading elements might include, but are not limited to, inserts or other additional material such as adhesive labels, stickers, onserts, scratch-offs and sleeves or relate to the shape of the tobacco product itself. Certain packaging and tobacco

products could also mislead consumers by suggesting benefits in terms of weight loss, sex appeal, social status, social life or qualities such as femininity, masculinity or elegance. Likewise, the size and appearance of individual cigarettes could mislead consumers by creating the impression that they are less harmful. ...

(28) In order to ensure the integrity and the visibility of health warnings and maximise their efficacy, provisions should be made regarding the dimensions of the health warnings as well as regarding certain aspects of the appearance of the unit packets of tobacco products, including the shape and opening mechanism. ... Member States apply different rules on the minimum number of cigarettes per unit packet. Those rules should be aligned in order to ensure free circulation of the concerned products.

…

(33) Cross-border distance sales of tobacco products could facilitate access to tobacco products that do not comply with this Directive. There is also an increased risk that young people would get access to tobacco products. Consequently, there is a risk that tobacco control legislation would be undermined. Member States should, therefore, be allowed to prohibit cross-border distance sales. Where cross-border distance sales are not prohibited, common rules on the registration of retail outlets engaging in such sales are appropriate to ensure the effectiveness of this Directive. ...

…

(48) Moreover, this Directive does not harmonise the rules on smoke-free environments ... Member States are free to regulate such matters within the remit of their own jurisdiction and are encouraged to do so.

…

(53) Tobacco and related products which comply with this Directive should benefit from the free movement of goods. However, in light of the different degrees of harmonisation achieved by this Directive, the Member States should, under certain conditions, retain the power to impose further requirements in certain respects in order to protect public health. This is the case in relation to the presentation and the packaging, including colours, of tobacco products other than health warnings, for which this Directive provides a first set of basic common rules. Accordingly, Member States could, for example, introduce provisions providing for further standardisation of the packaging of tobacco products, provided that those provisions are compatible with the FEU [Treaty], with WTO obligations and do not affect the full application of this Directive.

(54) Moreover, in order to take into account possible future market developments, Member States should also be allowed to prohibit a certain category of tobacco or related products, on grounds relating to the specific situation in the Member State concerned and provided the provisions are justified by the need to protect public health, taking into account the high level of protection achieved through this Directive. Member States should notify such stricter national provisions to the Commission.

(55) A Member State should remain free to maintain or introduce national laws applying to all products placed on its national market for aspects not regulated by this Directive, provided they are compatible with the FEU [Treaty] and do not jeopardise the full application of this Directive. ...

…

(60) Since the objectives of this Directive, namely to approximate the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products, cannot be sufficiently achieved by the Member States, but can rather, by reason of their scale and effects, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the EU [Treaty]. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.'

12 Article 1 of Directive 2014/40, entitled 'Subject matter', provides:

'The objective of this Directive is to approximate the laws, regulations and administrative provisions of the Member States concerning:

(a) the ingredients and emissions of tobacco products and related reporting obligations, including the maximum emission levels for tar, nicotine and carbon monoxide for cigarettes;

(b) certain aspects of the labelling and packaging of tobacco products including the health warnings to appear on unit packets of tobacco products and any outside packaging as well as traceability and security features that are applied to tobacco products to ensure their compliance with this Directive;

(c) the prohibition on the placing on the market of tobacco for oral use;

(d) cross-border distance sales of tobacco products;

(e) the obligation to submit a notification of novel tobacco products;

(f) the placing on the market and the labelling of certain products, which are related to tobacco products, namely electronic cigarettes and refill containers, and herbal products for smoking;

in order to facilitate the smooth functioning of the internal market for tobacco and related products, taking as a base a high level of protection of human health, especially for young people, and to meet the obligations of the Union under the [FCTC].'

13 In accordance with points 24 and 25 of Article 2 of Directive 2014/40, entitled 'Definitions', 'flavouring' means 'an additive that imparts smell and/or taste', whilst 'characterising flavour' means 'a clearly noticeable smell or taste other than one of tobacco, resulting from an additive or a combination of additives, including, but not limited to, fruit, spice, herbs, alcohol, candy, menthol or vanilla, which is noticeable before or during the consumption of the tobacco product'.

14 Article 7 of that directive, entitled 'Regulation of ingredients', provides as follows:

'1. Member States shall prohibit the placing on the market of tobacco products with a characterising flavour.

…

7. Member States shall prohibit the placing on the market of tobacco products containing flavourings in any of their components such as filters, papers, packages, capsules or any technical features allowing modification of the smell or taste of the tobacco products concerned or their smoke intensity. Filters, papers and capsules shall not contain tobacco or nicotine.

…

14. In the case of tobacco products with a characterising flavour whose Union-wide sales volumes represent 3% or more in a particular product category, the provisions of this Article shall apply from 20 May 2020.'

15 Chapter II, entitled 'Labelling and packaging', of Title II of Directive 2014/40 contains, inter alia, rules concerning (i) the health warnings that must appear on the labelling and unit packets, (ii) the presentation of tobacco products, (iii) the appearance and content of unit packets, (iv) the traceability of those products and (v) the security features which the products must carry.

16 In particular, Article 8 of that directive, entitled 'General provisions', provides, in paragraph 3:

'Member States shall ensure that the health warnings on a unit packet and any outside packaging are irremovably printed, indelible and fully visible, including not being partially or totally hidden or interrupted by tax stamps, price marks, security features, wrappers, jackets, boxes, or other items, when tobacco products are placed on the market. On unit packets of tobacco products other than cigarettes and roll-your-own tobacco in pouches, the health warnings may be affixed by means of stickers, provided that such stickers are irremovable. The health warnings shall remain intact when opening the unit packet other than packets with a flip-top lid, where the health warnings may be split when opening the packet, but only in a manner that ensures the graphical integrity and visibility of the text, photographs and cessation information.'

17 Under Article 9 of Directive 2014/40, which is entitled 'General warnings and information messages on tobacco products for smoking':

'1. Each unit packet and any outside packaging of tobacco products for smoking shall carry one of the following general warnings:

"Smoking kills — quit now"

or

"Smoking kills"

Member States shall determine which of the general warnings referred to in the first subparagraph is to be used.

2. Each unit packet and any outside packaging of tobacco products for smoking shall carry the following information message:

"Tobacco smoke contains over 70 substances known to cause cancer."

3. For cigarette packets and roll-your-own tobacco in cuboid packets the general warning shall appear on the bottom part of one of the lateral surfaces of the unit packets, and the information message shall appear on the bottom part of the other lateral surface. These health warnings shall have a width of not less than 20 mm.

For packets in the form of a shoulder box with a hinged lid that result in the lateral surfaces being split into two when the packet is open, the general warning and the information message shall appear in their entirety on the larger parts of those split surfaces. The general warning shall also appear on the inside of the top surface that is visible when the packet is open.

The lateral surfaces of this type of packet shall have a height of not less than 16 mm.

For roll-your-own tobacco marketed in pouches the general warning and the information message shall appear on the surfaces that ensure the full visibility of those health warnings. For roll-your-own tobacco in cylindrical packets the general warning shall appear on the outside surface of the lid and the information message on the inside surface of the lid.

Both the general warning and the information message shall cover 50% of the surfaces on which they are printed.

…'

18 Article 10 of the directive, entitled 'Combined health warnings for tobacco products for smoking', provides

'1. Each unit packet and any outside packaging of tobacco products for smoking shall carry combined health warnings. The combined health warnings shall:

(a) contain one of the text warnings listed in Annex I and a corresponding colour photograph specified in the picture library in Annex II;

…

(c) cover 65% of both the external front and back surface of the unit packet and any outside packaging. Cylindrical packets shall display two combined health warnings, equidistant from each other, each covering 65% of their respective half of the curved surface;

…

(g) in the case of unit packets of cigarettes, respect the following dimensions:
(i) height: not less than 44 mm;
(ii) width: not less than 52 mm.

…'

19 Article 13 of Directive 2014/40, 'Product presentation', provides:

'1. The labelling of unit packets and any outside packaging and the tobacco product itself shall not include any element or feature that:

(a) promotes a tobacco product or encourages its consumption by creating an erroneous impression about its characteristics, health effects, risks or emissions; labels shall not include any information about the nicotine, tar or carbon monoxide content of the tobacco product;

(b) suggests that a particular tobacco product is less harmful than others or aims to reduce the effect of some harmful components of smoke or has vitalising, energetic, healing, rejuvenating, natural, organic properties or has other health or lifestyle benefits;

(c) refers to taste, smell, any flavourings or other additives or the absence thereof;

(d) resembles a food or a cosmetic product;

(e) suggests that a certain tobacco product has improved biodegradability or other environmental advantages.

2. The unit packets and any outside packaging shall not suggest economic advantages by including printed vouchers, offering discounts, free distribution, two-for-one or other similar offers.

3. The elements and features that are prohibited pursuant to paragraphs 1 and 2 may include but are not limited to texts, symbols, names, trademarks, figurative or other signs.'

20 Under Article 14 of the directive, entitled 'Appearance and content of unit packets':

'1. Unit packets of cigarettes shall have a cuboid shape. Unit packets of roll-your-own tobacco shall have a cuboid or cylindrical shape, or the form of a pouch. A unit packet of cigarettes shall include at least 20 cigarettes. A unit packet of roll-your-own tobacco shall contain tobacco weighing not less than 30 g.

2. A unit packet of cigarettes may consist of carton or soft material and shall not have an opening that can be re-closed or re-sealed after it is first opened, other than the flip-top lid and shoulder box with a hinged lid. For packets with a flip-top lid and hinged lid, the lid shall be hinged only at the back of the unit packet.'

21 Article 18 of Directive 2014/40, entitled 'Cross-border distance sales of tobacco products', is worded as follows:

'1. Member States may prohibit cross-border distance sales of tobacco products to consumers. Member States shall cooperate to prevent such sales. Retail outlets engaging in cross-border distance sales of tobacco products may not supply such products to consumers in Member States where such sales have been prohibited. Member States which do not prohibit such sales shall require retail outlets intending to engage in cross-border distance sales to consumers located in the Union to register with the competent authorities in the Member State, where the retail outlet is established, and in the Member State, where the actual or potential consumers are located. ...

…

3. The Member States of destination of tobacco products sold via cross-border distance sales may require that the supplying retail outlet nominates a natural person to be responsible for verifying — before the tobacco products reach the consumer — that they comply with the national provisions adopted pursuant to this Directive in the Member State of destination, if such verification is necessary in order to ensure compliance and facilitate enforcement.

…'

22 Article 24 of that directive, entitled 'Free movement', provides:

'1. Member States may not, for considerations relating to aspects regulated by this Directive, and subject to paragraphs 2 and 3 of this Article, prohibit or restrict the placing on the market of tobacco or related products which comply with this Directive.

2. This Directive shall not affect the right of a Member State to maintain or introduce further requirements, applicable to all products placed on its market, in relation to the standardisation of the packaging of tobacco products, where it is justified on grounds of public health, taking into account the high level of protection of human health achieved through this Directive. Such measures shall be proportionate and may not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States. Those measures shall be notified to the Commission together with the grounds for maintaining or introducing them.

3. A Member State may also prohibit a certain category of tobacco or related products, on grounds relating to the specific situation in that Member State and provided the provisions are justified by the need to protect public health, taking into account the high level of protection of human health achieved through this Directive. Such national provisions shall be notified to the Commission together with the grounds for introducing them. The Commission shall, within six months of the date of receiving the notification provided for in this paragraph, approve or reject the national provisions after having verified, taking into account the high level of protection of human health achieved through this Directive, whether or not they are justified, necessary and proportionate to their aim and whether or not they are a means of arbitrary discrimination or a disguised restriction on trade between the Member States. In the absence of a decision by the Commission within the period of six months, the national provisions shall be deemed to be approved.'

23 Article 28 of Directive 2014/40, entitled 'Report', specifies, in paragraph 2(a), that the Commission, in its report on the application of the directive, is to indicate, amongst other things, 'the experience gained with respect to the design of package surfaces not governed by this Directive taking into account national, international, legal, economic and scientific developments'.

24 The directive must, under Article 29 thereof, be transposed into the national legal orders of the Member States by 20 May 2016 and the relevant provisions must enter into force from that date.

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

25 PMI and BAT brought claims before the referring court seeking judicial review of the 'intention and/or obligation' of the United Kingdom Government to implement Directive 2014/40 in national law.

26 They argue that the directive is invalid, in whole or in part, on the ground that it infringes Articles 114 TFEU, 290 TFEU and 291 TFEU, the principles of proportionality and subsidiarity and Article 11 of the Charter of Fundamental Rights of the European Union ('the Charter').

27 The referring court considers that the arguments advanced by the claimants in the main proceedings are 'reasonably arguable'.

28 In those circumstances, the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court), decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is [Directive 2014/40] invalid in whole or in part because Article 114 TFEU does not provide an adequate legal basis? In particular:
   (a) In relation to Article 24(2) of [Directive 2014/40]:
      (i) on its proper interpretation, to what extent does it permit Member States to adopt more stringent rules in relation to matters relating to the "standardisation" of the packaging of tobacco products; and,
      (ii) in light of that interpretation, is Article 24(2) invalid because Article 114 TFEU does not provide an adequate legal basis?
   (b) Is Article 24(3) [of Directive 2014/40], which allows Member States to prohibit a category of tobacco or related products in specified circumstances, invalid because Article 114 TFEU does not provide an adequate legal basis?
   (c) Are the following provisions invalid because Article 114 TFEU does not provide an adequate legal basis:
      (i) the provisions of Chapter II of Title II [of Directive 2014/40], which relate to packaging and labelling;
      (ii) Article 7 [of Directive 2014/40], in so far as it prohibits menthol cigarettes and tobacco products with a characterising flavour;

(iii) Article 18 [of Directive 2014/40], which allows Member States to prohibit cross-border distance sales of tobacco products; and,
(iv) Articles 3(4) and 4(5) [of Directive 2014/40], which delegate powers to the Commission in relation to emission levels?

(2) In relation to Article 13 [of Directive 2014/40]:
(a) on its true interpretation, does it prohibit true and non-misleading statements about tobacco products on the product packaging; and,
(b) if so, is it invalid because it violates the principle of proportionality and/or Article 11 of the [Charter]?

(3) Are any or all of the following provisions of [Directive 2014/40] invalid because they infringe the principle of proportionality:
(a) Article 7(1) and (7), in so far as [it] prohibit[s] the placing on the market of tobacco products with menthol as a characterising flavour and the placing on the market of tobacco products containing flavourings in any of their components;
(b) Articles 8(3), 9(3), 10(1)(g) and 14, in so far as they impose various pack standardisation requirements; and,
(c) Article 10(1)(a) and (c), in so far as [it] require[s] health warnings to cover 65% of the external front and back surface of the unit packaging and any outside packaging?

(4) Are any or all of the following provisions of [Directive 2014/40] invalid because they infringe Article 290 TFEU:
(a) Article 3(2) and (4) concerning maximum emission levels;
(b) Article 4(5) relating to measurement methods for emissions;
(c) Article 7(5), (11) and (12) concerning the regulation of ingredients;
(d) Articles 9(5), 10(1)(f), 10(3), 11(6), 12(3) and 20(12) concerning health warnings;
(e) Article 20(11) concerning the prohibition of electronic cigarettes and/or refill containers; and/or,
(f) Article 15(12) concerning data storage contracts?

(5) Are Articles 3(4) and 4(5) [of Directive 2014/40] invalid because they breach the principle of legal certainty and/or impermissibly delegate powers to external bodies that are not subject to the procedural safeguards required by EU law?

(6) Are any or all of the following provisions of [Directive 2014/40] invalid because they infringe Article 291 TFEU:
(a) Article 6(1) concerning reporting obligations;
(b) Article 7(2) [to] (4) and (10) concerning implementing acts relating to the prohibition of tobacco products in certain circumstances; and/or,
(c) Articles 9(6) and 10(4) concerning health warnings?

(7) Is [Directive 2014/40] and in particular Articles 7, 8(3), 9(3), 10(l)(g), 13 and 14 invalid for failure to comply with the principle of subsidiarity?'

Consideration of the questions referred

Admissibility

29 The European Parliament, the Council of the European Union and the Commission, as well as the French Government, maintain that the request for a preliminary ruling is inadmissible in whole or in part.

Admissibility of the request for a preliminary ruling in its entirety

30 It is argued that the request for a preliminary ruling is inadmissible in its entirety on the ground (i) that there is no genuine dispute between the parties and (ii) that the claims for judicial review challenging the 'intention and/or obligation' of the United Kingdom Government to implement a directive are a means of circumventing the system of remedies established by the FEU Treaty.

31 In that regard, it should be recalled that it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. 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 (judgment in *Gauweiler and Others*, C-62/14, EU:C:2015:400, paragraph 24).

32 It follows that 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 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 (judgment in *Gauweiler and Others*, C-62/14, EU:C:2015:400, paragraph 25).

33 As regards, first, the genuine nature of the dispute in the main proceedings, it should be noted that the claims for judicial review of the 'intention and/or obligation' of the United Kingdom Government to implement Directive 2014/40, which the claimants in the main proceedings have brought before the referring court, have been held admissible by the latter, even though, when those claims were brought, the period prescribed for implementation of the directive had not yet expired and no national implementation measures had been adopted. There is, moreover, disagreement between the claimants in the main proceedings and the Secretary of State for Health as to whether or not the abovementioned claims are well founded. Given that the referring court has been asked to resolve that disagreement, it is not obvious that the dispute in the main proceedings is not genuine (see, by analogy, judgment in *British American Tobacco (Investments) and Imperial Tobacco*, C-491/01, EU:C:2002:741, paragraphs 36 and 38).

34 As regards, secondly, the argument that the claim for judicial review of the 'intention and/or obligation' of the United Kingdom Government to implement a directive is a means of circumventing the system of remedies established by the FEU Treaty, the Court has already held admissible several requests for preliminary rulings concerning the validity of secondary legislation made in judicial review claims, in particular in the cases that resulted in the judgments in *British American Tobacco (Investments) and Imperial Tobacco* (C-491/01, EU:C:2002:741); *Intertanko and Others* (C-308/06, EU:C:2008:312); and *Afton Chemical* (C-343/09, EU:C:2010:419).

35 Moreover, 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 called upon to hear a genuine dispute in which the question of the validity of such an act is raised indirectly. That condition is fulfilled in the case of the main proceedings, as is apparent from paragraph 33 of this judgment (see, by analogy, judgments in *British American Tobacco (Investments) and Imperial Tobacco*, C-491/01, EU:C:2002:741, paragraph 40, and *Gauweiler and Others*, C-62/14, EU:C:2015:400, paragraph 29).

36 Accordingly, the request for a preliminary ruling cannot be declared inadmissible in its entirety.

Admissibility of certain of the questions referred

37 The admissibility of certain of the questions referred must be examined in the light, first, of the argument that Question 1(a), (b) and (c)(iii), which concerns the interpretation and validity of Articles 18 and 24(2) and (3) of Directive 2014/40, is hypothetical and unrelated to the purpose of the main proceedings.

38 Articles 18 and 24(2) and (3) of the directive are addressed to the Member States, permitting them, in essence, to maintain or introduce in their domestic legal orders certain prohibitions or further requirements. Whilst it is true that those provisions thus grant the Member States an option, rather than laying down an obligation to act, the fact remains that those provisions may be taken into account when national measures implementing Directive 2014/40 are adopted. Indeed, the nature, content and extent of those measures may vary depending on the interpretation and validity of Articles 18 and 24(2) and (3) of the directive.

39 The fact that the order for reference contains no indication of whether the United Kingdom intends to make use of those provisions when it implements Directive 2014/40 in its domestic legal order does not mean that questions relating to their interpretation and validity are purely hypothetical. Indeed, the decision to make use of those provisions could depend upon the outcome of the main proceedings, which concern precisely the intention and/or obligation of the United Kingdom to implement the directive.

40 Accordingly, it is not obvious that the interpretation and determination of the validity of those provisions are unrelated to the purpose of the main proceedings or that the problems raised are hypothetical.

41 Points (a), (b) and (c)(iii) of Question 1 are thus admissible.

42 As regards, secondly, the admissibility of Question 1, point (c)(iv), and Questions 4 to 6, it must be noted that those questions concern the validity of Article 3(2) and (4), Article 4(5), Article 6(1), Article 7(2) to (5) and (10) to (12), Article 9(5) and (6), Article 10(1)(f), (3) and (4), Article 11(6), Article 12(3), Article 15(12) and Article 20(11) and (12) of Directive 2014/40. Those provisions empower the Commission to adopt various delegated and implementing acts.

43 Clearly, none of those provisions are addressed to the Member States. The provisions do not therefore relate to the implementation of that directive in the domestic legal systems of the Member States.

44 Moreover, it has not been argued that the invalidity of one or more of those provisions would entail the invalidity of other provisions of the directive that do entail implementation by the Member State.

45 That being so, it is obvious that Question 1, point (c)(iv), and Questions 4 to 6 bear no relation to the purpose of the main proceedings, which concern the intention and/or obligation of the United Kingdom to implement Directive 2014/40.

46 Accordingly, Question 1, point (c)(iv), and Questions 4 to 6 must be declared inadmissible.

47 With regard, thirdly, to the admissibility of Question 7, which concerns the validity of Articles 7, 8(3), 9(3), 10(1)(g), 13 and 14 of Directive 2014/40, it should be borne in mind that it follows from the spirit of cooperation which must prevail in the operation of the preliminary reference procedure that it is essential that the national court sets out in its order for reference the precise reasons why it considers a reply to its questions concerning the interpretation or validity of certain provisions of EU law to be necessary to enable it to give judgment (see to that effect, inter alia, judgments in *Bertini and Others*,

98/85, 162/85 and 258/85, EU:C:1986:246, paragraph 6; *ABNA and Others*, C-453/03, C-11/04, C-12/04 and C-194/04, EU:C:2005:741, paragraph 46; and *IATA and ELFAA*, C-344/04, EU:C:2006:10, paragraph 31).

48 It is therefore important that the national court should set out, in particular, the precise reasons which led it to question the validity of certain provisions of EU law and set out the grounds of invalidity which, consequently, appear to it capable of being upheld (see to that effect, inter alia, judgment in *Greenpeace France and Others*, C-6/99, EU:C:2000:148, paragraph 55, and order in *Adiamix*, C-368/12, EU:C:2013:257, paragraph 22). Such a requirement also arises under Article 94(c) of the Rules of Procedure of the Court.

49 Furthermore, according to settled case-law of the Court, the information provided in orders for reference not only enables the Court to give useful answers but also serves to ensure that the governments of the Member States and other interested persons are given an 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 Article 23, 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 (see, inter alia, judgments in *Holdijk and Others*, 141/81 to 143/81, EU:C:1982:122, paragraph 6; *Lehtonen and Castors Braine*, C-176/96, EU:C:2000:201, paragraph 23; and order in *Adiamix*, C-368/12, EU:C:2013:257, paragraph 24).

50 It follows from the foregoing, first, that in a reference for a preliminary ruling, the Court will examine the validity of an EU act or certain provisions thereof in the light of the grounds of invalidity set out in the order for reference. Secondly, if there is no mention of the precise reasons which led the referring court to question the validity of that act or of those provisions, the questions relating to the validity thereof will be inadmissible.

51 In the present case, the referring court does not explain the reasons why it decided, in the context of Question 7, to raise a question with the Court concerning the validity of Articles 8(3), 9(3), 10(1)(g), 13 and 14 of Directive 2014/40. All the elements in the order for reference which pertain to that question relate exclusively to Article 7 of the directive.

52 In those conditions, Question 7 is admissible only in so far as it concerns Article 7 of Directive 2014/40.

53 Having regard to all the foregoing considerations, the Court must declare inadmissible Question 1, point (c)(iv), Questions 4 to 6 and Question 7 in so far as it concerns Articles 8(3), 9(3), 10(1)(g), 13 and 14 of Directive 2014/40.

Question 1

54 By Question 1 the referring court asks, in essence, whether Directive 2014/40 is invalid in whole or in part by reason of the fact that Article 114 TFEU does not provide an adequate legal basis. In particular, that court has some doubts about the validity of Articles 7, 18 and 24(2) and (3) of the directive and that of the provisions of Chapter II of Title II thereof.

55 The Court notes that, notwithstanding the wording of Question 1, the order for reference does not give any precise ground of invalidity as regards Directive 2014/40 as a whole. The reasoning in the order for reference relates exclusively to the validity of each of the provisions set out in the previous paragraph of this judgment, taken in isolation.

56 In those circumstances, the Court, in answering Question 1, will examine the grounds of invalidity raised against each of those provisions. If, on conclusion of that examination, one of those provisions were to be declared invalid, it would be necessary to consider whether that invalidity affects the validity of Directive 2014/40 as a whole.

57 Article 114(1) TFEU establishes that the Parliament and the Council are to adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.

58 In that regard, while a mere finding of disparities between national rules is not sufficient to justify having recourse to Article 114 TFEU, it is otherwise where there are differences between the laws, regulations or administrative provisions of the Member States which are such as to obstruct the fundamental freedoms and thus have a direct effect on the functioning of the internal market (see, to that effect, judgments in *Germany* v *Parliament and Council*, C-376/98, EU:C:2000:544, paragraphs 84 and 95; *British American Tobacco (Investments) and Imperial Tobacco*, C-491/01, EU:C:2002:741, paragraphs 59 and 60; *Arnold André*, C-434/02, EU:C:2004:800, paragraph 30; *Swedish Match*, C-210/03, EU:C:2004:802, paragraph 29; *Germany* v *Parliament and Council*, C-380/03, EU:C:2006:772, paragraph 37; and *Vodafone and Others*, C-58/08, EU:C:2010:321, paragraph 32).

59 It is also settled case-law that, although recourse to Article 114 TFEU as a legal basis is possible if the aim is to prevent the emergence of future obstacles to trade as a result of divergences in national laws, the emergence of such obstacles must be likely and the measure in question must be designed to prevent them (judgments in *British American Tobacco (Investments) and Imperial Tobacco*, C-491/01, EU:C:2002:741, paragraph 61; *Arnold André*, C-434/02, EU:C:2004:800, paragraph 31; *Swedish Match*, C-210/03, EU:C:2004:802, paragraph 30; *Germany* v *Parliament and Council*, C-380/03, EU:C:2006:772, paragraph 38; and *Vodafone and Others*, C-58/08, EU:C:2010:321, paragraph 33).

60 The Court has also held that, provided that the conditions for recourse to Article 114 TFEU as a legal basis are fulfilled, the EU legislature cannot be prevented from relying on that legal basis on the ground that public health protection is a decisive factor in the choices to be made (judgments in *British American Tobacco (Investments) and Imperial Tobacco*, C-491/01, EU:C:2002:741, paragraph 62; *Arnold André*, C-434/02, EU:C:2004:800, paragraph 32; *Swedish Match*, C-210/03, EU:C:2004:802, paragraph 31; and *Germany* v *Parliament and Council*, C-380/03, EU:C:2006:772, paragraph 39).

61 The point should also be made that the first subparagraph of Article 168(1) TFEU provides that a high level of human health protection is to be ensured in the definition and implementation of all EU policies and activities, and that Article 114(3) TFEU explicitly requires that, in achieving harmonisation, a high level of protection of human health should be guaranteed (judgments in *British American Tobacco (Investments) and Imperial Tobacco*, C-491/01, EU:C:2002:741, paragraph 62; *Arnold André*, C-434/02, EU:C:2004:800, paragraph 33; *Swedish Match*, C-210/03, EU:C:2004:802, paragraph 32; and *Germany* v *Parliament and Council*, C-380/03, EU:C:2006:772, paragraph 40).

62 It follows from the foregoing that when there are obstacles to trade, or it is likely that such obstacles will emerge in the future, because the Member States have taken, or are about to take, divergent measures with respect to a product or a class of products such as to bring about different levels of protection and thereby prevent the product or products concerned from moving freely within the European Union, Article 114 TFEU authorises the EU legislature to intervene by adopting appropriate measures, in compliance with Article 114(3) TFEU and with the legal principles mentioned in the FEU Treaty or identified in the case-law, in particular the principle of proportionality (judgments in *Arnold André*, C-434/02, EU:C:2004:800, paragraph 34; *Swedish Match*, C-210/03, EU:C:2004:802, paragraph 33; and *Germany* v *Parliament and Council*, C-380/03, EU:C:2006:772, paragraph 41).

63 It is also to be observed that, by using the words 'measures for the approximation' in Article 114 TFEU, the authors of the Treaty intended to confer on the EU legislature a discretion, depending on the general context and the specific circumstances of the matter to be harmonised, as regards the method of approximation most appropriate for achieving the desired result, in particular in fields with complex technical features (judgments in *Germany* v *Parliament and Council*, C-380/03, EU:C:2006:772, paragraph 42, and *United Kingdom* v *Parliament and Council*, C-270/12, EU:C:2014:18, paragraph 102). It was thus open to the EU legislature, in the exercise of that discretion, to proceed towards harmonisation only in stages and to require only the gradual abolition of unilateral measures adopted by the Member States (judgment in *Rewe-Zentral*, 37/83, EU:C:1984:89, paragraph 20).

64 Depending on the circumstances, the measures referred to in Article 114(1) TFEU may consist in requiring all the Member States to authorise the marketing of the product or products concerned, subjecting such an obligation of authorisation to certain conditions, or even provisionally or definitively prohibiting the marketing of a product or products (judgments in *Arnold André*, C-434/02, EU:C:2004:800, paragraph 35; *Swedish Match*, C-210/03, EU:C:2004:802, paragraph 34; and *Germany* v *Parliament and Council*, C-380/03, EU:C:2006:772, paragraph 43).

65 The question whether the conditions for recourse to Article 114 TFEU as a legal basis for the provisions of Directive 2014/40 covered by Question 1 were met must be determined in the light of those principles.

Question 1(a)

66 By Question 1(a) the referring court asks, in essence, whether Article 24(2) of Directive 2014/40 must be interpreted as permitting Member States to adopt rules in relation to the standardisation of the packaging of tobacco products which are more stringent than those provided for by the directive and whether, in light of that interpretation, Article 24(2) is invalid because Article 114 TFEU does not provide an adequate legal basis for it.

67 Under Article 24(1) of Directive 2014/40, Member States may not, for considerations relating to aspects regulated by the directive, and subject to paragraphs 2 and 3 of Article 24, prohibit or restrict the placing on the market of tobacco or related products which comply with the directive. According to Article 24(2), Directive 2014/40 is not to affect the right of a Member State to maintain or introduce, under certain conditions, 'further requirements, applicable to all products placed on its market, in relation to the standardisation of the packaging of tobacco products'.

68 The claimants in the main proceedings, Ireland, the United Kingdom Government and the Norwegian Government submit that Article 24(2) of Directive 2014/40 permits the Member States to maintain or introduce further requirements in relation to all matters relating to the packaging of tobacco products, regardless of whether or not such matters are regulated by the directive. On the other hand, the Portuguese Government, the Parliament, the Council and the Commission take the view that that power can extend only to the aspects of packaging which have not been harmonised by the directive.

69 It must be observed in this regard that Article 24(2) of Directive 2014/40 may in fact lend itself to several interpretations, and consequently the precise extent of the power granted to the Member States is not entirely unambiguous. First, the directive does not contain a definition of the expressions 'further requirements' and 'standardisation', which are used in Article 24(2). Secondly, Article 24(2) does not indicate whether or not that power extends to aspects of the packaging of tobacco products which have been harmonised by Directive 2014/40.

70 The Court has consistently held that, if the wording of secondary law is open to more than one interpretation, preference should be given to the interpretation which renders the provision consistent with the Treaty rather than to the interpretation which leads to its being incompatible with the Treaty (see, inter alia, judgment in *Ordre des barreaux francophones et germanophone and Others*, C-305/05, EU:C:2007:383, paragraph 28).

71 If Article 24(2) of Directive 2014/40 were interpreted as permitting Member States to maintain or introduce further requirements in relation to all aspects of the packaging of tobacco products, including those which have been harmonised by the directive, that would amount, in essence, to undermining the harmonisation effected by the directive with regard to the packaging of those products. Indeed, the consequence of such an interpretation would be to permit Member States to replace the requirements relating to packaging which have been harmonised by the directive with other requirements, introduced at national level, and to do so in breach of the rules laid down in Article 114(4) to (10) TFEU relating to the retention and introduction of national provisions derogating from a harmonisation measure.

72 Such an interpretation would render Article 24(2) of Directive 2014/40 incompatible with Article 114 TFEU.

73 However, Article 24(2) of Directive 2014/40 may also be interpreted as meaning that it permits Member States to maintain or introduce further requirements only in relation to aspects of the standardisation of the packaging of tobacco products which have not been harmonised by the directive. Whilst it is true that the wording of Article 24(2) does not contain a specific statement to that effect, the fact remains that such an interpretation is consonant with the objective and general scheme of the directive.

74 It is clear from Article 1(b) of Directive 2014/40 that the objective of the directive is to approximate the laws, regulations and administrative provisions of the Member States concerning 'certain' aspects of the labelling and packaging of tobacco products. It follows that the directive is not intended to harmonise all aspects of the labelling and packaging of those products.

75 That conclusion is borne out by Article 28(2)(a) of Directive 2014/40, which provides that, when the Commission prepares the report referred to in Article 28(1) of the directive, it is to pay special attention to, amongst other things, the 'experience gained with respect to the design of package surfaces not governed by [the] directive'.

76 Recital 53 of Directive 2014/40 states in this connection that, in light of the different degrees of harmonisation achieved by the directive, the Member States should retain the power to impose further requirements relating, for example, to the colours of the packaging of tobacco products or to provide for the further standardisation of that packaging. There is nothing in the directive which provides for, or prohibits, such standardisation and nor is there a provision that regulates the colours of the packaging of tobacco products, without prejudice to the requirements set out in Article 13 of the directive.

77 Furthermore, it follows from the general scheme of Directive 2014/40 that the latter does not bring about full harmonisation in relation to the manufacture, presentation and sale of tobacco products and related products. That is borne out by, inter alia, recitals 47 and 48 of the directive, which refer to a number of aspects that are not governed by it. Similarly, recital 55 of the directive states that Member States should remain free to maintain or introduce national laws applying to all products placed on their national markets 'for aspects not regulated by [the] directive'.

78 Consideration must therefore thus be given to whether the interpretation of Article 24(2) of Directive 2014/40 proposed in paragraph 73 of this judgment renders that provision compatible with Article 114 TFEU.

79 Admittedly, by permitting Member States to maintain or introduce further requirements relating to aspects of packaging that have not been harmonised by Directive 2014/40, Article 24(2) does not guarantee that products whose packaging complies with the requirements of the directive may move freely on the internal market.

80 However, that is the inevitable consequence of the method of harmonisation chosen by the EU legislature in the present case. As has been recalled in paragraph 63 of this judgment, the EU legislature has a discretion, in particular with regard to the possibility of proceeding towards harmonisation only in stages and requiring only the gradual abolition of unilateral measures adopted by the Member States.

81 As the Advocate General has observed in point 119 of her Opinion, a measure for partial harmonisation in relation to the labelling and packaging of tobacco products, such as the harmonisation achieved by Directive 2014/40, undeniably offers advantages for the functioning of the internal market, since, whilst it does not eliminate all obstacles to trade, it does eliminate some.

82 In contrast to the directive at issue in the case that gave rise to the judgment in *Germany* v *Parliament and Council* (C-376/98, EU:C:2000:544), paragraph 1 of Article 24 of Directive 2014/40 read in conjunction with paragraph 2 thereof, as it has been interpreted in paragraph 73 of this judgment, forbids the Member States from preventing, on grounds relating to the aspects of packaging harmonised by that directive, the import, sale or consumption of tobacco products which comply with the requirements laid down by the directive. Those provisions thus play a part in achieving the objective of improving the conditions for the functioning of the internal market and are therefore compatible with Article 114 TFEU (see, by analogy, judgment in *British American Tobacco (Investments) and Imperial Tobacco*, C-491/01, EU:C:2002:741, paragraph 74).

83 It follows that an interpretation of Article 24(2) of Directive 2014/40 to the effect that it permits the Member States to maintain or introduce further requirements solely in relation to aspects of the packaging of tobacco products that are not harmonised by the directive renders Article 24(2) consistent with Article 114 TFEU. Therefore, applying the case-law cited in paragraph 70 of this judgment, the Court accepts that interpretation.

84 In the light of the foregoing considerations, the answer to Question 1(a) is as follows:

— Article 24(2) of Directive 2014/40 must be interpreted as permitting Member States to maintain or introduce further requirements in relation to aspects of the packaging of tobacco products which are not harmonised by that directive;

— consideration of that question has disclosed no factor of such a kind as to affect the validity of that provision.

Question 1(b)

85 By Question 1(b), the referring court asks whether Article 24(3) of Directive 2014/40 is invalid because Article 114 TFEU does not constitute an adequate legal basis for that provision.

86 Article 24(3) of Directive 2014/40 provides, inter alia, that a Member State may prohibit a ‘certain category’ of tobacco or related products, on grounds relating to the specific situation in that Member State and provided the provisions are justified by the need to protect public health, taking into account the high level of protection of human health achieved through that directive.

87 It is true that by permitting the Member States to prohibit a certain category of tobacco or related products even though they comply with the requirements of Directive 2014/40, Article 24(3) of the directive is capable of impeding the free movement of those products.

88 However, Directive 2014/40 is not intended to interfere with the policies of the Member States concerning the lawfulness of tobacco products as such.

89 Indeed, recital 48 of Directive 2014/40 makes clear that the directive 'does not harmonise the rules on smoke-free environments'. Such rules could extend from a prohibition on smoking in certain places to a prohibition on the placing on the market of an entire category of tobacco products.

90 It follows that Article 24(3) of Directive 2014/40 concerns an aspect which is not covered by the harmonisation measures in the directive and which is not, therefore, to be subject to the rules laid down in Article 114(4) to (10) TFEU relating to the introduction of national measures derogating from a harmonisation measure.

91 Article 24(3) of Directive 2014/40, read in conjunction with paragraph 1 of that article, thus seeks to delineate the scope of the directive by clarifying that tobacco and related products which comply with the requirements laid down by the directive may move freely on the internal market, provided that those products belong to a category of tobacco products or related products which is, as such, lawful in the Member State in which they are marketed.

92 It should be made clear in this regard that the EU legislature may properly decide to include, in a legislative measure adopted on the basis of Article 114 TFEU, provisions intended to set out the issues which are not the subject of the harmonising measures adopted, particularly since Article 24(3) of Directive 2014/40 lays down conditions and a mechanism intended to guard against arbitrary discrimination or disguised restrictions on trade between the Member States, in the interest of the smooth functioning of the internal market which underpins Article 114 TFEU.

93 The Court must also reject the argument based on the alleged inconsistency between Article 24(3) of Directive 2014/40 and Article 7 thereof, which is said to result from the fact that, on the one hand, the objective of the prohibition on characterising flavours laid down in Article 7 is to abolish disparities between the rules of the Member States, while, on the other, Article 24(3) facilitates the emergence of such disparities.

94 That argument is, in fact, based on a misunderstanding of the relationship between Article 7 and Article 24(3) of Directive 2014/40. Those provisions, without being in any way contradictory, are complementary. In prohibiting tobacco products with a characterising flavour, Article 7 of the directive seeks to eliminate disparities existing in that respect between the rules of the Member States, in order, in particular, to ensure the free movement of tobacco products in general. Under Article 24(1) of Directive 2014/40, those products, where they comply with, inter alia, Article 7, enjoy freedom of movement on the internal market as long as the category of tobacco products to which they belong is not — as follows from Article 24(3) of the directive — prohibited, as such, in the Member State in which they are marketed.

95 Having regard to the foregoing, consideration of Question 1(b) has disclosed no factor of such a kind as to affect the validity of Article 24(3) of Directive 2014/40.

Question 1(c)

96 By Question 1(c), the referring court asks whether the provisions of Chapter II of Title II of Directive 2014/40, and Articles 7 and 18 thereof, are invalid because Article 114 TFEU does not constitute an adequate legal basis for those provisions.

– Question 1(c)(i)

97 The grounds of invalidity raised in the order for reference with regard to the provisions of Chapter II (entitled 'Labelling and packaging') of Title II of Directive 2014/40 concern, in the first place, the alleged absence of any actual or likely divergences between national rules concerning the labelling and packaging of tobacco products which are liable to hinder the free movement of those products. Existing differences are said to be driven, not by such divergences in rules, but rather by the manufacturers' commercial strategy of tailoring the packaging and labelling of their products to consumer preferences, which vary from one Member State to another.

98 It must be noted in this regard that it is apparent from recitals 22, 23 and 28 of Directive 2014/40 and from the impact assessment of 19 December 2012, drawn up by the Commission and accompanying the Proposal for a Directive of the European Parliament and of the Council on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products (SWD(2012) 452 final, Part 1, p. 30 et seq.), that there were, when Directive 2014/40 was adopted, significant disparities between national rules on the labelling and packaging of tobacco products. Whilst, inter alia, some Member States prescribed combined health warnings consisting in a picture and text, others required text warnings only. In addition, there were disparities at national level in the size of cigarette packets, the minimum number of cigarettes per unit packet and the advertising allowed on those units.

99 Moreover, as is stated in recitals 23 and 24 of Directive 2014/40, in the absence of further action at EU level, those disparities were likely to increase in the years to come, in view in particular of the need to adapt the rules on labelling to relevant international developments, such as the developments mentioned in the FCTC guidelines on the packaging and labelling of tobacco products.

100 Given that the market for tobacco products is one in which trade between Member States represents a relatively large part, national rules laying down the requirements to be met by those products, in particular requirements relating to their designation, composition or labelling, are in themselves liable, in the absence of harmonisation at EU level, to constitute obstacles to the free movement of goods (see, to that effect, judgment in *British American Tobacco (Investments) and Imperial Tobacco*, C-491/01, EU:C:2002:741, paragraph 64).

101 In accordance with the case-law cited in paragraph 62 of this judgment, when there are obstacles to trade, or it is likely that such obstacles will emerge in the future, because the Member States have taken, or are about to take, divergent measures with respect to a product or a class of products, which bring about different levels of protection and thereby prevent the product or products concerned from moving freely within the European Union, Article 114 TFEU authorises the EU legislature to take action.

102 In the second place, the validity of the provisions of Chapter II of Title II of Directive 2014/40 is challenged on the ground that those provisions do not contribute to the elimination of obstacles to the free movement of tobacco products, since some of them require, in any event, that the manufacturers produce different packaging for each Member State. That is the case, in particular, of rules concerning tax stamps, which are different for each Member State, and of rules relating to health warnings, which must appear in the official language(s) of the Member State in which the product is marketed.

103 Whilst it is true that some provisions of Chapter II of Title II of Directive 2014/40 require that certain elements of the labelling and packaging of tobacco products are adapted to take account of, amongst other things, the official language(s) or the tax legislation of the Member State of marketing, the fact remains that the directive harmonises other elements of the labelling and packaging of those products, such as the shape of the unit packets, the minimum number of cigarettes per unit packet and the size

and combined nature of health warnings. As the Advocate General has observed in point 98 of her Opinion, those measures thus contribute to the removal of obstacles to trade, since they allow the undertakings concerned to reduce costs through economies of scale.

104 As regards, in the third place, the argument that the provisions of Chapter II of Title II of Directive 2014/40 are liable to introduce distortions of competition by reducing the ability of the manufacturers to differentiate their products, the Court finds that it relates to observance of the principle of proportionality, with which Question 3(b) and (c) is concerned.

105 It follows from the foregoing that consideration of Question 1(c)(i) has disclosed no factor of such a kind as to affect the validity of the provisions of Chapter II of Title II of Directive 2014/40.

– Question 1(c)(ii)

106 According to the order for reference, the validity of Article 7 of Directive 2014/40, which prohibits the placing on the market of tobacco products with a characterising flavour, is challenged on the ground, first, that there are no actual or likely divergences between Member States' rules as regards, in particular, the use of menthol which are such as to create obstacles to trade.

107 That argument concerns specifically the use of menthol as a characterising flavour rather than the use of all the flavours covered by that prohibition. The argument is based on the premiss that Article 114 TFEU requires the EU legislature to establish the existence of actual or likely divergences between the rules of the Member States relating to the placing on the market of tobacco products containing menthol in particular.

108 It must, however, be noted in this regard that the EU legislature decided to adopt uniform rules for all tobacco products containing a characterising flavour. It thus took the view, as can be seen from recital 16 of Directive 2014/40, that those products could facilitate initiation of tobacco consumption or affect consumption patterns.

109 In addition, the EU legislature took into account, as recital 15 of the directive confirms, the Partial Guidelines for Implementation of Articles 9 and 10 of the FCTC, which call in particular for the removal of ingredients that increase palatability, create the impression that tobacco products have health benefits, are associated with energy and vitality or have colouring properties.

110 It must be stated in this connection that those partial guidelines likewise do not draw any distinction between the various flavourings that may be added to tobacco products. On the contrary, Section 3.1.2.2 of the partial guidelines recommends that Parties should regulate, by prohibiting or restricting, ingredients that may be used to increase palatability in tobacco products. In this regard, reference is explicitly made in that section to menthol as a flavour which masks tobacco smoke harshness and contributes to promoting and sustaining tobacco use.

111 Whilst it is correct that the FCTC guidelines do not have binding force, they are intended, in accordance with Articles 7 and 9 of the FCTC, to assist the Contracting Parties in implementing the binding provisions of that convention.

112 Furthermore, those guidelines are based on the best available scientific evidence and the experience of the Parties to the FCTC, as can be seen from Section 1.1 of the guidelines, and have been adopted by consensus, including by the European Union and its Member States, as is stated in recital 7 of Directive 2014/40.

113 Accordingly, the recommendations thus drawn up are intended to have a decisive influence on the content of the rules adopted in the area under consideration, as is confirmed by the EU legislature's express decision to take those recommendations into account when adopting Directive 2014/40, mention of which is made in recitals 7 and 15 of the directive.

114 It follows that tobacco products containing a characterising flavour, whether that is menthol or another flavouring, have certain similar, objective characteristics and similar effects as regards initiating tobacco consumption and sustaining tobacco use.

115 That being so, the EU legislature could properly make all characterising flavours subject to the same set of legal rules.

116 Accordingly, for Article 114 TFEU to be capable of constituting an adequate legal basis for Article 7 of Directive 2014/40, it is sufficient to establish that divergences exist between the national rules concerning tobacco products containing a characterising flavour, as a whole, which are such as to present obstacles to the free movement of those products, or that it is likely that such divergences will emerge in the future.

117 As regards, in the second place, the argument that the prohibition laid down in Article 7 of Directive 2014/40 does not have as its object facilitation of the smooth functioning of the internal market, it should be noted that, as is apparent from both recital 15 of the directive and the impact assessment referred to in paragraph 98 of this judgment (Part 1, p. 34, and Part 4, p. 6 et seq.), there were, when the directive was adopted, significant discrepancies between the regulatory systems of the Member States, given that some of them had established different lists of permitted or prohibited flavourings, whilst others had not adopted any specific rules on the matter.

118 In addition, it seems likely that, in the absence of any measures at EU level, disparate sets of rules applying to tobacco products containing a characterising flavour, including menthol, would have been implemented at national level.

119 Indeed, as has been stated in paragraph 110 of this judgment, the Partial Guidelines for Implementation of Articles 9 and 10 of the FCTC recommend that the Parties to that framework convention 'regulate, by prohibiting or restricting, ingredients that may be used to increase palatability in tobacco products', including menthol.

120 As a result of the broad discretion thus afforded to the Contracting Parties by those partial guidelines, it is foreseeable, with a sufficient degree of probability, that in the absence of measures at EU level, the relevant national rules could develop in divergent ways, including with regard to the use of menthol.

121 Article 7 of Directive 2014/40, in prohibiting the placing on the market of tobacco products with a characterising flavour, guards precisely against such divergences in the rules of the Member States.

122 According to the case-law cited in paragraph 59 of this judgment, recourse to Article 114 TFEU as a legal basis is possible if the aim is to prevent the emergence of future obstacles to trade as a result of divergences in national laws, when the emergence of such obstacles is likely and the harmonisation measure adopted is designed to prevent them.

123 Furthermore, as has already been stated in paragraph 100 of this judgment, the market for tobacco products is one in which trade between Member States represents a relatively large part and, therefore, national rules laying down the requirements to be met by those products, in particular requirements relating to their composition, are in themselves liable, in the absence of harmonisation at EU level, to constitute obstacles to the free movement of goods.

124 It should also be recalled that, according to the case-law cited in paragraph 64 of this judgment, the measures that may be adopted on the basis of Article 114 TFEU can consist, inter alia, in prohibiting, provisionally or definitively, the marketing of a product or products.

125 It follows that removing divergences between the national rules concerning the composition of tobacco products, or preventing those rules from developing in divergent ways, including by means of an EU-wide prohibition of certain additives, is intended to facilitate the smooth functioning of the internal market for the products concerned.

126 Having regard to the foregoing, consideration of Question 1(c)(ii) has disclosed no factor of such a kind as to affect the validity of Article 7 of Directive 2014/40.

– Question 1(c)(iii)

127 According to the order for reference, the validity of Article 18 of Directive 2014/40 is challenged on the ground that the provision does not contribute to improving the functioning of the internal market but, instead, facilitates the emergence of disparities between national rules, with the result that Article 114 TFEU does not provide an adequate legal basis for Article 18 of the directive.

128 Article 18 of Directive 2014/40 provides, on the one hand, that Member States may prohibit cross-border distance sales of tobacco products to consumers and, on the other, imposes a series of common rules on Member States which permit that method of sale.

129 The rationale behind Article 18 is apparent from recital 33 of Directive 2014/40, according to which cross-border distance sales of tobacco products, first, could facilitate access to tobacco products that do not comply with the directive and, second, entail an increased risk of young people getting access to those products.

130 That provision thus seeks to ensure that the rules on conformity laid down by Directive 2014/40 are not circumvented, whilst taking as a basis a high level of human health protection, especially for young people.

131 The Court has already had occasion to point out that an EU measure adopted on the basis of Article 114 TFEU may incorporate provisions whose purpose is to ensure that requirements aimed at improving the conditions for the functioning of the internal market are not circumvented (see, to that effect, judgments in *Germany* v *Parliament and Council*, C-376/98, EU:C:2000:544, paragraph 100, and *British American Tobacco (Investments) and Imperial Tobacco*, C-491/01, EU:C:2002:741, paragraph 82).

132 As to the objection that Article 18 of Directive 2014/40 would result in the emergence of disparities between the relevant national rules because some Member States might decide to prohibit cross-border distance sales, whilst others might continue to allow them, the Court observes that the rules relating to cross-border distance sales of tobacco products had not been the subject of harmonising measures at EU level prior to the adoption of that directive. Consequently, Member States were already applying different rules in respect of this type of sale, as is shown by the impact assessment referred to in paragraphs 98 and 117 of this judgment (Part 4, p. 8). The argument that Article 18 of the directive will give rise to such disparities therefore cannot be accepted.

133 Furthermore, as has been stated in paragraph 128 of this judgment, Article 18 also sets forth a series of common rules that apply to all the Member States which do not prohibit those sales, thereby approximating their laws, regulations or administrative provisions in the matter, within the meaning of Article 114 TFEU.

134 It should be recalled in this regard that, in accordance with the case-law cited in paragraph 63 of this judgment, Article 114 TFEU confers a discretion on the EU legislature, in particular with regard to the possibility of proceeding towards harmonisation only in stages and requiring only the gradual abolition of unilateral measures adopted by the Member States.

135 Accordingly, within the bounds of that discretion, the legislature could properly harmonise certain aspects of cross-border sales of tobacco products, whilst leaving other aspects of such sales to be determined by Member States.

136 It follows from the foregoing that consideration of Question 1(c)(iii) has disclosed no factor of such a kind as to affect the validity of Article 18 of Directive 2014/40.

Question 2

137 By Question 2 the referring court asks, in essence, whether Article 13(1) of Directive 2014/40 must be interpreted as prohibiting the display on the labelling of unit packets and on the outside packaging, as well as on the tobacco product itself, of certain information, although that information is factually accurate, and, if that is the case, whether Article 13(1) is invalid because it infringes Article 11 of the Charter and the principle of proportionality.

The interpretation of Article 13(1) of Directive 2014/40

138 Article 13(1) of Directive 2014/40 prohibits, in essence, the inclusion on the labelling of unit packets and on the outside packaging, as well on the tobacco product itself, of any element or feature that is such as to promote a tobacco product or encourage its consumption.

139 It is important to point out in this regard that such promotion or encouragement may result from certain information or claims, even when these are factually accurate.

140 For example, under Article 13(1)(a) of Directive 2014/40 'labels shall not include any information about the nicotine, tar or carbon monoxide content of the tobacco product'. That provision thus clearly attributes no importance to the question of whether or not this type of information is factually accurate. That indifference is due to the fact, explained in recital 25 of the directive, that indications of this type may be misleading in that they lead consumers to believe that certain cigarettes are less harmful than others.

141 Likewise, the prohibitions of any element or feature (i) suggesting that a particular tobacco product is less harmful than others (Article 13(1)(b) of Directive 2014/40), or (ii) referring to taste, smell, any flavourings or other additive (Article 13(1)(c) of the directive), or (iii) suggesting that a certain tobacco product has improved biodegradability or other environmental advantages (Article 13(1)(e) of the directive), also apply irrespective of whether the claims in question are factually accurate.

142 As is stated in recital 27 of Directive 2014/40, certain words or expressions, such as 'low-tar', 'light', 'ultra-light', 'natural', 'organic', 'without additives', 'without flavours' or 'slim', and other elements or features could mislead consumers, in particular young people, by suggesting that the products concerned are less harmful or that they have beneficial effects.

143 That interpretation is consistent with the objective pursued by Directive 2014/40, which is, in accordance with Article 1 thereof, to facilitate the smooth functioning of the internal market for tobacco and related products, taking as a base a high level of protection of human health, especially for young people.

144 A high level of protection of that kind requires that consumers of tobacco products, who are a particularly vulnerable class of consumers because of the addictive effects of nicotine, should not be encouraged to consume those products by means of, albeit factually accurate, information, which they may interpret as meaning that the risks associated with their habits are reduced or that the products have certain benefits.

145 Consequently, Article 13(1) of Directive 2014/40 must be interpreted as prohibiting the display, on the labelling of unit packets and on the outside packaging, as well as on the tobacco product itself, of any information covered by that provision, even if the information concerned is factually accurate.

The validity of Article 13(1) of Directive 2014/40

146 The referring court asks the Court to examine the validity of Article 13(1) of Directive 2014/40 in the light of Article 11 of the Charter and the principle of proportionality.

147 Article 11 of the Charter affirms the freedom of expression and information. That freedom is also protected under Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, which applies, in particular, as is clear from the case-law of the European Court of Human Rights, to the dissemination by a business of commercial information, including in the form of advertising. Given that the freedom of expression and information laid down in Article 11 of the Charter has — as is clear from Article 52(3) thereof and the Explanations Relating to the Charter as regards Article 11 — the same meaning and scope as the freedom guaranteed by the Convention, it must be held that that freedom covers the use by a business, on the packaging and labelling of tobacco products, of indications such as those covered by Article 13(1) of Directive 2014/40 (judgment in *Neptune Distribution*, C-157/14, EU:C:2015:823, paragraphs 64 and 65).

148 The prohibition on including on the labelling of unit packets and on outside packaging, as well as on the tobacco product itself, the elements and features referred to in Article 13(1) of Directive 2014/40 constitutes, it is true, an interference with a business's freedom of expression and information.

149 In accordance with Article 52(1) of the Charter, any limitation on the exercise of the rights and freedoms laid down by the Charter must be provided for by law and respect the essence of those rights and freedoms and, in compliance with the principle of proportionality, is permissible only if it is necessary and actually meets objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others.

150 In that regard, the Court finds, first, that the interference identified in paragraph 148 of this judgment must be regarded as being provided for by law given that it results from a provision adopted by the EU legislature.

151 Secondly, the essence of a business's freedom of expression and information is not affected by Article 13(1) of Directive 2014/40 inasmuch as that provision, far from prohibiting the communication of all information about the product, merely controls, in a very clearly defined area, the labelling of those products by prohibiting only the inclusion of certain elements and features (see, by analogy, judgments in *Deutsches Weintor*, C-544/10, EU:C:2012:526, paragraph 57, and *Neptune Distribution*, C-157/14, EU:C:2015:823, paragraph 71).

152 Thirdly, the interference with the freedom of expression and information that has been found to exist meets an objective of general interest recognised by the European Union, namely, the protection of health. Given that it is undisputed that tobacco consumption and exposure to tobacco smoke are

causes of death, disease and disability, the prohibition laid down in Article 13(1) of Directive 2014/40 contributes to the achievement of that objective in that it is intended to prevent the promotion of tobacco products and incitements to use them.

153 Fourthly, as regards the proportionality of the interference found, it is important to point out that the second sentence of Article 35 of the Charter and Articles 9 TFEU, 114(3) TFEU and 168(1) TFEU require that a high level of human health protection be ensured in the definition and implementation of all the Union's policies and activities.

154 In those circumstances, the determination of the validity of Article 13(1) of Directive 2014/40 must be carried out in accordance with the need to reconcile the requirements of the protection of those various fundamental rights and legitimate general interest objectives, protected by the EU legal order, and striking a fair balance between them (see, to that effect, judgment in *Neptune Distribution*, C-157/14, EU:C:2015:823, paragraph 75).

155 It should be stated in that regard that the discretion enjoyed by the EU legislature, in determining the balance to be struck, varies for each of the goals justifying restrictions on that freedom and depends on the nature of the activities in question. In the present case, the claimants in the main proceedings rely, in essence, under Article 11 of the Charter, on the freedom to disseminate information in pursuit of their commercial interests.

156 It must, however, be stated that human health protection — in an area characterised by the proven harmfulness of tobacco consumption, by the addictive effects of tobacco and by the incidence of serious diseases caused by the compounds those products contain that are pharmacologically active, toxic, mutagenic and carcinogenic — outweighs the interests put forward by the claimants in the main proceedings.

157 Indeed, as is apparent from the second sentence of Article 35 of the Charter and Articles 9 TFEU, 114(3) TFEU and 168(1) TFEU, a high level of human health protection must be ensured in the definition and implementation of all the European Union's policies and activities.

158 The Court finds, in the light of the foregoing, (i) that the prohibition laid down in Article 13(1) of Directive 2014/40 is such as to protect consumers against the risks associated with tobacco use, as follows from paragraph 152 of this judgment, and (ii) that that prohibition does not go beyond what is necessary in order to achieve the objective pursued.

159 On this point, the Court cannot accept the argument that the prohibition concerned is not necessary because consumer protection is already adequately ensured by the mandatory health warnings mentioning the risks associated with tobacco use. In fact, awareness of those risks may, on the contrary, be diminished by information that might suggest that the product concerned is less harmful or is beneficial in some respects.

160 Nor can the Court accept the argument that the objective pursued could be achieved by other, less restrictive measures, such as regulating the use of the elements and features referred to in Article 13 of Directive 2014/40, instead of prohibiting them, or adding certain supplementary health warnings. Such measures would not be as effective for ensuring the protection of consumers' health, since the elements and features referred to in Article 13 are, by their very nature, likely to encourage smoking (see, to that effect, judgment in *British American Tobacco (Investments) and Imperial Tobacco*, C-491/01, EU:C:2002:741, paragraph 140). It cannot be accepted that those elements and features may be included for the purpose of giving consumers clear and precise information, inasmuch as they are intended more to exploit the vulnerability of consumers of tobacco products who, because of their nicotine dependence, are particularly receptive to any element suggesting there may be some kind of benefit linked to tobacco consumption, in order to vindicate or reduce the risks associated with their habits.

161 In those circumstances, it must be held that, in prohibiting the placing, on the labelling of unit packets and on the outside packaging, as well as on the tobacco product itself, of the elements and features referred to in Article 13(1) of Directive 2014/40, even when they include factually accurate information, the EU legislature did not fail to strike a fair balance between the requirements of the protection of the freedom of expression and information and those of human health protection.

162 Accordingly, Article 13(1) of Directive 2014/40 does not infringe either Article 11 of the Charter or the principle of proportionality.

163 Having regard to the foregoing, consideration of Question 2 has disclosed no factor of such a kind as to affect the validity of Article 13(1) of Directive 2014/40.

Question 3

164 By Question 3, the referring court asks whether Articles 7(1) and (7), 8(3), 9(3), 10(1)(a), (c) and (g) and 14 of Directive 2014/40 are invalid because they infringe the principle of proportionality.

165 According to settled case-law, that principle requires that acts of the EU institutions be appropriate for attaining the legitimate objectives pursued by the legislation at issue and do not exceed the limits of what is necessary in order to achieve those objectives; when there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued (see, to that effect, judgments in *British American Tobacco (Investments) and Imperial Tobacco*, C-491/01, EU:C:2002:741, paragraph 122; *ERG and Others*, C-379/08 and C-380/08, EU:C:2010:127, paragraph 86; and *Gauweiler and Others*, C-62/14, EU:C:2015:400, paragraphs 67 and 91).

166 With regard to judicial review of the conditions referred to in the previous paragraph of this judgment, the EU legislature must be allowed broad discretion in an area such as that involved in the main proceedings, which entails political, economic and social choices on its part, and in which it is called upon to undertake complex assessments. Consequently, the legality of a measure adopted in that area can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institutions are seeking to pursue (see, to that effect, judgment in *British American Tobacco (Investments) and Imperial Tobacco*, C-491/01, EU:C:2002:741, paragraph 123).

167 The question whether the provisions of Directive 2014/40 to which Question 3 refers infringe the principle of proportionality must be determined in the light of those principles.

Question 3(a)

168 Question 3(a) concerns the validity of Article 7(1) and (7) of Directive 2014/40 in the light of the principle of proportionality. Those provisions prohibit the placing on the market of tobacco products with a characterising flavour or containing flavourings in any of their components such as filters, papers, packages, capsules or any technical features allowing modification of the smell or taste of the tobacco products concerned or their smoke intensity.

169 According to the order for reference, the validity of those provisions is challenged on the ground that the prohibition on the use of menthol is neither appropriate nor necessary to achieve the directive's objective and that the impact of the prohibition is disproportionate.

170 As regards, in the first place, the suitability of the prohibition on the placing on the market of tobacco products containing menthol, it is argued, in essence, that the prohibition is not appropriate for achieving the objective of protecting human health, especially as regards young people, because menthol is not attractive to them and its use consequently does not facilitate initiation of tobacco consumption.

171 It should be recalled in this regard that the objective of Directive 2014/40 is, according to Article 1 thereof, twofold in that it seeks to facilitate the smooth functioning of the internal market for tobacco and related products, taking as a base a high level of protection of human health, especially for young people.

172 On this point, it must be stated that, as follows from paragraph 125 of this judgment, the prohibition on the placing on the market of tobacco products with a characterising flavour is capable of facilitating the smooth functioning of the internal market for tobacco and related products.

173 That prohibition is also appropriate for ensuring a high level of human health protection, especially for young people. Indeed, it is not disputed that certain flavourings are particularly attractive to young people and that they facilitate initiation of tobacco consumption.

174 As regards the argument that young people are not attracted to menthol and that the use thereof does not facilitate that initiation, it has already been stated in paragraph 115 of this judgment that the EU legislature could properly make all characterising flavours subject to the same set of legal rules. Accordingly, the appropriateness of the prohibition in question for the purpose of achieving the object of human health protection cannot be called into question solely in respect of a particular flavouring.

175 The point should also be made that, according to the Partial Guidelines for Implementation of Articles 9 and 10 of the FCTC — which should, on account of the findings made in paragraph 112 of this judgment — be recognised as being of particularly high evidential value, menthol, amongst other flavours, contributes to promoting and sustaining tobacco use and, because of its palatability, renders tobacco products more attractive to consumers.

176 Furthermore, Directive 2014/40 is aimed at ensuring a high level of health protection for consumers as a whole and consequently its ability to achieve that aim cannot be assessed solely in relation to a single category of consumers.

177 Accordingly, the prohibition laid down in Article 7 of Directive 2014/40 cannot be regarded as manifestly inappropriate for achieving the objective of facilitating the smooth functioning of the internal market for tobacco and related products, taking as a base a high level of protection of human health, especially for young people.

178 With regard, in the second place, to whether that prohibition is necessary, it should be borne in mind, first, that, as has already been stated in paragraph 110 of this judgment, the Partial Guidelines for Implementation of Articles 9 and 10 of the FCTC recommend that the Parties to the FCTC, inter alia, prohibit ingredients that may be used to increase palatability in tobacco products. In addition, in accordance with Section 1.1 of those partial guidelines, the Parties to the FCTC are encouraged to implement measures beyond those recommended by the guidelines.

179 It was thus lawful for the EU legislature — taking account of those recommendations and in the exercise of its broad discretion — to impose a prohibition on all characterising flavours.

180 Secondly, as regards the less restrictive measures advocated by some of the parties to the main proceedings, they do not appear to be equally suitable for achieving the objective pursued.

181 Raising — solely in respect of tobacco products with a characterising flavour — the age limit from which their consumption is permitted is unlikely to reduce the attractiveness of those products and thus prevent persons above that age from starting smoking. In addition, any prohibition on sale resulting from an increase in that age limit can, in any event, be easily circumvented when the products concerned are marketed.

182 The organisation of targeted information campaigns on the danger of tobacco products with characterising flavours is not, as such, likely to remove divergences between national rules relating to the placing on the market of such products and thus improve the conditions for the functioning of the internal market.

183 So far as the adoption of lists of prohibited or permitted flavourings is concerned, such a measure could result in the introduction of unjustified differences of treatment between the various types of tobacco products with a characterising flavour. Moreover, such lists may quickly become out of date because of continuing developments in the manufacturers' commercial strategies and are readily susceptible to circumvention.

184 The Court therefore finds that the prohibition on the placing on the market of tobacco products with a characterising flavour does not go manifestly beyond what is necessary to achieve the objective sought.

185 As regards, in the third place, the allegedly disproportionate effects of the prohibition on the use of menthol as a characterising flavour because of the negative economic and social consequences that such a prohibition entails, it should be borne in mind that even though, as in the present case, the EU legislature has a broad legislative power, it must base its choice on objective criteria and examine whether objectives pursued by the measure chosen are such as to justify even substantial negative economic consequences for certain operators (see, to that effect, judgment in *Luxembourg* v *Parliament and Council*, C-176/09, EU:C:2011:290, paragraph 63 and the case-law cited).

186 Indeed, under Article 5 of Protocol (No 2) on the application of the principles of subsidiarity and proportionality, annexed to the EU Treaty and to the FEU Treaty, draft legislative acts must take account of the need for any burden falling upon economic operators to be minimised and commensurate with the objective to be achieved.

187 In the present case, the EU legislature made sure that the negative economic and social consequences of the prohibition on the placing on the market of tobacco products with a characterising flavour were limited.

188 Thus, first, in order to give both the tobacco industry and consumers time to adapt, Article 7(14) of Directive 2014/40 provides that, in the case of tobacco products with a characterising flavour whose EU-wide sales volumes represent 3% or more in a particular product category, the prohibition on the placing of those products on the EU market is to apply only from 20 May 2020.

189 Second, it can be seen from the impact assessment referred to in paragraphs 98, 117 and 132 of this judgment (Part 1, p. 114, and Part 6, p. 2), which is not disputed on this point, that the prohibition in question is expected to result in a decrease in cigarette consumption in the European Union of 0.5% to 0.8% over a five-year period.

190 Those elements show that the EU legislature weighed up, on the one hand, the economic consequences of that prohibition and, on the other, the requirement to ensure, in accordance with the second sentence of Article 35 of the Charter and Articles 9 TFEU, 114(3) TFEU and 168(1) TFEU, a high level of human health protection with regard to a product which is characterised by properties that are carcinogenic, mutagenic and toxic to reproduction. The impact of the prohibition laid down in Article 7 of Directive 2014/40 thus does not appear manifestly disproportionate.

191 Having regard to the foregoing, consideration of Question 3(a) has disclosed no factor of such a kind as to affect the validity of Article 7(1) and (7) of Directive 2014/40.

Question 3(b)

192 The provisions at which Question 3(b) is directed include various rules concerning the labelling and packaging of tobacco products which relate, in essence, to the integrity of health warnings after the packet has been opened (Article 8(3) of Directive 2014/40), to the position and minimum dimensions of the general health warning and the information message (Article 9(3) of the directive), to the minimum dimensions of combined health warnings (Article 10(1)(g) of the directive) and to the shape of unit packets of cigarettes and the minimum number of cigarettes per unit packet (Article 14 of the directive).

193 It appears from the order for reference that the validity of this set of provisions is challenged, in extremely summary and general terms, on the ground, first, that the provisions are neither appropriate nor necessary to achieve the objective of public health protection. It is argued that, instead of the requirements imposed, which are considered to be very intrusive, there are less restrictive measures, such as, for example, a requirement that health warnings must be fully visible and not be distorted by packet shapes. Secondly, it is argued that the disputed requirements will prevent the differentiation of tobacco products and will cause distortions of competition. Thirdly, the requirement laid down in Article 14(1) of Directive 2014/40, pursuant to which a unit packet of cigarettes is to include at least 20 cigarettes, cannot be justified on grounds of public health protection.

194 Most of those objections call in question the proportionality of those requirements solely in relation to the objective of ensuring a high level of human health protection, while disregarding the objective of facilitating the smooth functioning of the internal market, thus failing to pay due regard to the fact that Directive 2014/40 and, in particular, the provisions covered by Question 3(b) pursue both those objectives.

195 As has been stated in paragraphs 97 to 105 of this judgment, Chapter II of Title II of Directive 2014/40, to which the provisions covered by Question 3(b) belong, contributes to improving the conditions for the functioning of the internal market for tobacco products by removing disparities on this point between the rules of the Member States.

196 The same is true of the minimum number of cigarettes per packet, prescribed in Article 14(1) of Directive 2014/40, and specifically mentioned in the order for reference. The main aim of that requirement is to remove differences between the rules of the Member States, as recital 28 of the directive confirms.

197 The requirements in question also help to achieve the objective of ensuring a high level of human health protection. As the Advocate General has stated in points 191 and 192 of her Opinion, innovative, novel or unusual shapes may help to maintain or enhance the attraction of the product and encourage its use. Similarly, certain packet shapes may obstruct the visibility of health warnings and, as a consequence, reduce their efficacy, as is stated in recitals 25 and 28 of Directive 2014/40. As regards the requirement that a unit packet must contain at least 20 cigarettes, it can be explained by the fact that smaller sales units are more of an inducement to start smoking because the consumer is inclined to think that they are cheaper, less of a constraint and psychologically more acceptable.

198 As to the less restrictive measure mentioned in paragraph 193 of this judgment, it is sufficient to observe that it is not aimed at removing differences between the Member States' rules on the labelling and packaging of tobacco products and it is therefore not appropriate for the purpose of achieving the objective of improving the functioning of the internal market.

199 Although those requirements may, by their very nature, to some extent increase the similarity between tobacco products, the fact remains that they concern only certain aspects of the labelling and packaging of those products and therefore still allow for adequate opportunities for product differentiation.

200 In view of the foregoing considerations, it cannot be accepted that the requirements laid down in Articles 8(3), 9(3), 10(1)(g) and 14 of Directive 2014/40 are manifestly inappropriate or manifestly go beyond what is necessary to attain the objective of improving the conditions for the functioning of the internal market for tobacco and related products, taking as a base a high level of protection of human health, especially for young people.

201 Accordingly, the Court finds that consideration of Question 3(b) has disclosed no factor of such a kind as to affect the validity of those provisions.

Question 3(c)

202 Article 10(1)(a) and (c) of Directive 2014/40, with which Question 3(c) is concerned, provides, in substance, that each unit packet and the outside packaging must carry combined health warnings taking the form of one of the messages listed in Annex I to the directive and a corresponding colour photograph as set out in Annex II thereto. The combined health warning must cover 65% of the external front and back surface of each unit packet.

203 The validity of those provisions is challenged, in essence, on account of the size of the area reserved for those warnings. Thus, it is alleged (i) that an area of that extent is neither appropriate nor necessary to achieve the objective of public health protection, (ii) that the figure of 65% is arbitrary and cannot be justified by the FCTC recommendations and (iii) that its impact is manifestly disproportionate.

204 As regards (i) the appropriateness of large combined health warnings, the Guidelines for Implementation of Article 11 of the FCTC explain, in point 7, that, in comparison with small, text-only health warnings, larger warnings with pictures are more likely to be noticed, better communicate health risks, provoke a greater emotional response and increase the motivation of tobacco users to quit and to decrease their tobacco consumption. Such warnings are also more likely to retain their effectiveness over time and are particularly effective in communicating health effects to low-literacy populations, children and young people.

205 The affixing of large combined health warnings thus does not appear manifestly inappropriate for achieving the objective sought.

206 As regards (ii) the allegedly arbitrary nature of the size of the area which Article 10(1)(a) and (c) of Directive 2014/40 reserves for the combined health warnings, the Court notes that, in accordance with Article 11(1)(b)(iv) of the FCTC, these warning should cover ‘50% or more’ of the principal display areas of the unit packets, but not less than 30%.

207 On this point, the Guidelines for Implementation of Article 11 of the FCTC recommend, in point 12, that the Contracting Parties consider using health warnings and messages that cover ‘more than 50%’ of the principal display areas and aim to cover ‘as much of the principal display areas as possible’, since according to existing evidence, ‘the effectiveness of health warnings and messages increases with their size’.

208 Against that background the EU legislature cannot be accused of having acted arbitrarily in selecting a figure of 65% for the area reserved for combined health warnings pursuant to Article 10(1)(a) and (c) of Directive 2014/40. Indeed, that selection is based on criteria deriving from the FCTC recommendations and, in making it, the EU legislature acted within the bounds of its broad discretion, to which reference is made in paragraph 166 of this judgment.

209 Concerning (iii) the necessity of the measure in question and its allegedly disproportionate impact on the ability of manufacturers to communicate information about the product concerned to consumers, it should be pointed out, first, that the area reserved for those warnings allows for a sufficient space for that type of information on the unit packets.

210 Secondly, the restrictions thereby imposed must be weighed up against the requirement to ensure a high level of human health protection in an area characterised by the toxicity of the product concerned and its addictive effects.

211 Having regard to the foregoing considerations, it does not appear that, in adopting Article 10(1)(a) and (c) of Directive 2014/40, the EU legislature manifestly went beyond the limits of what is appropriate and necessary to attain the objective of improving the conditions for the functioning of the internal market for tobacco and related products, taking as a base a high level of protection of human health, especially for young people.

212 Accordingly, the Court finds that consideration of Question 3(c) has disclosed no factor of such a kind as to affect the validity of Article 10(1)(a) and (c) of Directive 2014/40.

Question 7

213 In view of the finding made in paragraph 52 of this judgment, Question 7 should be addressed only in so far as it concerns the validity of Article 7 of Directive 2014/40 in the light of the principle of subsidiarity.

214 The Court notes in this regard that the order for reference does not mention any ground of invalidity based on that principle and concerning Directive 2014/40 as a whole. Only the validity of Article 7 of the directive is challenged in so far as that article prohibits the placing on the EU market of tobacco products containing menthol as a characterising flavour. It is claimed that the EU legislature merely asserted, using a standard formula, that the principle of subsidiarity was complied with, without showing that the internal market benefits deriving from that prohibition are sufficient to justify action on the part of the European Union. It is argued that public health protection could have been sufficiently achieved at the level of Member States.

215 The principle of subsidiarity is set out in Article 5(3) TEU, under which the European Union, in areas which do not fall within its exclusive competence, is to act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved at EU level. Furthermore, Article 5 of Protocol (No 2) on the application of the principles of subsidiarity and proportionality, annexed to the EU Treaty and to the FEU Treaty, lays down guidelines for the purpose of determining whether those conditions are met (judgment in *Estonia* v *Parliament and Council*, C-508/13, EU:C:2015:403, paragraph 44).

216 An initial review of compliance with the principle of subsidiarity is undertaken, at a political level, by national parliaments in accordance with the procedures laid down for that purpose by Protocol (No 2).

217 Subsequently, responsibility for that review lies with the EU judicature, which must verify both compliance with the substantive conditions set out in Article 5(3) TEU and compliance with the procedural safeguards provided for by that protocol.

218 As regards, in the first place, the judicial review of compliance with the substantive conditions laid down in Article 5(3) TEU, the Court must determine whether the EU legislature was entitled to consider, on the basis of a detailed statement, that the objective of the proposed action could be better achieved at EU level.

219 Since the present case concerns an area — the improvement of the functioning of the internal market — which is not among those in respect of which the European Union has exclusive competence, it must be determined whether the objective of Directive 2014/40 could be better achieved at EU level (see, to that effect, judgment in *British American Tobacco (Investments) and Imperial Tobacco*, C-491/01, EU:C:2002:741, paragraphs 179 and 180).

220 In this regard, as has been mentioned in paragraph 143 of this judgment, Directive 2014/40 has two objectives in that it seeks to facilitate the smooth functioning of the internal market for tobacco and related products, while ensuring a high level of protection of human health, especially for young people.

221 Even if the second of those objectives might be better achieved at the level of Member States, the fact remains that pursuing it at that level would be liable to entrench, if not create, situations in which some Member States permit the placing on the market of tobacco products containing certain characterising flavours, whilst others prohibit it, thus running completely counter to the first objective of Directive 2014/40, namely the improvement of the functioning of the internal market for tobacco and related products.

222 The interdependence of the two objectives pursued by the directive means that the EU legislature could legitimately take the view that it had to establish a set of rules for the placing on the EU market of tobacco products with characterising flavours and that, because of that interdependence, those two objectives could best be achieved at EU level (see, by analogy, judgment in *Vodafone and Others*, C-58/08, EU:C:2010:321, paragraph 78, and *Estonia* v *Parliament and Council*, C-508/13, EU:C:2015:403, paragraph 48).

223 Moreover, as has been stated in paragraph 115 of this judgment, the EU legislature could properly make all characterising flavours subject to the same set of legal rules.

224 Consequently, the Court must reject the arguments seeking to establish that the objective of human health protection could have been better achieved at national level as regards specifically the prohibition on the placing on the market of tobacco products with characterising flavours.

225 As regards, in the second place, compliance with formal requirements and, in particular, the statement of reasons for Directive 2014/40 in the light of the principle of subsidiarity, it should be borne in mind that, according to the Court's case-law, observance of the obligation to state reasons must be evaluated not only by reference to the wording of the contested act, but also by reference to its context and the circumstances of the individual case (see, to that effect, judgment in *Estonia* v *Parliament and Council*, C-508/13, EU:C:2015:403, paragraph 61).

226 In the present case, it is undisputed that the Commission's proposal for a directive and its impact assessment include sufficient information showing clearly and unequivocally the advantages of taking action at EU level rather than at Member State level.

227 Accordingly, it is established to the requisite legal standard that that information enabled both the EU legislature and national parliaments to determine whether the proposal complied with the principle of subsidiarity, whilst also enabling individuals to understand the reasons relating to that principle and the Court to exercise its power of review.

228 Having regard to the foregoing, consideration of Question 7 has disclosed no factor of such a kind as to affect the validity of Article 7 of Directive 2014/40.

Costs

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

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

1. **Article 24(2) of Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC must be interpreted as permitting Member States to maintain or introduce further requirements in relation to aspects of the packaging of tobacco products which are not harmonised by that directive.**

2. **Article 13(1) of Directive 2014/40 must be interpreted as prohibiting the display, on the labelling of unit packets and on the outside packaging, as well as on the tobacco product itself, of any information covered by that provision, even if the information concerned is factually accurate.**

3. **Consideration of the questions referred for a preliminary ruling by the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court) has disclosed no factor of such a kind as to affect the validity of Articles 7, 18 and 24(2) and (3) of Directive 2014/40 or that of the provisions of Chapter II of Title II of that directive.**

[Signatures]

Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

21 December 2016*

(Reference for a preliminary ruling — Electronic communications — Processing of personal data — Confidentiality of electronic communications — Protection — Directive 2002/58/EC — Articles 5, 6 and 9 and Article 15(1) — Charter of Fundamental Rights of the European Union — Articles 7, 8 and 11 and Article 52(1) — National legislation — Providers of electronic communications services — Obligation relating to the general and indiscriminate retention of traffic and location data — National authorities — Access to data — No prior review by a court or independent administrative authority — Compatibility with EU law)

In Joined Cases C-203/15 and C-698/15,

REQUESTS for a preliminary ruling under Article 267 TFEU, made by the Kammarrätten i Stockholm (Administrative Court of Appeal, Stockholm, Sweden) and the Court of Appeal (England & Wales) (Civil Division) (United Kingdom), by decisions, respectively, of 29 April 2015 and 9 December 2015, received at the Court on 4 May 2015 and 28 December 2015, in the proceedings

Tele2 Sverige AB (C-203/15)

v

Post- och telestyrelsen,

and

Secretary of State for the Home Department (C-698/15)

v

Tom Watson,

Peter Brice,

Geoffrey Lewis,

interveners:

Open Rights Group,

Privacy International,

The Law Society of England and Wales,

* * Languages of the case: English and Swedish.

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, A. Tizzano, Vice-President, R. Silva de Lapuerta, T. von Danwitz (Rapporteur), J.L. da Cruz Vilaça, E. Juhász and M. Vilaras, Presidents of the Chamber, A. Borg Barthet, J. Malenovský, E. Levits, J.-C. Bonichot, A. Arabadjiev, S. Rodin, F. Biltgen and C. Lycourgos, Judges,

Advocate General: H. Saugmandsgaard Øe,

Registrar: C. Strömholm, Administrator,

having regard to the decision of the President of the Court of 1 February 2016 that Case C-698/15 should be determined pursuant to the expedited procedure provided for in Article 105(1) of the Rules of Procedure of the Court,

having regard to the written procedure and further to the hearing on 12 April 2016,

after considering the observations submitted on behalf of:

— Tele2 Sverige AB, by M. Johansson and N. Torgerzon, advokater, and by E. Lagerlöf and S. Backman,

— Mr Watson, by J. Welch and E. Norton, Solicitors, I. Steele, Advocate, B. Jaffey, Barrister, and D. Rose QC,

— Mr Brice and Mr Lewis, by A. Suterwalla and R. de Mello, Barristers, R. Drabble QC, and S. Luke, Solicitor,

— Open Rights Group and Privacy International, by D. Carey, Solicitor, and by R. Mehta and J. Simor, Barristers,

— The Law Society of England and Wales, by T. Hickman, Barrister, and by N. Turner,

— the Swedish Government, by A. Falk, C. Meyer-Seitz, U. Persson, N. Otte Widgren and L. Swedenborg, acting as Agents,

— the United Kingdom Government, by S. Brandon, L. Christie and V. Kaye, acting as Agents, and by D. Beard QC, G. Facenna QC, J. Eadie QC and S. Ford, Barrister,

— the Belgian Government, by J.-C. Halleux, S. Vanrie and C. Pochet, acting as Agents,

— the Czech Government, by M. Smolek and J. Vláčil, acting as Agents,

— the Danish Government, by C. Thorning and M. Wolff, acting as Agents,

— the German Government, by T. Henze, M. Hellmann and J. Kemper, acting as Agents, and by M. Kottmann and U. Karpenstein, Rechtsanwalte,

— the Estonian Government, by K. Kraavi-Käerdi, acting as Agent,

— Ireland, by E. Creedon, L. Williams and A. Joyce, acting as Agents, and by D. Fennelly BL,

— the Spanish Government, by A. Rubio González, acting as Agent,

— the French Government, by G. de Bergues, D. Colas, F.-X. Bréchot and C. David, acting as Agents,

— the Cypriot Government, by K. Kleanthous, acting as Agent,

— the Hungarian Government, by M. Fehér and G. Koós, acting as Agents,

— the Netherlands Government, by M. Bulterman, M. Gijzen and. J. Langer, acting as Agents,

— the Polish Government, by B. Majczyna, acting as Agent,

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

— the European Commission, by H. Krämer, K. Simonsson, H. Kranenborg, D. Nardi, P. Costa de Oliveira and J. Vondung, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 19 July 2016,

gives the following

Judgment

1 These requests for a preliminary ruling concern the interpretation of Article 15(1) of Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ 2002 L 201, p. 37), as amended by Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 (OJ 2009 L 337, p. 11) ('Directive 2002/58'), read in the light of Articles 7 and 8 and Article 52(1) of the Charter of Fundamental Rights of the European Union ('the Charter').

2 The requests have been made in two proceedings between (i) Tele2 Sverige AB and Post- och telestyrelsen (the Swedish Post and Telecom Authority; 'PTS'), concerning an order sent by PTS to Tele2 Sverige requiring the latter to retain traffic and location data in relation to its subscribers and registered users (Case C-203/15), and (ii) Mr Tom Watson, Mr Peter Brice and Mr Geoffrey Lewis, on the one hand, and the Secretary of State for the Home Department (United Kingdom of Great Britain and Northern Ireland), on the other, concerning the conformity with EU law of Section 1 of the Data Retention and Investigatory Powers Act 2014 ('DRIPA') (Case C-698/15).

Legal context

EU law

Directive 2002/58

3 Recitals 2, 6, 7, 11, 21, 22, 26 and 30 of Directive 2002/58 state:

'(2) This Directive seeks to respect the fundamental rights and observes the principles recognised in particular by [the Charter]. In particular, this Directive seeks to ensure full respect for the rights set out in Articles 7 and 8 of that Charter.

...

(6) The Internet is overturning traditional market structures by providing a common, global infrastructure for the delivery of a wide range of electronic communications services. Publicly available electronic communications services over the Internet open new possibilities for users but also new risks for their personal data and privacy.

(7) In the case of public communications networks, specific legal, regulatory and technical provisions should be made in order to protect fundamental rights and freedoms of natural persons and legitimate interests of legal persons, in particular with regard to the increasing capacity for automated storage and processing of data relating to subscribers and users.

...

(11) Like 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)], this Directive does not address issues of protection of fundamental rights and freedoms related to activities which are not governed by Community law. Therefore it does not alter the existing balance between the individual's right to privacy and the possibility for Member States to take the measures referred to in Article 15(1) of this Directive, necessary for the protection of public security, defence, State security (including the economic well-being of the State when the activities relate to State security matters) and the enforcement of criminal law. Consequently, this Directive does not affect the ability of Member States to carry out lawful interception of electronic communications, or take other measures, if necessary for any of these purposes and in accordance with the European Convention for the Protection of Human Rights and Fundamental Freedoms, as interpreted by the rulings of the European Court of Human Rights. Such measures must be appropriate, strictly proportionate to the intended purpose and necessary within a democratic society and should be subject to adequate safeguards in accordance with the European Convention for the Protection of Human Rights and Fundamental Freedoms.

...

(21) Measures should be taken to prevent unauthorised access to communications in order to protect the confidentiality of communications, including both the contents and any data related to such communications, by means of public communications networks and publicly available electronic communications services. National legislation in some Member States only prohibits intentional unauthorised access to communications.

(22) The prohibition of storage of communications and the related traffic data by persons other than the users or without their consent is not intended to prohibit any automatic, intermediate and transient storage of this information in so far as this takes place for the sole purpose of carrying out the transmission in the electronic communications network and provided that the information is not stored for any period longer than is necessary for the transmission and for traffic management purposes, and that during the period of storage the confidentiality remains guaranteed. ...

...

(26) The data relating to subscribers processed within electronic communications networks to establish connections and to transmit information contain information on the private life of natural persons and concern the right to respect for their correspondence or concern the legitimate interests of legal persons. Such data may only be stored to the extent that is necessary for the provision of the service for the purpose of billing and for interconnection payments, and for a limited time. Any further processing of such data … may only be allowed if the subscriber has agreed to this on the basis of accurate and full information given by the provider of the

publicly available electronic communications services about the types of further processing it intends to perform and about the subscriber's right not to give or to withdraw his/her consent to such processing. ...

...

(30) Systems for the provision of electronic communications networks and services should be designed to limit the amount of personal data necessary to a strict minimum. ...'

4 Article 1 of Directive 2002/58, headed 'Scope and aim', provides:

'1. This Directive provides for the harmonisation of the national provisions required to ensure an equivalent level of protection of fundamental rights and freedoms, and in particular the right to privacy and confidentiality, with respect to the processing of personal data in the electronic communication sector and to ensure the free movement of such data and of electronic communication equipment and services in the Community.

2. The provisions of this Directive particularise and complement Directive [95/46] for the purposes mentioned in paragraph 1. Moreover, they provide for protection of the legitimate interests of subscribers who are legal persons.

3. This Directive shall not apply to activities which fall outside the scope of the Treaty establishing the European Community, such as those covered by Titles V and VI of the Treaty on European Union, and in any case to activities concerning public security, defence, State security (including the economic well-being of the State when the activities relate to State security matters) and the activities of the State in areas of criminal law.'

5 Article 2 of Directive 2002/58, headed 'Definitions', provides:

'Save as otherwise provided, the definitions in Directive [95/46] and in Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) [(OJ 2002 L 108, p. 33)] shall apply.

The following definitions shall also apply:

...

(b) "traffic data" means any data processed for the purpose of the conveyance of a communication on an electronic communications network or for the billing thereof;

(c) "location data" means any data processed in an electronic communications network or by an electronic communications service, indicating the geographic position of the terminal equipment of a user of a publicly available electronic communications service;

(d) "communication" means any information exchanged or conveyed between a finite number of parties by means of a publicly available electronic communications service. This does not include any information conveyed as part of a broadcasting service to the public over an electronic communications network except to the extent that the information can be related to the identifiable subscriber or user receiving the information;

...'

6 Article 3 of Directive 2002/58, headed ‘Services concerned’, provides:

‘This Directive shall apply to the processing of personal data in connection with the provision of publicly available electronic communications services in public communications networks in the Community, including public communications networks supporting data collection and identification devices.’

7 Article 4 of that directive, headed ‘Security of processing’, is worded as follows:

‘1. The provider of a publicly available electronic communications service must take appropriate technical and organisational measures to safeguard security of its services, if necessary in conjunction with the provider of the public communications network with respect to network security. Having regard to the state of the art and the cost of their implementation, these measures shall ensure a level of security appropriate to the risk presented.

1a. Without prejudice to Directive [95/46], the measures referred to in paragraph 1 shall at least:

— ensure that personal data can be accessed only by authorised personnel for legally authorised purposes,

— protect personal data stored or transmitted against accidental or unlawful destruction, accidental loss or alteration, and unauthorised or unlawful storage, processing, access or disclosure, and

— ensure the implementation of a security policy with respect to the processing of personal data.

...’

8 Article 5 of Directive 2002/58, headed ‘Confidentiality of the communications’, provides:

‘1. Member States shall ensure the confidentiality of communications and the related traffic data by means of a public communications network and publicly available electronic communications services, through national legislation. In particular, they shall prohibit listening, tapping, storage or other kinds of interception or surveillance of communications and the related traffic data by persons other than users, without the consent of the users concerned, except when legally authorised to do so in accordance with Article 15(1). This paragraph shall not prevent technical storage which is necessary for the conveyance of a communication without prejudice to the principle of confidentiality.

...

3. Member States shall ensure that the storing of information, or the gaining of access to information already stored, in the terminal equipment of a subscriber or user is only allowed on condition that the subscriber or user concerned has given his or her consent, having been provided with clear and comprehensive information, in accordance with Directive [95/46], inter alia, about the purposes of the processing. This shall not prevent any technical storage or access for the sole purpose of carrying out the transmission of a communication over an electronic communications network, or as strictly necessary in order for the provider of an information society service explicitly requested by the subscriber or user to provide the service.’

9 Article 6 of Directive 2002/58, headed ‘Traffic data’, provides:

‘1. Traffic data relating to subscribers and users processed and stored by the provider of a public communications network or publicly available electronic communications service must be erased or made anonymous when it is no longer needed for the purpose of the transmission of a communication without prejudice to paragraphs 2, 3 and 5 of this Article and Article 15(1).

2. Traffic data necessary for the purposes of subscriber billing and interconnection payments may be processed. Such processing is permissible only up to the end of the period during which the bill may lawfully be challenged or payment pursued.

3. For the purpose of marketing electronic communications services or for the provision of value added services, the provider of a publicly available electronic communications service may process the data referred to in paragraph 1 to the extent and for the duration necessary for such services or marketing, if the subscriber or user to whom the data relate has given his or her prior consent. Users or subscribers shall be given the possibility to withdraw their consent for the processing of traffic data at any time.

...

5. Processing of traffic data, in accordance with paragraphs 1, 2, 3 and 4, must be restricted to persons acting under the authority of providers of the public communications networks and publicly available electronic communications services handling billing or traffic management, customer enquiries, fraud detection, marketing electronic communications services or providing a value added service, and must be restricted to what is necessary for the purposes of such activities.'

10 Article 9(1) of that directive, that article being headed 'Location data other than traffic data', provides:

'Where location data other than traffic data, relating to users or subscribers of public communications networks or publicly available electronic communications services, can be processed, such data may only be processed when they are made anonymous, or with the consent of the users or subscribers to the extent and for the duration necessary for the provision of a value added service. The service provider must inform the users or subscribers, prior to obtaining their consent, of the type of location data other than traffic data which will be processed, of the purposes and duration of the processing and whether the data will be transmitted to a third party for the purpose of providing the value added service. …'

11 Article 15 of that directive, headed 'Application of certain provisions of Directive [95/46]', states:

'1. Member States may adopt legislative measures to restrict the scope of the rights and obligations provided for in Article 5, Article 6, Article 8(1), (2), (3) and (4), and Article 9 of this Directive when such restriction constitutes a necessary, appropriate and proportionate measure within a democratic society to safeguard national security (i.e. State security), defence, public security, and the prevention, investigation, detection and prosecution of criminal offences or of unauthorised use of the electronic communication system, as referred to in Article 13(1) of Directive [95/46]. To this end, Member States may, inter alia, adopt legislative measures providing for the retention of data for a limited period justified on the grounds laid down in this paragraph. All the measures referred to in this paragraph shall be in accordance with the general principles of Community law, including those referred to in Article 6(1) and (2) of the Treaty on European Union.

...

1b. Providers shall establish internal procedures for responding to requests for access to users' personal data based on national provisions adopted pursuant to paragraph 1. They shall provide the competent national authority, on demand, with information about those procedures, the number of requests received, the legal justification invoked and their response.

2. The provisions of Chapter III on judicial remedies, liability and sanctions of Directive [95/46] shall apply with regard to national provisions adopted pursuant to this Directive and with regard to the individual rights derived from this Directive.

…’

Directive 95/46

12 Article 22 of Directive 95/46, which is in Chapter III of that directive, is worded as follows:

‘Without prejudice to any administrative remedy for which provision may be made, inter alia before the supervisory authority referred to in Article 28, prior to referral to the judicial authority, Member States shall provide for the right of every person to a judicial remedy for any breach of the rights guaranteed him by the national law applicable to the processing in question.’

Directive 2006/24/EC

13 Article 1(2) of 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), that article being headed ‘Subject matter and scope’, provided:

‘This Directive shall apply to traffic and location data on both legal entities and natural persons and to the related data necessary to identify the subscriber or registered user. It shall not apply to the content of electronic communications, including information consulted using an electronic communications network.’

14 Article 3 of that directive, headed ‘Obligation to retain data’, provided:

‘1. By way of derogation from Articles 5, 6 and 9 of [Directive 2002/58], Member States shall adopt measures to ensure that the data specified in Article 5 of this Directive are retained in accordance with the provisions thereof, to the extent that those data are generated or processed by providers of publicly available electronic communications services or of a public communications network within their jurisdiction in the process of supplying the communications services concerned.

2. The obligation to retain data provided for in paragraph 1 shall include the retention of the data specified in Article 5 relating to unsuccessful call attempts where those data are generated or processed, and stored (as regards telephony data) or logged (as regards Internet data), by providers of publicly available electronic communications services or of a public communications network within the jurisdiction of the Member State concerned in the process of supplying the communication services concerned. This Directive shall not require data relating to unconnected calls to be retained.’

Swedish law

15 It is apparent from the order for reference in Case C-203/15 that the Swedish legislature, in order to transpose Directive 2006/24 into national law, amended the lagen (2003:389) om elektronisk kommunikation [Law (2003:389) on electronic communications; ‘the LEK’] and the förordningen (2003:396) om elektronisk kommunikation [Regulation (2003:396) on electronic communications]. Both of those texts, in the versions applicable to the dispute in the main proceedings, contain rules on the retention of electronic communications data and on access to that data by the national authorities.

16 Access to that data is, in addition, regulated by the lagen (2012:278) om inhämtning av uppgifter om elektronisk kommunikation i de brottsbekämpande myndigheternas underrättelseverksamhet (Law (2012:278) on gathering of data relating to electronic communications as part of intelligence gathering by law enforcement authorities: ‘Law 2012:278’) and by the rättegångsbalken (Code of Judicial Procedure; ‘the RB’).

The obligation to retain electronic communications data

17 According to the information provided by the referring court in Case C-203/15, the provisions of Paragraph 16a of Chapter 6 of the LEK, read together with Paragraph 1 of Chapter 2 of that law, impose an obligation on providers of electronic communications services to retain data the retention of which was required by Directive 2006/24. The data concerned is that relating to subscriptions and all electronic communications necessary to trace and identify the source and destination of a communication; to determine its date, time, and type; to identify the communications equipment used and to establish the location of mobile communication equipment used at the start and end of each communication. The data which there is an obligation to retain is data generated or processed in the context of telephony services, telephony services which use a mobile connection, electronic messaging systems, internet access services and internet access capacity (connection mode) provision services. The obligation extends to data relating to unsuccessful communications. The obligation does not however extend to the content of communications.

18 Articles 38 to 43 of Regulation (2003:396) on electronic communications specify the categories of data that must be retained. As regards telephony services, there is the obligation to retain data relating to calls and numbers called and the identifiable dates and times of the start and end of the communication. As regards telephony services which use a mobile connection, additional obligations are imposed, covering, for example, the retention of location data at the start and end of the communication. As regards telephony services using an IP packet, data to be retained includes, in addition to data mentioned above, data relating to the IP addresses of the caller and the person called. As regards electronic messaging systems, data to be retained includes data relating to the numbers of senders and recipients, IP addresses or other messaging addresses. As regards internet access services, data to be retained includes, for example, data relating to the IP addresses of users and the traceable dates and times of logging into and out of the internet access service.

Data retention period

19 In accordance with Paragraph 16d of Chapter 6 of the LEK, the data covered by Paragraph 16a of that Chapter must be retained by the providers of electronic communications services for six months from the date of the end of communication. The data must then be immediately erased, unless otherwise provided in the second subparagraph of Paragraph 16d of that Chapter.

Access to retained data

20 Access to retained data by the national authorities is governed by the provisions of Law 2012:278, the LEK and the RB.

– Law 2012:278

21 In the context of intelligence gathering, the national police, the Säkerhetspolisen (the Swedish Security Service), and the Tullverket (the Swedish Customs Authority) may, on the basis of Paragraph 1 of Law 2012:278, on the conditions prescribed by that law and without informing the provider of an electronic communications network or a provider of an electronic communications service authorised under the LEK, undertake the collection of data relating to messages transmitted by an electronic communications network, the electronic communications equipment located in a specified geographical area and the geographical areas(s) where electronic communications equipment is or was located.

22 In accordance with Paragraphs 2 and 3 of Law 2012:278, data may, as a general rule, be collected if, depending on the circumstances, the measure is particularly necessary in order to avert, prevent or detect criminal activity involving one or more offences punishable by a term of imprisonment of at least two years, or one of the acts listed in Paragraph 3 of that law, referring to offences punishable by a term of imprisonment of less than two years. Any grounds supporting that measure must outweigh considerations relating to the harm or prejudice that may be caused to the person affected by that measure or to an interest opposing that measure. In accordance with Paragraph 5 of that law, the duration of the measure must not exceed one month.

23 The decision to implement such a measure is to be taken by the director of the authority concerned or by a person to whom that responsibility is delegated. The decision is not subject to prior review by a judicial authority or an independent administrative authority.

24 Under Paragraph 6 of Law 2012:278, the Säkerhets och integritetsskyddsnämnden (the Swedish Commission on Security and Integrity Protection) must be informed of any decision authorising the collection of data. In accordance with Paragraph 1 of Lagen (2007:980) om tillsyn över viss brottsbekämpande verksamhet (Law (2007:980) on the supervision of certain law enforcement activities), that authority is to oversee the application of the legislation by the law enforcement authorities.

– The LEK

25 Under Paragraph 22, first subparagraph, point 2, of Chapter 6 of the LEK, all providers of electronic communications services must disclose data relating to a subscription at the request of the prosecution authority, the national police, the Security Service or any other public law enforcement authority, if that data is connected with a presumed criminal offence. On the information provided by the referring court in Case C-203/15, it is not necessary that the offence be a serious crime.

– The RB

26 The RB governs the disclosure of retained data to the national authorities within the framework of preliminary investigations. In accordance with Paragraph 19 of Chapter 27 of the RB, 'placing electronic communications under surveillance' without the knowledge of third parties is, as a general rule, permitted within the framework of preliminary investigations that relate to, inter alia, offences punishable by a sentence of imprisonment of at least six months. The expression 'placing electronic communications under surveillance', under Paragraph 19 of Chapter 27 of the RB, means obtaining data without the knowledge of third parties that relates to a message transmitted by an electronic communications network, the electronic communications equipment located or having been located in a specific geographical area, and the geographical area(s) where specific electronic communications equipment is or has been located.

27 According to what is stated by the referring court in Case C-203/15, information on the content of a message may not be obtained on the basis of Paragraph 19 of Chapter 27 of the RB. As a general rule, placing electronic communications under surveillance may be ordered, under Paragraph 20 of Chapter 27 of the RB, only where there are reasonable grounds for suspicion that an individual has committed an offence and that the measure is particularly necessary for the purposes of the investigation: the subject of that investigation must moreover be an offence punishable by a sentence of imprisonment of at least two years, or attempts, preparation or conspiracy to commit such an offence. In accordance with Paragraph 21 of Chapter 27 of the RB, the prosecutor must, other than in cases of urgency, request from the court with jurisdiction authority to place electronic communications under surveillance.

The security and protection of retained data

28 Under Paragraph 3a of Chapter 6 of the LEK, providers of electronic communications services who are subject to an obligation to retain data must take appropriate technical and organisational measures to ensure the protection of data during processing. On the information provided by the referring court in Case C-203/15, Swedish law does not, however, make any provision as to where the data is to be retained.

United Kingdom law

DRIPA

29 Section 1 of DRIPA, headed 'Powers for retention of relevant communications data subject to safeguards', provides:

'(1) The Secretary of State may by notice (a "retention notice") require a public telecommunications operator to retain relevant communications data if the Secretary of State considers that the requirement is necessary and proportionate for one or more of the purposes falling within paragraphs (a) to (h) of section 22(2) of the Regulation of Investigatory Powers Act 2000 (purposes for which communications data may be obtained).

(2) A retention notice may:

(a) relate to a particular operator or any description of operators;

(b) require the retention of all data or any description of data;

(c) specify the period or periods for which data is to be retained;

(d) contain other requirements, or restrictions, in relation to the retention of data;

(e) make different provision for different purposes;

(f) relate to data whether or not in existence at the time of the giving, or coming into force, of the notice.

(3) The Secretary of State may by regulations make further provision about the retention of relevant communications data.

(4) Such provision may, in particular, include provision about:

(a) requirements before giving a retention notice;

(b) the maximum period for which data is to be retained under a retention notice;

(c) the content, giving, coming into force, review, variation or revocation of a retention notice;

(d) the integrity, security or protection of, access to, or the disclosure or destruction of, data retained by virtue of this section;

(e) the enforcement of, or auditing compliance with, relevant requirements or restrictions;

(f) a code of practice in relation to relevant requirements or restrictions or relevant power;

(g) the reimbursement by the Secretary of State (with or without conditions) of expenses incurred by public telecommunications operators in complying with relevant requirements or restrictions;

(h) the [Data Retention (EC Directive) Regulations 2009] ceasing to have effect and the transition to the retention of data by virtue of this section.

(5) The maximum period provided for by virtue of subsection (4)(b) must not exceed 12 months beginning with such day as is specified in relation to the data concerned by regulations under subsection (3).

...'

30 Section 2 of DRIPA defines the expression 'relevant communications data' as meaning 'communications data of the kind mentioned in the Schedule to the [Data Retention (EC Directive) Regulations 2009] so far as such data is generated or processed in the United Kingdom by public telecommunications operators in the process of supplying the telecommunications services concerned'.

RIPA

31 Section 21(4) of the Regulation of Investigatory Powers Act 2000 ('RIPA'), that section being in Chapter II of that act and headed 'Lawful acquisition and disclosure of communications data', states:

'In this Chapter "communications data" means any of the following:

(a) any traffic data comprised in or attached to a communication (whether by the sender or otherwise) for the purposes of any postal service or telecommunication system by means of which it is being or may be transmitted;

(b) any information which includes none of the contents of a communication (apart from any information falling within paragraph (a)) and is about the use made by any person:

(i) of any postal service or telecommunications service; or

(ii) in connection with the provision to or use by any person of any telecommunications service, of any part of a telecommunication system;

(c) any information not falling within paragraph (a) or (b) that is held or obtained, in relation to persons to whom he provides the service, by a person providing a postal service or telecommunications service'.

32 On the information provided in the order for reference in Case C-698/15, that data includes 'user location data', but not data relating to the content of a communication.

33 As regards access to retained data, Section 22 of RIPA provides:

'(1) This section applies where a person designated for the purposes of this Chapter believes that it is necessary on grounds falling within subsection (2) to obtain any communications data.

(2) It is necessary on grounds falling within this subsection to obtain communications data if it is necessary:

(a) in the interests of national security;

(b) for the purpose of preventing or detecting crime or of preventing disorder;

(c) in the interests of the economic well-being of the United Kingdom;

(d) in the interests of public safety;

(e) for the purpose of protecting public health;

(f) for the purpose of assessing or collecting any tax, duty, levy or other imposition, contribution or charge payable to a government department;

(g) or the purpose, in an emergency, of preventing death or injury or any damage to a person's physical or mental health, or of mitigating any injury or damage to a person's physical or mental health; or

(h) or any purpose (not falling within paragraphs (a) to (g)) which is specified for the purposes of this subsection by an order made by the Secretary of State.

…

(4) Subject to subsection (5), where it appears to the designated person that a postal or telecommunications operator is or may be in possession of, or be capable of obtaining, any communications data, the designated person may, by notice to the postal or telecommunications operator, require the operator:

(a) if the operator is not already in possession of the data, to obtain the data; and

(b) in any case, to disclose all of the data in his possession or subsequently obtained by him.

(5) The designated person shall not grant an authorisation under subsection (3) or give a notice under subsection (4), unless he believes that obtaining the data in question by the conduct authorised or required by the authorisation or notice is proportionate to what is sought to be achieved by so obtaining the data.'

34 Under Section 65 of RIPA, complaints may be made to the Investigatory Powers Tribunal (United Kingdom) if there is reason to believe that data has been acquired inappropriately.

The Data Retention Regulations 2014

35 The Data Retention Regulations 2014 ('the 2014 Regulations'), adopted on the basis of DRIPA, are divided into three parts, Part 2 containing regulations 2 to 14 of that legislation. Regulation 4, headed 'Retention notices', provides:

'(1) A retention notice must specify:

(a) the public telecommunications operator (or description of operators) to whom it relates,

(b) the relevant communications data which is to be retained,

(c) the period or periods for which the data is to be retained,

(d) any other requirements, or any restrictions, in relation to the retention of the data.

(2) A retention notice must not require any data to be retained for more than 12 months beginning with:

(a) in the case of traffic data or service use data, the day of the communication concerned, and

(b) in the case of subscriber data, the day on which the person concerned leaves the telecommunications service concerned or (if earlier) the day on which the data is changed.

...'

36 Regulation 7 of the 2014 Regulations, headed 'Data integrity and security', provides:

'(1) A public telecommunications operator who retains communications data by virtue of section 1 of [DRIPA] must:

(a) secure that the data is of the same integrity and subject to at least the same security and protection as the data on any system from which it is derived,

(b) secure, by appropriate technical and organisational measures, that the data can be accessed only by specially authorised personnel, and

(c) protect, by appropriate technical and organisational measures, the data against accidental or unlawful destruction, accidental loss or alteration, or unauthorised or unlawful retention, processing, access or disclosure.

(2) A public telecommunications operator who retains communications data by virtue of section 1 of [DRIPA] must destroy the data if the retention of the data ceases to be authorised by virtue of that section and is not otherwise authorised by law.

(3) The requirement in paragraph (2) to destroy the data is a requirement to delete the data in such a way as to make access to the data impossible.

(4) It is sufficient for the operator to make arrangements for the deletion of the data to take place at such monthly or shorter intervals as appear to the operator to be practicable.'

37 Regulation 8 of the 2014 Regulations, headed Disclosure of retained data', provides:

'(1) A public telecommunications operator must put in place adequate security systems (including technical and organisational measures) governing access to communications data retained by virtue of section 1 of [DRIPA] in order to protect against any disclosure of a kind which does not fall within section 1(6)(a) of [DRIPA].

(2) A public telecommunications operator who retains communications data by virtue of section 1 of [DRIPA] must retain the data in such a way that it can be transmitted without undue delay in response to requests.'

38 Regulation 9 of the 2014 Regulations, headed 'Oversight by the Information Commissioner', states:

'The Information Commissioner must audit compliance with requirements or restrictions imposed by this Part in relation to the integrity, security or destruction of data retained by virtue of section 1 of [DRIPA].'

The Code of Practice

39 The Acquisition and Disclosure of Communications Data Code of Practice ('the Code of Practice') contains, in paragraphs 2.5 to 2.9 and 2.36 to 2.45, guidance on the necessity for and proportionality of obtaining communications data. As explained by the referring court in Case C-698/15, particular attention must, in accordance with paragraphs 3.72 to 3.77 of that code, be paid to necessity and proportionality where the communications data sought relates to a person who is a member of a profession that handles privileged or otherwise confidential information.

40 Under paragraph 3.78 to 3.84 of that code, a court order is required in the specific case of an application for communications data that is made in order to identify a journalist's source. Under paragraphs 3.85 to 3.87 of that code, judicial approval is required when an application for access is made by local authorities. No authorisation, on the other hand, need be obtained from a court or any independent body with respect to access to communications data protected by legal professional privilege or relating to doctors of medicine, Members of Parliament or ministers of religion.

41 Paragraph 7.1 of the Code of Practice provides that communications data acquired or obtained under the provisions of RIPA, and all copies, extracts and summaries of that data, must be handled and stored securely. In additions, the requirements of the Data Protection Act must be adhered to.

42 In accordance with paragraph 7.18 of the Code of Practice, where a United Kingdom public authority is considering the possible disclosure to overseas authorities of communications data, it must, inter alia, consider whether that data will be adequately protected. However, it is stated in paragraph 7.22 of that code that a transfer of data to a third country may take place where that transfer is necessary for reasons of substantial public interest, even where the third country does not provide an adequate level of protection. On the information given by the referring court in Case C-698/15, the Secretary of State for the Home Department may issue a national security certificate that exempts certain data from the provisions of the legislation.

43 In paragraph 8.1 of that code, it is stated that RIPA established the Interception of Communications Commissioner (United Kingdom), whose remit is, inter alia, to provide independent oversight of the exercise and performance of the powers and duties contained in Chapter II of Part I of RIPA. As is stated in paragraph 8.3 of the code, the Commissioner may, where he can 'establish that an individual has been adversely affected by any wilful or reckless failure', inform that individual of suspected unlawful use of powers.

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

Case C-203/15

44 On 9 April 2014, Tele2 Sverige, a provider of electronic communications services established in Sweden, informed the PTS that, following the ruling in the judgment of 8 April 2014, *Digital Rights Ireland and Others* (C-293/12 and C-594/12; 'the *Digital Rights* judgment', EU:C:2014:238) that Directive 2006/24 was invalid, it would cease, as from 14 April 2014, to retain electronic communications data, covered by the LEK, and that it would erase data retained prior to that date.

45 On 15 April 2014, the Rikspolisstyrelsen (the Swedish National Police Authority, Sweden) sent to the PTS a complaint to the effect that Tele2 Sverige had ceased to send to it the data concerned.

46 On 29 April 2014, the justitieminister (Swedish Minister for Justice) appointed a special reporter to examine the Swedish legislation at issue in the light of the *Digital Rights* judgment. In a report dated 13 June 2014, entitled 'Datalagring, EU-rätten och svensk rätt, Ds 2014:23' (Data retention, EU law

and Swedish law; 'the 2014 report'), the special reporter concluded that the national legislation on the retention of data, as set out in Paragraphs 16a to 16f of the LEK, was not incompatible with either EU law or the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR'). The special reporter emphasised that the *Digital Rights* judgment could not be interpreted as meaning that the general and indiscriminate retention of data was to be condemned as a matter of principle. From his perspective, neither should the *Digital Rights* judgment be understood as meaning that the Court had established, in that judgment, a set of criteria all of which had to be satisfied if legislation was to be able to be regarded as proportionate. He considered that it was necessary to assess all the circumstances in order to determine the compatibility of the Swedish legislation with EU law, such as the extent of data retention in the light of the provisions on access to data, on the duration of retention, and on the protection and the security of data.

47 On that basis, on 19 June 2014 the PTS informed Tele2 Sverige that it was in breach of its obligations under the national legislation in failing to retain the data covered by the LEK for six months, for the purpose of combating crime. By an order of 27 June 2014, the PTS ordered Tele2 Sverige to commence, by no later than 25 July 2014, the retention of that data.

48 Tele2 Sverige considered that the 2014 report was based on a misinterpretation of the *Digital Rights* judgment and that the obligation to retain data was in breach of the fundamental rights guaranteed by the Charter, and therefore brought an action before the Förvaltningsrätten i Stockholm (Administrative Court, Stockholm) challenging the order of 27 June 2014. Since that court dismissed the action, by judgment of 13 October 2014, Tele2 Sverige brought an appeal against that judgment before the referring court.

49 In the opinion of the referring court, the compatibility of the Swedish legislation with EU law should be assessed with regard to Article 15(1) of Directive 2002/58. While that directive establishes the general rule that traffic and location data should be erased or made anonymous when no longer required for the transmission of a communication, Article 15(1) of that directive introduces a derogation from that general rule since it permits the Member States, where justified on one of the specified grounds, to restrict that obligation to erase or render anonymous, or even to make provision for the retention of data. Accordingly, EU law allows, in certain situations, the retention of electronic communications data.

50 The referring court nonetheless seeks to ascertain whether a general and indiscriminate obligation to retain electronic communications data, such as that at issue in the main proceedings, is compatible, taking into consideration the *Digital Rights* judgment, with Article 15(1) of Directive 2002/58, read in the light of Articles 7 and 8 and Article 52(1) of the Charter. Given that the opinions of the parties differ on that point, it is necessary that the Court give an unequivocal ruling on whether, as maintained by Tele2 Sverige, the general and indiscriminate retention of electronic communications data is per se incompatible with Articles 7 and 8 and Article 52(1) of the Charter, or whether, as stated in the 2014 Report, the compatibility of such retention of data is to be assessed in the light of provisions relating to access to the data, the protection and security of the data and the duration of retention.

51 In those circumstances the Kammarrätten i Stockholm (Administrative Court of Appeal of Stockholm, Sweden) decided to stay the proceedings and to refer to the Court the following questions for a preliminary ruling:

'(1) Is a general obligation to retain traffic data covering all persons, all means of electronic communication and all traffic data without any distinctions, limitations or exceptions for the purpose of combating crime … compatible with Article 15(1) of Directive 2002/58/EC, taking account of Articles 7 and 8 and Article 52(1) of the Charter?

(2) If the answer to question 1 is in the negative, may the retention nevertheless be permitted where:

(a) access by the national authorities to the retained data is determined as [described in paragraphs 19 to 36 of the order for reference], and

(b) data protection and security requirements are regulated as [described in paragraphs 38 to 43 of the order for reference], and

(c) all relevant data is to be retained for six months, calculated as from the day when the communication is ended, and subsequently erased as [described in paragraph 37 of the order for reference]?'

Case C-698/15

52 Mr Watson, Mr Brice and Mr Lewis each lodged, before the High Court of Justice (England & Wales), Queen's Bench Division (Divisional Court) (United Kingdom), applications for judicial review of the legality of Section 1 of DRIPA, claiming, inter alia, that that section is incompatible with Articles 7 and 8 of the Charter and Article 8 of the ECHR.

53 By judgment of 17 July 2015, the High Court of Justice (England & Wales), Queen's Bench Division (Divisional Court) held that the *Digital Rights* judgment laid down 'mandatory requirements of EU law' applicable to the legislation of Member States on the retention of communications data and access to such data. According to the High Court of Justice, since the Court, in that judgment, held that Directive 2006/24 was incompatible with the principle of proportionality, national legislation containing the same provisions as that directive could, equally, not be compatible with that principle. It follows from the underlying logic of the *Digital Rights* judgment that legislation that establishes a general body of rules for the retention of communications data is in breach of the rights guaranteed in Articles 7 and 8 of the Charter, unless that legislation is complemented by a body of rules for access to the data, defined by national law, which provides sufficient safeguards to protect those rights. Accordingly, Section 1 of DRIPA is not compatible with Articles 7 and 8 of the Charter in so far as it does not lay down clear and precise rules providing for access to and use of retained data and in so far as access to that data is not made dependent on prior review by a court or an independent administrative body.

54 The Secretary of State for the Home Department brought an appeal against that judgment before the Court of Appeal (England & Wales) (Civil Division) (United Kingdom).

55 That court states that Section 1(1) of DRIPA empowers the Secretary of State for the Home Department to adopt, without any prior authorisation from a court or an independent administrative body, a general regime requiring public telecommunications operators to retain all data relating to any postal service or any telecommunications service for a maximum period of 12 months if he/she considers that such a requirement is necessary and proportionate to achieve the purposes stated in the United Kingdom legislation. Even though that data does not include the content of a communication, it could be highly intrusive into the privacy of users of communications services.

56 In the order for reference and in its judgment of 20 November 2015, delivered in the appeal procedure, wherein it decided to send to the Court this request for a preliminary ruling, the referring court considers that the national rules on the retention of data necessarily fall within the scope of Article 15(1) of Directive 2002/58 and must therefore conform to the requirements of the Charter. However, as stated in Article 1(3) of that directive, the EU legislature did not harmonise the rules relating to access to retained data.

57 As regards the effect of the *Digital Rights* judgment on the issues raised in the main proceedings, the referring court states that, in the case that gave rise to that judgment, the Court was considering the validity of Directive 2006/24 and not the validity of any national legislation. Having regard, inter alia, to the close relationship between the retention of data and access to that data, it was essential that that directive should incorporate a set of safeguards and that the *Digital Rights* judgment should analyse, when examining the lawfulness of the data retention regime established by that directive, the rules relating to access to that data. The Court had not therefore intended to lay down, in that judgment, mandatory requirements applicable to national legislation on access to data that does not implement EU law. Further, the reasoning of the Court was closely linked to the objective pursued by Directive 2006/24. National legislation should, however, be assessed in the light of the objectives pursued by that legislation and its context.

58 As regards the need to refer questions to the Court for a preliminary ruling, the referring court draws attention to the fact that, when the order for reference was issued, six courts in other Member States, five of those courts being courts of last resort, had declared national legislation to be invalid on the basis of the *Digital Rights* judgment. The answer to the questions referred is therefore not obvious, although the answer is required to give a ruling on the cases brought before that court.

59 In those circumstances, the Court of Appeal (England & Wales) (Civil Division) decided to stay the proceedings and to refer to the Court the following questions for a preliminary ruling:

‘(1) Does [the *Digital Rights* judgment] (including, in particular, paragraphs 60 to 62 thereof) lay down mandatory requirements of EU law applicable to a Member State’s domestic regime governing access to data retained in accordance with national legislation, in order to comply with Articles 7 and 8 of [the Charter]?

(2) Does [the *Digital Rights* judgment] expand the scope of Articles 7 and/or 8 of [the Charter] beyond that of Article 8 of the European Convention of Human Rights … as established in the jurisprudence of the European Court of Human Rights …?’

The procedure before the Court

60 By order of 1 February 2016, *Davis and Others* (C-698/15, not published, EU:C:2016:70), the President of the Court decided to grant the request of the Court of Appeal (England & Wales) (Civil Division) that Case C-698/15 should be dealt with under the expedited procedure provided for in Article 105(1) of the Court’s Rules of Procedure.

61 By decision of the President of the Court of 10 March 2016, Cases C-203/15 and C-698/15 were joined for the purposes of the oral part of the procedure and the judgment.

Consideration of the questions referred for a preliminary ruling

The first question in Case C-203/15

62 By the first question in Case C-203/15, the Kammarrätten i Stockholm (Administrative Court of Appeal, Stockholm) seeks, in essence, to ascertain whether Article 15(1) of Directive 2002/58, read in the light of Articles 7 and 8 and Article 52(1) of the Charter, must be interpreted as precluding national legislation such as that at issue in the main proceedings that provides, for the purpose of fighting crime, for general and indiscriminate retention of all traffic and location data of all subscribers and registered users with respect to all means of electronic communications.

63 That question arises, in particular, from the fact that Directive 2006/24, which the national legislation at issue in the main proceedings was intended to transpose, was declared to be invalid by the *Digital Rights* judgment, though the parties disagree on the scope of that judgment and its effect on that legislation, given that it governs the retention of traffic and location data and access to that data by the national authorities.

64 It is necessary first to examine whether national legislation such as that at issue in the main proceeding falls within the scope of EU law.

The scope of Directive 2002/58

65 The Member States that have submitted written observations to the Court have differed in their opinions as to whether and to what extent national legislation on the retention of traffic and location data and access to that data by the national authorities, for the purpose of combating crime, falls within the scope of Directive 2002/58. Whereas, in particular, the Belgian, Danish, German and Estonian Governments, Ireland and the Netherlands Government have expressed the opinion that the answer is that it does, the Czech Government has proposed that the answer is that it does not, since the sole objective of such legislation is to combat crime. The United Kingdom Government, for its part, argues that only legislation relating to the retention of data, but not legislation relating to the access to that data by the competent national law enforcement authorities, falls within the scope of that directive.

66 As regards, finally, the Commission, while it maintained, in its written observations submitted to the Court in Case C-203/15, that the national legislation at issue in the main proceedings falls within the scope of Directive 2002/58, the Commission argues, in its written observations in Case C-698/15, that only national rules relating to the retention of data, and not those relating to the access of the national authorities to that data, fall within the scope of that directive. The latter rules should, however, according to the Commission, be taken into consideration in order to assess whether national legislation governing the retention of data by providers of electronic communications services constitutes a proportionate interference in the fundamental rights guaranteed in Articles 7 and 8 of the Charter.

67 In that regard, it must be observed that a determination of the scope of Directive 2002/58 must take into consideration, inter alia, the general structure of that directive.

68 Article 1(1) of Directive 2002/58 indicates that the directive provides, inter alia, for the harmonisation of the provisions of national law required to ensure an equivalent level of protection of fundamental rights and freedoms, and in particular the right to privacy and confidentiality, with respect to the processing of personal data in the electronic communications sector.

69 Article 1(3) of that directive excludes from its scope 'activities of the State' in specified fields, including the activities of the State in areas of criminal law and in the areas of public security, defence and State security, including the economic well-being of the State when the activities relate to State security matters (see, by analogy, with respect to the first indent of Article 3(2) of Directive 95/46, judgments of 6 November 2003, *Lindqvist*, C-101/01, EU:C:2003:596, paragraph 43, and of 16 December 2008, *Satakunnan Markkinapörssi and Satamedia*, C-73/07, EU:C:2008:727, paragraph 41).

70 Article 3 of Directive 2002/58 states that the directive is to apply to the processing of personal data in connection with the provision of publicly available electronic communications services in public communications networks in the European Union, including public communications networks supporting data collection and identification devices ('electronic communications services'). Consequently, that directive must be regarded as regulating the activities of the providers of such services.

71 Article 15(1) of Directive 2002/58 states that Member States may adopt, subject to the conditions laid down, 'legislative measures to restrict the scope of the rights and obligations provided for in Article 5, Article 6, Article 8(1), (2), (3) and (4), and Article 9 [of that directive]'. The second sentence of Article 15(1) of that directive identifies, as an example of measures that may thus be adopted by Member States, measures 'providing for the retention of data'.

72 Admittedly, the legislative measures that are referred to in Article 15(1) of Directive 2002/58 concern activities characteristic of States or State authorities, and are unrelated to fields in which individuals are active (see, to that effect, judgment of 29 January 2008, *Promusicae*, C-275/06, EU:C:2008:54, paragraph 51). Moreover, the objectives which, under that provision, such measures must pursue, such as safeguarding national security, defence and public security and the prevention, investigation, detection and prosecution of criminal offences or of unauthorised use of the electronic communications system, overlap substantially with the objectives pursued by the activities referred to in Article 1(3) of that directive.

73 However, having regard to the general structure of Directive 2002/58, the factors identified in the preceding paragraph of this judgment do not permit the conclusion that the legislative measures referred to in Article 15(1) of Directive 2002/58 are excluded from the scope of that directive, for otherwise that provision would be deprived of any purpose. Indeed, Article 15(1) necessarily presupposes that the national measures referred to therein, such as those relating to the retention of data for the purpose of combating crime, fall within the scope of that directive, since it expressly authorises the Member States to adopt them only if the conditions laid down in the directive are met.

74 Further, the legislative measures referred to in Article 15(1) of Directive 2002/58 govern, for the purposes mentioned in that provision, the activity of providers of electronic communications services. Accordingly, Article 15(1), read together with Article 3 of that directive, must be interpreted as meaning that such legislative measures fall within the scope of that directive.

75 The scope of that directive extends, in particular, to a legislative measure, such as that at issue in the main proceedings, that requires such providers to retain traffic and location data, since to do so necessarily involves the processing, by those providers, of personal data.

76 The scope of that directive also extends to a legislative measure relating, as in the main proceedings, to the access of the national authorities to the data retained by the providers of electronic communications services.

77 The protection of the confidentiality of electronic communications and related traffic data, guaranteed in Article 5(1) of Directive 2002/58, applies to the measures taken by all persons other than users, whether private persons or bodies or State bodies. As confirmed in recital 21 of that directive, the aim of the directive is to prevent unauthorised access to communications, including 'any data related to such communications', in order to protect the confidentiality of electronic communications.

78 In those circumstances, a legislative measure whereby a Member State, on the basis of Article 15(1) of Directive 2002/58, requires providers of electronic communications services, for the purposes set out in that provision, to grant national authorities, on the conditions laid down in such a measure, access to the data retained by those providers, concerns the processing of personal data by those providers, and that processing falls within the scope of that directive.

79 Further, since data is retained only for the purpose, when necessary, of making that data accessible to the competent national authorities, national legislation that imposes the retention of data necessarily entails, in principle, the existence of provisions relating to access by the competent national authorities to the data retained by the providers of electronic communications services.

80 That interpretation is confirmed by Article 15(1b) of Directive 2002/58, which provides that providers are to establish internal procedures for responding to requests for access to users' personal data, based on provisions of national law adopted pursuant to Article 15(1) of that directive.

81 It follows from the foregoing that national legislation, such as that at issue in the main proceedings in Cases C-203/15 and C-698/15, falls within the scope of Directive 2002/58.

The interpretation of Article 15(1) of Directive 2002/58, in the light of Articles 7, 8, 11 and Article 52(1) of the Charter

82 It must be observed that, according to Article 1(2) of Directive 2002/58, the provisions of that directive 'particularise and complement' Directive 95/46. As stated in its recital 2, Directive 2002/58 seeks to ensure, in particular, full respect for the rights set out in Articles 7 and 8 of the Charter. In that regard, it is clear from the explanatory memorandum of the Proposal for a Directive of the European Parliament and of the Council concerning the processing of personal data and the protection of privacy in the electronic communications sector (COM(2000) 385 final), which led to Directive 2002/58, that the EU legislature sought 'to ensure that a high level of protection of personal data and privacy will continue to be guaranteed for all electronic communications services regardless of the technology used'.

83 To that end, Directive 2002/58 contains specific provisions designed, as is apparent from, in particular, recitals 6 and 7 of that directive, to offer to the users of electronic communications services protection against risks to their personal data and privacy that arise from new technology and the increasing capacity for automated storage and processing of data.

84 In particular, Article 5(1) of that directive provides that the Member States must ensure, by means of their national legislation, the confidentiality of communications effected by means of a public communications network and publicly available electronic communications services, and the confidentiality of the related traffic data.

85 The principle of confidentiality of communications established by Directive 2002/58 implies, inter alia, as stated in the second sentence of Article 5(1) of that directive, that, as a general rule, any person other than the users is prohibited from storing, without the consent of the users concerned, the traffic data related to electronic communications. The only exceptions relate to persons lawfully authorised in accordance with Article 15(1) of that directive and to the technical storage necessary for conveyance of a communication (see, to that effect, judgment of 29 January 2008, *Promusicae*, C-275/06, EU:C:2008:54, paragraph 47).

86 Accordingly, as confirmed by recitals 22 and 26 of Directive 2002/58, under Article 6 of that directive, the processing and storage of traffic data are permitted only to the extent necessary and for the time necessary for the billing and marketing of services and the provision of value added services (see, to that effect, judgment of 29 January 2008, *Promusicae*, C-275/06, EU:C:2008:54, paragraphs 47 and 48). As regards, in particular, the billing of services, that processing is permitted only up to the end of the period during which the bill may be lawfully challenged or legal proceedings brought to obtain payment. Once that period has elapsed, the data processed and stored must be erased or made anonymous. As regards location data other than traffic data, Article 9(1) of that directive provides that that data may be processed only subject to certain conditions and after it has been made anonymous or the consent of the users or subscribers obtained.

87 The scope of Article 5, Article 6 and Article 9(1) of Directive 2002/58, which seek to ensure the confidentiality of communications and related data, and to minimise the risks of misuse, must moreover be assessed in the light of recital 30 of that directive, which states: 'Systems for the provision of electronic communications networks and services should be designed to limit the amount of personal data necessary to a strict minimum'.

88 Admittedly, Article 15(1) of Directive 2002/58 enables the Member States to introduce exceptions to the obligation of principle, laid down in Article 5(1) of that directive, to ensure the confidentiality of personal data, and to the corresponding obligations, referred to in Articles 6 and 9 of that directive (see, to that effect, judgment of 29 January 2008, *Promusicae*, C-275/06, EU:C:2008:54, paragraph 50).

89 Nonetheless, in so far as Article 15(1) of Directive 2002/58 enables Member States to restrict the scope of the obligation of principle to ensure the confidentiality of communications and related traffic data, that provision must, in accordance with the Court's settled case-law, be interpreted strictly (see, by analogy, judgment of 22 November 2012, *Probst*, C-119/12, EU:C:2012:748, paragraph 23). That provision cannot, therefore, permit the exception to that obligation of principle and, in particular, to the prohibition on storage of data, laid down in Article 5 of Directive 2002/58, to become the rule, if the latter provision is not to be rendered largely meaningless.

90 It must, in that regard, be observed that the first sentence of Article 15(1) of Directive 2002/58 provides that the objectives pursued by the legislative measures that it covers, which derogate from the principle of confidentiality of communications and related traffic data, must be 'to safeguard national security — that is, State security — defence, public security, and the prevention, investigation, detection and prosecution of criminal offences or of unauthorised use of the electronic communication system', or one of the other objectives specified in Article 13(1) of Directive 95/46, to which the first sentence of Article 15(1) of Directive 2002/58 refers (see, to that effect, judgment of 29 January 2008, *Promusicae*, C-275/06, EU:C:2008:54, paragraph 53). That list of objectives is exhaustive, as is apparent from the second sentence of Article 15(1) of Directive 2002/58, which states that the legislative measures must be justified on 'the grounds laid down' in the first sentence of Article 15(1) of that directive. Accordingly, the Member States cannot adopt such measures for purposes other than those listed in that latter provision.

91 Further, the third sentence of Article 15(1) of Directive 2002/58 provides that '[a]ll the measures referred to [in Article 15(1)] shall be in accordance with the general principles of [European Union] law, including those referred to in Article 6(1) and (2) [EU]', which include the general principles and fundamental rights now guaranteed by the Charter. Article 15(1) of Directive 2002/58 must, therefore, be interpreted in the light of the fundamental rights guaranteed by the Charter (see, by analogy, in relation to Directive 95/46, judgments of 20 May 2003, *Österreichischer Rundfunk and Others*, C-465/00, C-138/01 and C-139/01, EU:C:2003:294, paragraph 68; of 13 May 2014, *Google Spain and Google*, C-131/12, EU:C:2014:317, paragraph 68, and of 6 October 2015, *Schrems*, C-362/14, EU:C:2015:650, paragraph 38).

92 In that regard, it must be emphasised that the obligation imposed on providers of electronic communications services, by national legislation such as that at issue in the main proceedings, to retain traffic data in order, when necessary, to make that data available to the competent national authorities, raises questions relating to compatibility not only with Articles 7 and 8 of the Charter, which are expressly referred to in the questions referred for a preliminary ruling, but also with the freedom of expression guaranteed in Article 11 of the Charter (see, by analogy, in relation to Directive 2006/24, the *Digital Rights* judgment, paragraphs 25 and 70).

93 Accordingly, the importance both of the right to privacy, guaranteed in Article 7 of the Charter, and of the right to protection of personal data, guaranteed in Article 8 of the Charter, as derived from the Court's case-law (see, to that effect, judgment of 6 October 2015, *Schrems*, C-362/14, EU:C:2015:650, paragraph 39 and the case-law cited), must be taken into consideration in interpreting Article 15(1) of

Directive 2002/58. The same is true of the right to freedom of expression in the light of the particular importance accorded to that freedom in any democratic society. That fundamental right, guaranteed in Article 11 of the Charter, constitutes one of the essential foundations of a pluralist, democratic society, and is one of the values on which, under Article 2 TEU, the Union is founded (see, to that effect, judgments of 12 June 2003, *Schmidberger*, C-112/00, EU:C:2003:333, paragraph 79, and of 6 September 2011, *Patriciello*, C-163/10, EU:C:2011:543, paragraph 31).

94 In that regard, it must be recalled that, under Article 52(1) of the Charter, any limitation on the exercise of the rights and freedoms recognised by the Charter must be provided for by law and must respect the essence of those rights and freedoms. With due regard to the principle of proportionality, limitations may be imposed on the exercise of those rights and freedoms only if they are necessary and if they genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others (judgment of 15 February 2016, *N.*, C-601/15 PPU, EU:C:2016:84, paragraph 50).

95 With respect to that last issue, the first sentence of Article 15(1) of Directive 2002/58 provides that Member States may adopt a measure that derogates from the principle of confidentiality of communications and related traffic data where it is a 'necessary, appropriate and proportionate measure within a democratic society', in view of the objectives laid down in that provision. As regards recital 11 of that directive, it states that a measure of that kind must be 'strictly' proportionate to the intended purpose. In relation to, in particular, the retention of data, the requirement laid down in the second sentence of Article 15(1) of that directive is that data should be retained 'for a limited period' and be 'justified' by reference to one of the objectives stated in the first sentence of Article 15(1) of that directive.

96 Due regard to the principle of proportionality also derives from the Court's settled case-law to the effect that the protection of the fundamental right to respect for private life at EU level requires that derogations from and limitations on the protection of personal data should apply only in so far as is strictly necessary (judgments of 16 December 2008, *Satakunnan Markkinapörssi and Satamedia*, C-73/07, EU:C:2008:727, paragraph 56; of 9 November 2010, *Volker und Markus Schecke and Eifert*, C-92/09 and C-93/09, EU:C:2010:662, paragraph 77; the *Digital Rights* judgment, paragraph 52, and of 6 October 2015, *Schrems*, C-362/14, EU:C:2015:650, paragraph 92).

97 As regards whether national legislation, such as that at issue in Case C-203/15, satisfies those conditions, it must be observed that that legislation provides for a general and indiscriminate retention of all traffic and location data of all subscribers and registered users relating to all means of electronic communication, and that it imposes on providers of electronic communications services an obligation to retain that data systematically and continuously, with no exceptions. As stated in the order for reference, the categories of data covered by that legislation correspond, in essence, to the data whose retention was required by Directive 2006/24.

98 The data which providers of electronic communications services must therefore retain makes it possible to trace and identify the source of a communication and its destination, to identify the date, time, duration and type of a communication, to identify users' communication equipment, and to establish the location of mobile communication equipment. That data includes, inter alia, the name and address of the subscriber or registered user, the telephone number of the caller, the number called and an IP address for internet services. That data makes it possible, in particular, to identify the person with whom a subscriber or registered user has communicated and by what means, and to identify the time of the communication as well as the place from which that communication took place. Further, that data makes it possible to know how often the subscriber or registered user communicated with certain persons in a given period (see, by analogy, with respect to Directive 2006/24, the *Digital Rights* judgment, paragraph 26).

99 That data, taken as a whole, is liable to allow very precise conclusions to be drawn concerning the private lives of the persons whose data has been retained, such as everyday habits, permanent or temporary places of residence, daily or other movements, the activities carried out, the social relationships of those persons and the social environments frequented by them (see, by analogy, in relation to Directive 2006/24, the *Digital Rights judgment*, paragraph 27). In particular, that data provides the means, as observed by the Advocate General in points 253, 254 and 257 to 259 of his Opinion, of establishing a profile of the individuals concerned, information that is no less sensitive, having regard to the right to privacy, than the actual content of communications.

100 The interference entailed by such legislation in the fundamental rights enshrined in Articles 7 and 8 of the Charter is very far-reaching and must be considered to be particularly serious. The fact that the data is retained without the subscriber or registered user being informed is likely to cause the persons concerned to feel that their private lives are the subject of constant surveillance (see, by analogy, in relation to Directive 2006/24, the *Digital Rights* judgment, paragraph 37).

101 Even if such legislation does not permit retention of the content of a communication and is not, therefore, such as to affect adversely the essence of those rights (see, by analogy, in relation to Directive 2006/24, the *Digital Rights* judgment, paragraph 39), the retention of traffic and location data could nonetheless have an effect on the use of means of electronic communication and, consequently, on the exercise by the users thereof of their freedom of expression, guaranteed in Article 11 of the Charter (see, by analogy, in relation to Directive 2006/24, the *Digital Rights* judgment, paragraph 28).

102 Given the seriousness of the interference in the fundamental rights concerned represented by national legislation which, for the purpose of fighting crime, provides for the retention of traffic and location data, only the objective of fighting serious crime is capable of justifying such a measure (see, by analogy, in relation to Directive 2006/24, the *Digital Rights* judgment, paragraph 60).

103 Further, while the effectiveness of the fight against serious crime, in particular organised crime and terrorism, may depend to a great extent on the use of modern investigation techniques, such an objective of general interest, however fundamental it may be, cannot in itself justify that national legislation providing for the general and indiscriminate retention of all traffic and location data should be considered to be necessary for the purposes of that fight (see, by analogy, in relation to Directive 2006/24, the *Digital Rights* judgment, paragraph 51).

104 In that regard, it must be observed, first, that the effect of such legislation, in the light of its characteristic features as described in paragraph 97 of the present judgment, is that the retention of traffic and location data is the rule, whereas the system put in place by Directive 2002/58 requires the retention of data to be the exception.

105 Second, national legislation such as that at issue in the main proceedings, which covers, in a generalised manner, all subscribers and registered users and all means of electronic communication as well as all traffic data, provides for no differentiation, limitation or exception according to the objective pursued. It is comprehensive in that it affects all persons using electronic communication services, even though those persons are not, even indirectly, in a situation that is liable to give rise to criminal proceedings. It therefore applies even to persons for whom there is no evidence capable of suggesting that their conduct might have a link, even an indirect or remote one, with serious criminal offences. Further, it does not provide for any exception, and consequently it applies even to persons whose communications are subject, according to rules of national law, to the obligation of professional secrecy (see, by analogy, in relation to Directive 2006/24, the *Digital Rights* judgment, paragraphs 57 and 58).

106 Such legislation does not require there to be any relationship between the data which must be retained and a threat to public security. In particular, it is not restricted to retention in relation to (i) data pertaining to a particular time period and/or geographical area and/or a group of persons likely to be involved, in one way or another, in a serious crime, or (ii) persons who could, for other reasons, contribute, through their data being retained, to fighting crime (see, by analogy, in relation to Directive 2006/24, the *Digital Rights* judgment, paragraph 59).

107 National legislation such as that at issue in the main proceedings therefore exceeds the limits of what is strictly necessary and cannot be considered to be justified, within a democratic society, as required by Article 15(1) of Directive 2002/58, read in the light of Articles 7, 8 and 11 and Article 52(1) of the Charter.

108 However, Article 15(1) of Directive 2002/58, read in the light of Articles 7, 8 and 11 and Article 52(1) of the Charter, does not prevent a Member State from adopting legislation permitting, as a preventive measure, the targeted retention of traffic and location data, for the purpose of fighting serious crime, provided that the retention of data is limited, with respect to the categories of data to be retained, the means of communication affected, the persons concerned and the retention period adopted, to what is strictly necessary.

109 In order to satisfy the requirements set out in the preceding paragraph of the present judgment, that national legislation must, first, lay down clear and precise rules governing the scope and application of such a data retention measure and imposing minimum safeguards, so that the persons whose data has been retained have sufficient guarantees of the effective protection of their personal data against the risk of misuse. That legislation must, in particular, indicate in what circumstances and under which conditions a data retention measure may, as a preventive measure, be adopted, thereby ensuring that such a measure is limited to what is strictly necessary (see, by analogy, in relation to Directive 2006/24, the *Digital Rights* judgment, paragraph 54 and the case-law cited).

110 Second, as regards the substantive conditions which must be satisfied by national legislation that authorises, in the context of fighting crime, the retention, as a preventive measure, of traffic and location data, if it is to be ensured that data retention is limited to what is strictly necessary, it must be observed that, while those conditions may vary according to the nature of the measures taken for the purposes of prevention, investigation, detection and prosecution of serious crime, the retention of data must continue nonetheless to meet objective criteria, that establish a connection between the data to be retained and the objective pursued. In particular, such conditions must be shown to be such as actually to circumscribe, in practice, the extent of that measure and, thus, the public affected.

111 As regard the setting of limits on such a measure with respect to the public and the situations that may potentially be affected, the national legislation must be based on objective evidence which makes it possible to identify a public whose data is likely to reveal a link, at least an indirect one, with serious criminal offences, and to contribute in one way or another to fighting serious crime or to preventing a serious risk to public security. Such limits may be set by using a geographical criterion where the competent national authorities consider, on the basis of objective evidence, that there exists, in one or more geographical areas, a high risk of preparation for or commission of such offences.

112 Having regard to all of the foregoing, the answer to the first question referred in Case C-203/15 is that Article 15(1) of Directive 2002/58, read in the light of Articles 7, 8 and 11 and Article 52(1) of the Charter, must be interpreted as precluding national legislation which, for the purpose of fighting crime, provides for the general and indiscriminate retention of all traffic and location data of all subscribers and registered users relating to all means of electronic communication.

The second question in Case C-203/15 and the first question in Case C-698/15

113 It must, at the outset, be noted that the Kammarrätten i Stockholm (Administrative Court of Appeal, Stockholm) referred the second question in Case C-203/15 only in the event that the answer to the first question in that case was negative. That second question, however, arises irrespective of whether retention of data is generalised or targeted, as set out in paragraphs 108 to 111 of this judgment. Accordingly, the Court must answer the second question in Case C-203/15 together with the first question in Case C-698/15, which is referred regardless of the extent of the obligation to retain data that is imposed on providers of electronic communications services.

114 By the second question in Case C-203/15 and the first question in Case C-698/15, the referring courts seek, in essence, to ascertain whether Article 15(1) of Directive 2002/58, read in the light of Articles 7, 8 and Article 52(1) of the Charter, must be interpreted as precluding national legislation governing the protection and security of traffic and location data, and more particularly, the access of the competent national authorities to retained data, where that legislation does not restrict that access solely to the objective of fighting serious crime, where that access is not subject to prior review by a court or an independent administrative authority, and where there is no requirement that the data concerned should be retained within the European Union.

115 As regards objectives that are capable of justifying national legislation that derogates from the principle of confidentiality of electronic communications, it must be borne in mind that, since, as stated in paragraphs 90 and 102 of this judgment, the list of objectives set out in the first sentence of Article 15(1) of Directive 2002/58 is exhaustive, access to the retained data must correspond, genuinely and strictly, to one of those objectives. Further, since the objective pursued by that legislation must be proportionate to the seriousness of the interference in fundamental rights that that access entails, it follows that, in the area of prevention, investigation, detection and prosecution of criminal offences, only the objective of fighting serious crime is capable of justifying such access to the retained data.

116 As regards compatibility with the principle of proportionality, national legislation governing the conditions under which the providers of electronic communications services must grant the competent national authorities access to the retained data must ensure, in accordance with what was stated in paragraphs 95 and 96 of this judgment, that such access does not exceed the limits of what is strictly necessary.

117 Further, since the legislative measures referred to in Article 15(1) of Directive 2002/58 must, in accordance with recital 11 of that directive, 'be subject to adequate safeguards', a data retention measure must, as follows from the case-law cited in paragraph 109 of this judgment, lay down clear and precise rules indicating in what circumstances and under which conditions the providers of electronic communications services must grant the competent national authorities access to the data. Likewise, a measure of that kind must be legally binding under domestic law.

118 In order to ensure that access of the competent national authorities to retained data is limited to what is strictly necessary, it is, indeed, for national law to determine the conditions under which the providers of electronic communications services must grant such access. However, the national legislation concerned cannot be limited to requiring that access should be for one of the objectives referred to in Article 15(1) of Directive 2002/58, even if that objective is to fight serious crime. That national legislation must also lay down the substantive and procedural conditions governing the access of the competent national authorities to the retained data (see, by analogy, in relation to Directive 2006/24, the *Digital Rights* judgment, paragraph 61).

119 Accordingly, and since general access to all retained data, regardless of whether there is any link, at least indirect, with the intended purpose, cannot be regarded as limited to what is strictly necessary, the national legislation concerned must be based on objective criteria in order to define the

circumstances and conditions under which the competent national authorities are to be granted access to the data of subscribers or registered users. In that regard, access can, as a general rule, be granted, in relation to the objective of fighting crime, only to the data of individuals suspected of planning, committing or having committed a serious crime or of being implicated in one way or another in such a crime (see, by analogy, ECtHR, 4 December 2015, *Zakharov v. Russia*, CE:ECHR:2015:1204JUD004714306, § 260). However, in particular situations, where for example vital national security, defence or public security interests are threatened by terrorist activities, access to the data of other persons might also be granted where there is objective evidence from which it can be deduced that that data might, in a specific case, make an effective contribution to combating such activities.

120 In order to ensure, in practice, that those conditions are fully respected, it is essential that access of the competent national authorities to retained data should, as a general rule, except in cases of validly established urgency, be subject to a prior review carried out either by a court or by an independent administrative body, and that the decision of that court or body should be made following a reasoned request by those authorities submitted, inter alia, within the framework of procedures for the prevention, detection or prosecution of crime (see, by analogy, in relation to Directive 2006/24, the *Digital Rights* judgment, paragraph 62; see also, by analogy, in relation to Article 8 of the ECHR, ECtHR, 12 January 2016, *Szabó and Vissy v. Hungary*, CE:ECHR:2016:0112JUD003713814, §§ 77 and 80).

121 Likewise, the competent national authorities to whom access to the retained data has been granted must notify the persons affected, under the applicable national procedures, as soon as that notification is no longer liable to jeopardise the investigations being undertaken by those authorities. That notification is, in fact, necessary to enable the persons affected to exercise, inter alia, their right to a legal remedy, expressly provided for in Article 15(2) of Directive 2002/58, read together with Article 22 of Directive 95/46, where their rights have been infringed (see, by analogy, judgments of 7 May 2009, *Rijkeboer*, C-553/07, EU:C:2009:293, paragraph 52, and of 6 October 2015, *Schrems*, C-362/14, EU:C:2015:650, paragraph 95).

122 With respect to the rules relating to the security and protection of data retained by providers of electronic communications services, it must be noted that Article 15(1) of Directive 2002/58 does not allow Member States to derogate from Article 4(1) and Article 4(1a) of that directive. Those provisions require those providers to take appropriate technical and organisational measures to ensure the effective protection of retained data against risks of misuse and against any unlawful access to that data. Given the quantity of retained data, the sensitivity of that data and the risk of unlawful access to it, the providers of electronic communications services must, in order to ensure the full integrity and confidentiality of that data, guarantee a particularly high level of protection and security by means of appropriate technical and organisational measures. In particular, the national legislation must make provision for the data to be retained within the European Union and for the irreversible destruction of the data at the end of the data retention period (see, by analogy, in relation to Directive 2006/24, the *Digital Rights* judgment, paragraphs 66 to 68).

123 In any event, the Member States must ensure review, by an independent authority, of compliance with the level of protection guaranteed by EU law with respect to the protection of individuals in relation to the processing of personal data, that control being expressly required by Article 8(3) of the Charter and constituting, in accordance with the Court's settled case-law, an essential element of respect for the protection of individuals in relation to the processing of personal data. If that were not so, persons whose personal data was retained would be deprived of the right, guaranteed in Article 8(1) and (3) of the Charter, to lodge with the national supervisory authorities a claim seeking the protection of their data (see, to that effect, the *Digital Rights* judgment, paragraph 68, and the judgment of 6 October 2015, *Schrems*, C-362/14, EU:C:2015:650, paragraphs 41 and 58).

124 It is the task of the referring courts to determine whether and to what extent the national legislation at issue in the main proceedings satisfies the requirements stemming from Article 15(1) of Directive 2002/58, read in the light of Articles 7, 8 and 11 and Article 52(1) of the Charter, as set out in paragraphs 115 to 123 of this judgment, with respect to both the access of the competent national authorities to the retained data and the protection and level of security of that data.

125 Having regard to all of the foregoing, the answer to the second question in Case C-203/15 and to the first question in Case C-698/15 is that Article 15(1) of Directive 2002/58, read in the light of Articles 7, 8 and 11 and Article 52(1) of the Charter, must be interpreted as precluding national legislation governing the protection and security of traffic and location data and, in particular, access of the competent national authorities to the retained data, where the objective pursued by that access, in the context of fighting crime, is not restricted solely to fighting serious crime, where access is not subject to prior review by a court or an independent administrative authority, and where there is no requirement that the data concerned should be retained within the European Union.

The second question in Case C-698/15

126 By the second question in Case C-698/15, the Court of Appeal (England & Wales) (Civil Division) seeks in essence to ascertain whether, in the *Digital Rights* judgment, the Court interpreted Articles 7 and/or 8 of the Charter in such a way as to expand the scope conferred on Article 8 ECHR by the European Court of Human Rights.

127 As a preliminary point, it should be recalled that, whilst, as Article 6(3) TEU confirms, fundamental rights recognised by the ECHR constitute general principles of EU law, the ECHR does not constitute, as long as the European Union has not acceded to it, a legal instrument which has been formally incorporated into EU law (see, to that effect, judgment of 15 February 2016, *N.*, C-601/15 PPU, EU:C:2016:84, paragraph 45 and the case-law cited).

128 Accordingly, the interpretation of Directive 2002/58, which is at issue in this case, must be undertaken solely in the light of the fundamental rights guaranteed by the Charter (see, to that effect, judgment of 15 February 2016, *N.*, C-601/15 PPU, EU:C:2016:84, paragraph 46 and the case-law cited).

129 Further, it must be borne in mind that the explanation on Article 52 of the Charter indicates that paragraph 3 of that article is intended to ensure the necessary consistency between the Charter and the ECHR, 'without thereby adversely affecting the autonomy of Union law and … that of the Court of Justice of the European Union' (judgment of 15 February 2016, *N.*, C-601/15 PPU, EU:C:2016:84, paragraph 47). In particular, as expressly stated in the second sentence of Article 52(3) of the Charter, the first sentence of Article 52(3) does not preclude Union law from providing protection that is more extensive then the ECHR. It should be added, finally, that Article 8 of the Charter concerns a fundamental right which is distinct from that enshrined in Article 7 of the Charter and which has no equivalent in the ECHR.

130 However, in accordance with the Court's settled case-law, the justification for making a request for a preliminary ruling is not for advisory opinions to be delivered on general or hypothetical questions, but rather that it is necessary for the effective resolution of a dispute concerning EU law (see, to that effect, judgments of 24 April 2012, *Kamberaj*, C-571/10, EU:C:2012:233, paragraph 41; of 26 February 2013, *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraph 42, and of 27 February 2014, *Pohotovosť*, C-470/12, EU:C:2014:101 paragraph 29).

131 In this case, in view of the considerations set out, in particular, in paragraphs 128 and 129 of the present judgment, the question whether the protection conferred by Articles 7 and 8 of the Charter is wider than that guaranteed in Article 8 of the ECHR is not such as to affect the interpretation of Directive 2002/58, read in the light of the Charter, which is the matter in dispute in the proceedings in Case C-698/15.

132 Accordingly, it does not appear that an answer to the second question in Case C-698/15 can provide any interpretation of points of EU law that is required for the resolution, in the light of that law, of that dispute.

133 It follows that the second question in Case C-698/15 is inadmissible.

Costs

134 Since these proceedings are, for the parties to the main proceedings, a step in the actions pending before the national courts, the decision on costs is a matter for those courts. 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 15(1) of Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), as amended by Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009, read in the light of Articles 7, 8 and 11 and Article 52(1) of the Charter of Fundamental Rights of the European Union, must be interpreted as precluding national legislation which, for the purpose of fighting crime, provides for general and indiscriminate retention of all traffic and location data of all subscribers and registered users relating to all means of electronic communication.**

2. **Article 15(1) of Directive 2002/58, as amended by Directive 2009/136, read in the light of Articles 7, 8 and 11 and Article 52(1) of the Charter of Fundamental Rights, must be interpreted as precluding national legislation governing the protection and security of traffic and location data and, in particular, access of the competent national authorities to the retained data, where the objective pursued by that access, in the context of fighting crime, is not restricted solely to fighting serious crime, where access is not subject to prior review by a court or an independent administrative authority, and where there is no requirement that the data concerned should be retained within the European Union.**

3. **The second question referred by the Court of Appeal (England & Wales) (Civil Division) is inadmissible.**

Lenaerts	Tizzano	Silva de Lapuerta
von Danwitz	Da Cruz Vilaça Juhász	Vilaras
Borg Barthet	Malenovský	Levits
Bonichot	Arabadjiev	Rodin

Biltgen Lycourgos

Delivered in open court in Luxembourg on 21 December 2016.

A. Calot Escobar
Registrar

K. Lenaerts
President

Reports of Cases

JUDGMENT OF THE GENERAL COURT (Ninth Chamber)

15 June 2017*

(Common foreign and security policy — Restrictive measures in respect of actions undermining or threatening Ukraine — Freezing of funds — Restrictions on entry into the territories of the Member States — Natural person actively supporting or implementing actions undermining or threatening Ukraine — Obligation to state reasons — Manifest error of assessment — Freedom of expression — Proportionality — Rights of defence)

In Case T-262/15,

Dmitrii Konstantinovich Kiselev, residing in Korolev (Russia), represented by J. Linneker, Solicitor, T. Otty, Barrister, and B. Kennelly QC,

applicant,

v

Council of the European Union, represented by V. Piessevaux and J.-P. Hix, acting as Agents,

defendant,

APPLICATION pursuant to Article 263 TFEU seeking the annulment of (i) Council Decision (CFSP) 2015/432 of 13 March 2015 amending Decision 2014/145/CFSP concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine (OJ 2015 L 70, p. 47) and Council Implementing Regulation (EU) 2015/427 of 13 March 2015 implementing Regulation (EU) No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine (OJ 2015 L 70, p. 1), (ii) Council Decision (CFSP) 2015/1524 of 14 September 2015 amending Decision 2014/145/CFSP concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine (OJ 2015 L 239, p. 157) and Council Implementing Regulation (EU) 2015/1514 of 14 September 2015 implementing Regulation No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine (OJ 2015 L 239, p. 30), and (iii) Council Decision (CFSP) 2016/359 of 10 March 2016 amending Decision 2014/145/CFSP concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine (OJ 2016 L 67, p. 37) and Council Implementing Regulation (EU) 2016/353 of 10 March 2016 implementing Regulation No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine (OJ 2016 L 67, p. 1), in so far as those measures apply to the applicant,

THE GENERAL COURT (Ninth Chamber),

composed of G. Berardis (Rapporteur), President, V. Tomljenović and D. Spielmann, Judges,

* Language of the case: English.

Registrar: C. Heeren, Administrator,

having regard to the written part of the procedure and further to the hearing on 28 September 2016,

gives the following

Judgment

Background to the dispute

1 On 17 March 2014, the Council of the European Union adopted, on the basis of Article 29 TEU, Decision 2014/145/CFSP concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine (OJ 2014 L 78, p. 16).

2 On the same date, the Council adopted, on the basis of Article 215(2) TFEU, Regulation (EU) No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine (OJ 2014 L 78, p. 6).

3 By Council Implementing Decision 2014/151/CFSP of 21 March 2014 implementing Decision 2014/145 (OJ 2014 L 86, p. 30) and by Council Implementing Regulation (EU) No 284/2014 of 21 March 2014 implementing Regulation No 269/2014 (OJ 2014 L 86, p. 27), the name of the applicant, Dmitrii Konstantinovich Kiselev, was included on the lists of persons subject to the restrictive measures provided for in that regulation and that decision ('the lists at issue') for the following reasons:

'Appointed by Presidential Decree on 9 December 2013 Head of the Russian Federal State news agency "Rossiya Segodnya". Central figure of the government propaganda supporting the deployment of Russian forces in Ukraine.'

4 Subsequently, on 25 July 2014, the Council adopted Decision 2014/499/CFSP amending Decision 2014/145 (OJ 2014 L 221, p. 15) and Regulation (EU) No 811/2014 amending Regulation No 269/2014 (OJ 2014 L 221, p. 11) in order, inter alia, to amend the criteria by which natural or legal persons, entities or bodies could be made subject to the restrictive measures at issue.

5 Article 2(1) and (2) of Decision 2014/145, as amended by Decision 2014/499 ('Decision 2014/145, as amended'), is worded as follows:

'1. All funds and economic resources belonging to, or owned, held or controlled by:

(a) natural persons responsible for, actively supporting or implementing, actions or policies which undermine or threaten the territorial integrity, sovereignty and independence of Ukraine, or stability or security in Ukraine, or which obstruct the work of international organisations in Ukraine, and natural or legal persons, entities or bodies associated with them;

...

as listed in the Annex, shall be frozen.

2. No funds or economic resources shall be made available, directly or indirectly, to or for the benefit of natural or legal persons, entities or bodies listed in the Annex.'

6 The detailed rules for the freezing of those funds are set out in the subsequent paragraphs of that article.

7 Article 1(1)(a) of Decision 2014/145, as amended, prohibits the entry into or transit through the territories of the Member States of natural persons who satisfy essentially the same criteria as those set out in Article 2(1)(a) of that decision.

8 Regulation No 269/2014, as amended by Regulation No 811/2014 ('Regulation No 269/2014, as amended'), requires the adoption of measures to freeze funds and lays down the detailed rules governing that freezing in terms essentially identical to those of Decision 2014/145, as amended. Article 3(1)(a) of that regulation largely reproduces Article 2(1)(a) of that decision.

9 By letter of 4 February 2015 ('the letter of 4 February 2015'), the applicant, through his lawyers, made a request to the Council pursuant 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) for, inter alia, access to the documents on which his inclusion on the lists at issue had been based.

10 By letter of 13 February 2015, sent to the applicant's lawyers, the Council informed the applicant, inter alia, that it intended to extend the duration of the restrictive measures against him until September 2015 and invited him to present observations in that regard by 26 February 2015 at the latest.

11 By letter of 25 February 2015 ('the letter of 25 February 2015'), the applicant, through the same lawyers, replied to that invitation, asserting that the adoption of restrictive measures against him was not justified.

12 On 13 March 2015, the Council adopted Decision (CFSP) 2015/432 amending Decision 2014/145 (OJ 2015 L 70, p. 47) and Implementing Regulation (EU) 2015/427 implementing Regulation No 269/2014 (OJ 2015 L 70, p. 1) ('the measures of March 2015'), by which, after reviewing the individual designations, it maintained the applicant's name on the lists at issue until 15 September 2015, without amending the statement of reasons in respect of the applicant.

13 By letter of 16 March 2015 ('the letter of 16 March 2015'), the Council notified the measures of March 2015 to the applicant's lawyers, stating in particular that the arguments which the applicant had raised in the letter of 25 February 2015 did not cast doubt on the validity of the reasons adopted in his case, since the State news agency of the Russian Federation Rossiya Segodnya ('RS') had given coverage of the events in Ukraine which was favourable to the Russian Government and had thus provided support to the policy of that government in relation to the situation in Ukraine.

Procedure and forms of order sought

14 By application lodged at the Court Registry on 22 May 2015, the applicant brought an action for annulment of the March 2015 measures, in so far as they concerned him.

15 On 14 September 2015, by Decision (CFSP) 2015/1524 amending Decision 2014/145 (OJ 2015 L 239, p. 157) and by Implementing Regulation (EU) 2015/1514 implementing Regulation No 269/2014 (OJ 2015 L 239, p. 30) ('the September 2015 measures'), the application of the restrictive measures at issue was extended by the Council until 15 March 2016, without any amendment to the statement of reasons in respect of the applicant.

16 By document lodged at the Court Registry on 24 November 2015, the applicant, in accordance with Article 86 of the Rules of Procedure of the General Court, modified the application so as to cover also the annulment of the September 2015 measures, in so far as they concerned him.

17 The Council submitted observations on that request by document lodged at the Court Registry on 6 January 2016.

18 On 10 March 2016, by Decision (CFSP) 2016/359 amending Decision 2014/145 (OJ 2016 L 67, p. 37) and by Implementing Regulation (EU) 2016/353 implementing Regulation No 269/2014 (OJ 2016 L 67, p. 1) ('the March 2016 measures'), the Council extended the application of the restrictive measures at issue until 15 September 2016, without amending the statement of reasons concerning the applicant.

19 By a statement lodged at the Court Registry on 20 May 2016, the applicant modified the application so as to cover also the annulment of the March 2016 measures, in so far as they concerned him.

20 The Council submitted observations on that request by document lodged at the Court Registry on 14 June 2016.

21 Acting upon a proposal of the Judge-Rapporteur, the Court (Ninth Chamber) decided to open the oral part of the procedure and, by way of measures of organisation of procedure under Article 89(3) of the Rules of Procedure, put questions to the parties, requesting them to reply to some in writing, and to the others at the hearing.

22 The parties' written replies were lodged at the Court Registry within the prescribed period.

23 The parties presented oral argument and answered the questions put to them by the Court at the hearing on 28 September 2016. At that hearing, the Court authorised the applicant to submit a document, which the applicant lodged the following day. The Council submitted its written observations on that document on 24 October 2016 and the President of the Ninth Chamber of the General Court therefore closed the oral part of the procedure on 26 October 2016.

24 The applicant claims that the Court should:

— annul the measures of March 2015, of September 2015 and of March 2016 ('the contested measures'), in so far as they concern him;

— order the Council to pay the costs.

25 The Council contends that the Court should:

— dismiss the action;

— reject the modifications of the application;

— order the applicant to pay the costs.

Law

26 In support of his action, the applicant relies on six pleas in law alleging (i) a manifest error of assessment with regard to the application to his situation of the designation criterion set out in Article 1(1)(a) and Article 2(1)(a) of Decision 2014/145, as amended, and in Article 3(1)(a) of Regulation No 269/2014, as amended, (ii) infringement of the right to freedom of expression, (iii) infringement of the rights of the defence and of the right to effective judicial protection, (iv) failure to comply with the obligation to state reasons, (v) in the alternative, that the criterion at issue would be incompatible with the right to freedom of expression, and therefore unlawful, if it allowed the imposition of restrictive measures on journalists exercising that right and (vi) breach of the

Agreement on partnership and cooperation between the European Communities and their Member States, of the one part, and the Russian Federation, of the other part (OJ 1997 L 327, p. 3; 'the Partnership Agreement').

27 It is appropriate to examine, first of all, the sixth plea, then the fourth plea, next the first and second pleas, followed by the fifth plea and, lastly, the third plea.

A – *The sixth plea, alleging a breach of the Partnership Agreement*

28 The applicant claims that, in adopting the restrictive measures at issue, the Council failed to take account of the requirements of the Partnership Agreement. In particular, he submits, the contested measures infringe paragraphs 1, 5 and 8 of Article 52 of that Agreement, which provide, respectively, that restrictions on the free movement of capital between the EU and Russia are prohibited, that the contracting parties may not introduce restrictions following a transitional period of five years, and that the Cooperation Council established under Article 90 of that Agreement must be consulted. In addition, he argues, the Council made no attempt to justify the breaches of the Partnership Agreement. The applicant states in this regard that neither Decision 2014/145 nor Regulation No 269/2014, as amended, contains provisions which can justify the restrictive measures in the light of Article 99(1)(d) of the Partnership Agreement, which permits the parties to that agreement to disregard it in order to take measures necessary for the protection of their essential security interests 'in time of war or serious international tension constituting threat of war'.

29 The Council disputes the applicant's arguments.

30 As a preliminary point, it must be noted that paragraphs 1, 5 and 8 of Article 52 of the Partnership Agreement indeed ensure the free movement of capital between the EU and the Russian Federation.

31 Nevertheless, Article 99(1)(d) of that agreement lays down an exception which may be invoked unilaterally by a party in order to take the measures that it considers necessary for the protection of its essential security interests, in particular 'in time of war or serious international tension constituting threat of war or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security'.

32 First, it must be observed that, as the Council emphasised, under the Partnership Agreement, a party that wishes to take measures on the basis of that provision is not required to inform the other party beforehand, nor to consult it or provide it with reasons for its action.

33 Secondly, as regards the situation in Ukraine when the contested measures were adopted, it may be considered that the actions of the Russian Federation constitute 'war or serious international tension constituting threat of war' within the meaning of Article 99(1)(d) of the Partnership Agreement. In view of the interest of the European Union and its Member States in having, as a neighbour, a stable Ukraine, it could be considered necessary to adopt restrictive measures in order to exert pressure on the Russian Federation to cease its activities undermining or threatening the territorial integrity, sovereignty or independence of Ukraine. Furthermore, those measures could be aimed at 'maintaining peace and international security', which is also mentioned in that article.

34 Accordingly, it must held that the restrictive measures at issue are compatible with the exemptions in relation to security laid down in Article 99(1)(d) of the Partnership Agreement.

35 In the light of those considerations the sixth plea must be rejected.

B – *The fourth plea, alleging infringement of the obligation to state reasons*

36 The applicant argues that the statement of reasons adopted by the Council to justify including and maintaining his name on the lists at issue is not sufficiently precise and specific. The vagueness of that statement of reasons, even if it were well founded, did not enable him to mount an effective challenge to the allegations made against him.

37 Furthermore, the applicant claims that those reasons cannot be supplemented by the statements contained in the letter of 16 March 2015 (see paragraph 13 above).

38 The Council disputes the applicant's arguments.

39 It should be borne in mind that the purpose of the obligation to state the reasons for an act adversely affecting a person, as provided for in the second paragraph of Article 296 TFEU and Article 41(2)(c) of the Charter of Fundamental Rights of the European Union ('the Charter') is, first, to provide the person concerned with sufficient information to make it possible to determine whether the act is well founded or whether it is vitiated by an error permitting its validity to be contested before the Courts of the European Union and, secondly, to enable those Courts to review the lawfulness of the act. The obligation to state reasons therefore constitutes an essential principle of European Union law which may be derogated from only for compelling reasons. The statement of reasons must therefore in principle be notified to the person concerned at the same time as the act adversely affecting him, for failure to state the reasons cannot be remedied by the fact that the person concerned learns the reasons for the act during the proceedings before the EU Courts (see judgment of 5 November 2014, *Mayaleh* v *Council*, T-307/12 and T-408/13, EU:T:2014:926, paragraph 85 and the case-law cited).

40 Consequently, unless there are compelling reasons touching on the security of the European Union or of its Member States or the conduct of their international relations which prevent the disclosure of certain information, the Council is required to inform the person or entity covered by restrictive measures of the actual and specific reasons why it considers that those measures had to be adopted. It must thus state the matters of fact and law which constitute the legal basis of the measures concerned and the considerations which led it to adopt them (see judgment of 5 November 2014, *Mayaleh* v *Council*, T-307/12 and T-408/13, EU:T:2014:926, paragraph 86 and case-law cited).

41 Furthermore, the statement of reasons must be appropriate to the measure at issue and the context in which it was adopted. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons is sufficient must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question. In particular, the reasons given for a measure adversely affecting a person are sufficient if it was adopted in circumstances known to that person which enable him to understand the scope of the measure concerning him (see judgment of 5 November 2014, *Mayaleh* v *Council*, T-307/12 and T-408/13, EU:T:2014:926, paragraph 87 and the case-law cited).

42 In the present case, the reasons relied on in relation to the applicant in the contested measures coincide with those set out in paragraph 3 above.

43 It must be pointed out that, although that statement of reasons does not explicitly state the criterion on which the Commission relied in order to maintain the applicant's name on the lists at issue, it is sufficiently clear from that statement of reasons that the Council applied the criterion set out in Article 1(1)(a) and Article 2(1)(a) of Decision 2014/145, as amended, and in Article 3(1)(a) of

Regulation No 269/2014, as amended, since it refers to natural persons actively supporting actions or policies which undermine or threaten the territorial integrity, sovereignty and independence of Ukraine ('the criterion at issue').

44 In the statement of reasons in question, after noting that the applicant was appointed Head of RS by a Presidential Decree of 9 December 2013, the Council observed that he was a central figure of the Russian government propaganda supporting the deployment of Russian forces in Ukraine.

45 That statement of reasons therefore explains that the rationale for including and maintaining the applicant's name on the lists at issue is that the Council considered that the applicant, by his management role in RS and by his statements as a journalist, had engaged in propaganda supporting the military actions of the Russian Federation in Ukraine and was therefore one of the persons actively supporting actions or policies undermining or threatening the territorial integrity, sovereignty and independence of Ukraine.

46 The applicant's observations submitted to the Council in the letter of 25 February 2015 confirm, moreover, that he had understood that he was covered by the restrictive measures at issue specifically because of his professional role and conduct.

47 As regards the details provided by the Council in the letter of 16 March 2015, it must be pointed out that, as the Council rightly submitted, that letter containing additional reasons, sent in the context of correspondence between the Council and the applicant, may be taken into account in the examination of those measures (see, to that effect, judgment of 6 September 2013, *Bank Melli Iran* v *Council*, T-35/10 and T-7/11, EU:T:2013:397, paragraph 88).

48 Accordingly, although it would have been preferable if the additional reasons had been set out directly in the contested measures, and not only in the letter of 16 March 2015, it is necessary to assess the contested measures also in the light of the details which the Council provided in that letter, in response to the applicant's letter of 25 February 2015, relating to the fact that RS had presented the events that had occurred in Ukraine in a light favourable to the Russian Government and had thereby supported the policy of that government in relation to the situation in Ukraine.

49 In any event, as the Council submits, the letter of 16 March 2015 mainly refers to the statement of reasons in the contested measures. While it true that the subject matter of the propaganda in which the applicant and RS are alleged to have engaged generally relates to the Russian policy concerning Ukraine, that issue is closely linked to the deployment of Russian forces in that country. Furthermore, even before receiving that letter, the applicant had understood that the propaganda in question was not limited to the deployment of Russian forces, since, in the letter of 25 February 2015, reference was made, more generally, to his lack of influence on 'the situation in Ukraine' and the lack of any causal link between 'any Russian actions in Ukraine' and his role as a manager and journalist.

50 In view of the foregoing, it must be concluded, first, that the statement of reasons set out by the Council in the contested measures enabled the applicant to understand the reasons for which his name had been maintained on the lists at issue, particularly since the details provided in the letter of 16 March 2015 may also be taken into account, and, secondly, that the Court is able to review whether that statement of reasons is well founded.

51 Thus, it must be held that the Council fulfilled its obligation to state reasons laid down in Article 296 TFEU.

52 The question whether that statement of reasons is well founded must be assessed within the context of the first and second pleas, rather than the present plea. In that regard, it must be borne in mind that the obligation to state reasons on which an act is based is an essential procedural requirement, to be distinguished from the question whether the reasons given are well founded, which goes to the

substantive legality of the contested act. The reasoning on which an act is based consists in a formal statement of the grounds on which that act is based. If those grounds are vitiated by errors, the latter will vitiate the substantive legality of the act, but not the statement of reasons in it, which may be adequate even though it sets out reasons which are incorrect (see judgment of 5 November 2014, *Mayaleh* v *Council*, T-307/12 and T-408/13, EU:T:2014:926, paragraph 96 and the case-law cited).

53 Consequently, the fourth plea in law must be rejected.

C – The first and second pleas in law, alleging a manifest error of assessment with regard to the application of the criterion at issue to the situation of the applicant and infringement of the right to freedom of expression

54 The applicant, after referring to general principles relating inter alia to the scope of judicial review, asserts that the Council failed to demonstrate, by evidence forming a solid factual basis, that his case satisfied the criterion at issue, which cannot apply to just any kind of support for actions or policies which undermine or threaten the territorial integrity, sovereignty and independence of Ukraine or stability or security in Ukraine. That criterion must respect the principle of legal certainty and be interpreted consistently with the rules on the right to freedom of expression as set out in Article 11 of the Charter and Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR').

55 In particular, the applicant observes, first, that the limitations of that right must be provided for by law, having regard to the principle of legal certainty, pursue an objective of general interest and be necessary and proportionate to that objective, without impairing the substance of that freedom or significantly interfering with journalistic activity. The notions of national security and hate speech must also be interpreted strictly.

56 Secondly, the applicant submits that the Council has provided no reliable evidence demonstrating propaganda by him with regard to the policy of the Russian Government in Ukraine.

57 The Council asserts that the criterion at issue applies to natural persons actively supporting actions or policies which undermine or threaten the territorial integrity, sovereignty and independence of Ukraine, or stability or security in Ukraine, which is the case with regard to the applicant. It is therefore not necessary to show that such persons are themselves responsible for such actions or policies; it is sufficient that those persons provide quantitatively or qualitatively significant support in that regard, and this is consistent with the principle of legal certainty.

58 In particular, first, according to the Council, the designation of the applicant on the basis of that criterion does not infringe the right to freedom of expression because it is provided for by law, it is consistent with the objective, set out in Article 21(2)(c) TEU, of exerting pressure on the Russian Government to cease its activities threatening Ukraine, and it does not prevent the applicant from carrying on his journalistic activities and expressing his views. The limitations on the applicant's right are therefore consistent with Article 52(1) of the Charter and with Article 10(2) of the ECHR.

59 Secondly, the Council asserts that its conclusion that the applicant is a central figure of the propaganda actively supporting the Russian Government's policy in Ukraine is substantiated by several pieces of reliable evidence.

60 It is appropriate to begin the examination of those arguments by setting out the principles in relation to the review carried out by the Court and to the need to interpret the criterion at issue in the light of primary law, in particular the right to freedom of expression, which forms part of primary law.

1. *The scope of judicial review*

61 It must be borne in mind that, according to the case-law, as regards the general rules defining the procedures for giving effect to the restrictive measures, the Council has a broad discretion as to what to take into consideration for the purpose of adopting economic and financial sanctions on the basis of Article 215 TFEU, consistent with a decision adopted on the basis of Chapter 2 of Title V of the EU Treaty, in particular Article 29 TEU. Because the Courts of the European Union may not substitute their assessment of the evidence, facts and circumstances justifying the adoption of such measures for that of the Council, the review carried out by those Courts must be restricted to checking that the rules governing procedure and the statement of reasons have been complied with, that the facts are materially accurate and that there has been no manifest error of assessment of the facts or misuse of power. That limited review applies, especially, to the assessment of the considerations of appropriateness on which such measures are based (see judgment of 5 November 2014, *Mayaleh* v *Council*, T-307/12 and T-408/13, EU:T:2014:926, paragraph 127 and the case-law cited).

62 However, although the Council thus has a broad discretion as regards the general criteria to be taken into consideration for the purpose of adopting restrictive measures, the effectiveness of the judicial review guaranteed by Article 47 of the Charter requires that, as part of the review of the lawfulness of the grounds which are the basis of the decision to include or to maintain a person's name on the list of persons subject to restrictive measures, the Courts of the European Union are to ensure that that decision, which affects that person individually, is taken on a sufficiently solid factual basis. That entails a verification of the factual allegations in the summary of reasons underpinning that decision, with the consequence that judicial review cannot be restricted to an assessment of the cogency in the abstract of the reasons relied on, but must concern whether those reasons, or, at the very least, one of those reasons, deemed sufficient in itself to support that decision, are substantiated by sufficiently specific and concrete evidence (judgments of 21 April 2015, *Anbouba* v *Council*, C-605/13 P, EU:C:2015:248, paragraphs 41 and 45, and of 26 October 2015, *Portnov* v *Council*, T-290/14, EU:T:2015:806, paragraph 38).

63 It is for the competent European Union authority to establish, in the event of challenge, that the reasons relied on against the person concerned are well founded, and not the task of that person to adduce evidence of the negative, that those reasons are not well founded (judgments of 18 July 2013, *Commission and Others* v *Kadi*, C-584/10 P, C-593/10 P and C-595/10 P, EU:C:2013:518, paragraph 121, and of 5 November 2014, *Mayaleh* v *Council*, T-307/12 and T-408/13, EU:T:2014:926, paragraph 128).

2. *The interpretation of the criterion at issue in the light of primary law, in particular the right to freedom of expression*

64 It must be noted that, although it is true that the Council enjoys a broad discretion in relation to the definition of the criteria under which persons or entities may be the subject of restrictive measures, those criteria can be regarded as being in accordance with the EU legal order only to the extent that it is possible to attribute to them a meaning that is compatible with the requirements of the higher rules with which they must comply (see, to that effect, judgment of 15 September 2016, *Yanukovych* v *Council*, T-346/14, under appeal, EU:T:2016:497, paragraph 100).

65 Accordingly, an interpretation of those general criteria in accordance with the requirements of primary law is necessary.

66 In that respect, it must be observed that the right to freedom of expression forms part of primary law. The Charter, to which Article 6(1) TEU grants the same legal value as the Treaties, provides, in Article 11 thereof, the following:

‘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.’

67 That right is not absolute, since, under Article 52(1) of the Charter:

‘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.’

68 Similar provisions are set out in the ECHR, referred to in Article 6(3) TEU. Article 10 of the ECHR provides as follows:

‘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 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, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.’

69 According to the case-law, the right to freedom of expression does not constitute an unfettered prerogative and may, therefore, be limited, under the conditions laid down in Article 52(1) of the Charter. Consequently, in order to comply with EU law, a limitation on the freedom of expression and the freedom of the media must satisfy three conditions. First, the limitation must be ‘provided for by law’. In other words, the EU institution adopting measures liable to restrict a person’s freedom of expression must have a legal basis for its actions. Secondly, the limitation in question must be intended to achieve an objective of general interest, recognised as such by the European Union. Thirdly, the limitation in question must not be excessive (see, to that effect, judgment of 4 December 2015, *Sarafraz* v *Council*, T-273/13, not published, EU:T:2015:939, paragraphs 177 to 182 and 184).

70 Those conditions correspond, in essence, to those laid down by the case-law of the European Court of Human Rights (‘the ECtHR’), according to which, in order to be justified under Article 10(2) of the ECHR, an interference with the right to freedom of expression must have been ‘prescribed by law’, intended for one or more of the legitimate aims set out in that paragraph, and ‘necessary in a democratic society’ to achieve that aim or aims (ECtHR, 15 October 2015, *Perinçek v. Switzerland*, CE:ECHR:2015:1015JUD002751008, paragraph 124). It follows that the criterion at issue must be interpreted as meaning that the Council was allowed to adopt restrictive measures liable to limit the applicant’s freedom of expression, provided that those limitations comply with the conditions set out above, all of which must be satisfied in order for that freedom to be legitimately restricted.

71 It must therefore be examined whether the restrictive measures concerning the applicant are provided for by law, are intended to achieve an objective of general interest and are not excessive.

a) The conditions that any restriction on freedom of expression must be 'provided for by law'

72 As to whether the restrictive measures at issue were provided for by law, it must be noted that those measures are set out in acts of general application and have, first, clear legal bases in EU law, namely Article 29 TEU and Article 215 TFEU, and, secondly, a sufficient statement of reasons as regards both their scope and the reasons justifying their application to the applicant (see paragraphs 42 to 51 above) (see, by analogy, judgment of 5 November 2014, *Mayaleh* v *Council*, T-307/12 and T-408/13, EU:T:2014:926, paragraph 176 and the case-law cited). However, it must be established whether the applicant could reasonably expect that the criterion at issue, which refers to the concept of 'active support', could be applied to his situation, which was, in principle, protected by the freedom of expression.

73 In that respect, although it is true that the contested measures do not contain a specific definition of 'active support', that concept can only be understood as meaning that it covers persons who — without being themselves responsible for the actions and policies of the Russian Government destabilising Ukraine and without themselves implementing those actions or policies — provide support for those policies and actions.

74 In addition, it must be stated that the criterion at issue does not cover all forms of support for the Russian Government, but rather concerns forms of support which, by their quantitative or qualitative significance, contribute to the continuance of its actions and policies destabilising Ukraine. Interpreted, subject to review by the Courts of the European Union, by reference to the objective of exerting pressure on the Russian Government in order to force it to put an end to those actions and policies, the criterion at issue thus objectively establishes a limited category of persons and entities which may be subject to fund-freezing measures (see, to that effect and by analogy, judgment of 16 July 2014, *National Iranian Oil Company* v *Council*, T-578/12, not published, EU:T:2014:678, paragraph 119).

75 When interpreting that criterion, account must be taken of the case-law of the ECtHR which has recognised the impossibility of attaining absolute precision in the framing of laws, especially in fields in which the situation changes according to the prevailing views of society, and has accepted that the need to avoid rigidity and keep pace with changing circumstances means that many laws are couched in terms which are to some extent vague and whose interpretation and application are questions of practice. The condition that offences must be clearly defined in law is satisfied where a person can know from the wording of the relevant provision — if need be, with the assistance of the courts' interpretation of it — what acts and omissions will render him or her criminally liable (see, to that effect, ECtHR, 15 October 2015, *Perinçek v. Switzerland*, CE:ECHR:2015:1015JUD002751008, paragraphs 133 and 134).

76 In view of the important role played by the media, in particular the audiovisual media, in modern society (see, to that effect, ECtHR, 17 September 2009, *Manole and Others v. Moldova*, CE:ECHR:2009:0917JUD001393602, paragraph 97, and 16 June 2016, *Delfi v. Estonia*, CE:ECHR:2015:0616JUD006456909, paragraph 134), it was foreseeable that large-scale media support for the actions and policies of the Russian Government destabilising Ukraine, provided, in particular during very popular television programmes, by a person appointed by a decree of President Putin as Head of RS, a news agency that the applicant himself describes as a 'unitary enterprise' of the Russian State, could be covered by the criterion based on the concept of 'active support', provided that the resulting limitations on the freedom of expression comply with the other conditions that must be satisfied in order for that freedom to be legitimately restricted.

77 Furthermore, it must be noted that, contrary to the applicant's assertions, the case-law resulting from the judgment of 23 September 2014, *Mikhalchanka* v *Council* (T-196/11 and T-542/12, not published, EU:T:2014:801), does not allow the conclusion that the concept of 'active support' applies to the work of a journalist only when his remarks have a concrete impact. As the Council rightly submitted, in that

judgment the Court did not address the issue of the right to freedom of expression, but rather considered that the Council had not proved that, in the case that gave rise to that judgment, the applicant fell within the scope of the designation criteria laid down in the measures that were at issue. Those criteria covered, inter alia, persons responsible for the violations of international electoral standards in the presidential elections held in Belarus on 19 December 2010 and those responsible for the serious violations of human rights or the crackdown on civil society and democratic opposition in that country. In those circumstances, the Court held that the Council had not adduced evidence capable of demonstrating the influence, the specific impact and, above all, the responsibility that the applicant, and, where relevant, the television programme that he presented, could have had in the violations of international electoral standards and in the crackdown on civil society and the democratic opposition (see, to that effect, judgment of 23 September 2014, *Mikhalchanka* v *Council*, T-196/11 and T-542/12, not published, EU:T:2014:801, paragraphs 7, 8, 15, 134 and 135).

78 In the present case, the criterion of 'active support', applied by the Council to the applicant, is broader than those, based on responsibility, at issue in the case that gave rise to the judgment of 23 September 2014, *Mikhalchanka* v *Council* (T-196/11 and T-542/12, not published, EU:T:2014:801). Accordingly, the applicant is not justified in invoking that judgment in support of his argument that the Council should have shown the concrete effects of his statements.

79 In those circumstances, it must be held that the condition that the limitations on the freedom of expression must be laid down by law is satisfied in the present case.

b) The pursuit of an objective of general interest

80 As regards the condition in relation to the pursuit of an objective of general interest, recognised as such by the European Union, it must be observed that, by the restrictive measures adopted inter alia under the criterion at issue, the Council seeks to exert pressure on the Russian authorities to put an end to their actions and policies destabilising Ukraine, which corresponds to one of the objectives of the Common Foreign and Security Policy (CFSP).

81 The adoption of restrictive measures in relation, inter alia, to persons who actively support the actions and policies of the Russian Government destabilising Ukraine meets the objective, referred to in Article 21(2)(c) TEU, of preserving peace, preventing conflicts and strengthening international security, in accordance with the purposes and principles of the United Nations Charter.

82 In that respect, it must be pointed out that, as the Council submits, on 27 March 2014, the United Nations General Assembly adopted Resolution 68/262, entitled 'Territorial integrity of Ukraine', in which it recalled the obligation of all States, under Article 2 of the UN Charter, to refrain in their international relations from the threat or use of force against the territorial integrity and political independence of any State, and to settle international disputes by peaceful means. It welcomed the continued efforts, in particular, by international and regional organisations to support de-escalation of the situation in Ukraine. In the operative part of that resolution, the General Assembly notably reaffirmed the importance of sovereignty, political independence, unity and territorial integrity of Ukraine within its internationally recognised borders, and urged all parties to pursue immediately the peaceful resolution of the situation with respect to Ukraine, to exercise restraint, to refrain from unilateral actions and inflammatory rhetoric that may increase tensions and to engage fully with international mediation efforts.

83 Accordingly, it must be concluded that the condition relating to the pursuit of an objective of general interest is satisfied in the present case.

c) The non-excessive nature of the restrictive measures imposed on the applicant

84 The condition that the limitations on the freedom of expression arising from the restrictive measures at issue must not be excessive has two aspects: (i) those limitations must be necessary and proportionate to the aim sought, and (ii) the essence of that freedom must not be impaired (see, to that effect, judgment of 4 December 2015, *Sarafraz* v *Council*, T-273/13, not published, EU:T:2015:939, paragraph 184 and the case-law cited).

The necessary and proportionate nature of the limitations

85 In the first place, as regards the necessity of the limitations at issue, it should be noted that alternative and less restrictive measures, such as a system of prior authorisation or an obligation to justify, a posteriori, how the funds transferred were used, are not as effective in achieving the objectives pursued, namely bringing pressure to bear on Russian decision-makers responsible for the situation in Ukraine, particularly given the possibility of circumventing the restrictions imposed (see, by analogy, judgment of 12 March 2014, *Al Assad* v *Council*, T-202/12, EU:T:2014:113, paragraph 117 and the case-law cited).

86 In the second place, as regards the proportionate nature of the limitations at issue, it is necessary to recall the case-law on the principle of proportionality and on the limitations on the freedom of expression and to establish how they may be applied to the applicant's specific situation, as set out in the documents in the Council's file.

87 The principle of proportionality, as one of the general principles of EU law, requires that measures adopted by the EU institutions do not exceed the limits of what is appropriate and necessary in order to attain the objectives pursued by the legislation in question. Consequently, when there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued (see judgment of 4 December 2015, *Sarafraz* v *Council*, T-273/13, not published, EU:T:2015:939, paragraph 185 and the case-law cited).

88 In that respect, the case-law makes clear that, with regard to judicial review of compliance with the principle of proportionality, the EU legislature must be allowed a broad discretion in areas which involve political, economic and social choices on its part, and in which it is called upon to undertake complex assessments. Consequently, the legality of a measure adopted in those fields can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue (see judgment of 28 November 2013, *Council* v *Manufacturing Support & Procurement Kala Naft*, C-348/12 P, EU:C:2013:776, paragraph 120 and the case-law cited).

89 As regards, in particular, limitations on the freedom of expression, several principles may be identified in the case-law of the ECtHR.

90 First, it has held that freedom of expression is one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment, and that, in principle, it applies not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb, such being the demands of pluralism, tolerance and broadmindedness without which there is no democratic society. That freedom is indeed subject to exceptions, but these must be construed strictly, and the need for any restrictions must be established convincingly (ECtHR, 15 October 2015, *Perinçek v. Switzerland*, CE:ECHR:2015:1015JUD002751008, paragraph 196(i)).

91 Secondly, the ECtHR has held that there is little scope under Article 10(2) of the ECHR for restrictions on political expression or on debate on questions of public interest. Expression on matters of public interest is in principle entitled to strong protection, contrary to expression that promotes or justifies violence, hatred, xenophobia or other forms of intolerance, which is normally not protected. It is in the nature of political speech to be controversial and often virulent, but that does not diminish its public interest, provided that it does not cross the line and turn into a call for violence, hatred or intolerance (ECtHR, 15 October 2015, *Perinçek v. Switzerland*, CE:ECHR:2015:1015JUD002751008, paragraphs 197, 230 and 231).

92 Thirdly, as regards the 'necessary' nature of a limitation of the freedom of expression, the ECtHR considers that this implies the existence of a pressing social need and that an interference must be examined in the light of the case as a whole in order to determine whether it was proportionate to the legitimate aim pursued and whether the reasons adduced by the national authorities to justify it were relevant and sufficient (ECtHR, 15 October 2015, *Perinçek v. Switzerland*, CE:ECHR:2015:1015JUD002751008, paragraph 196(ii) and (iii)).

93 Those principles are indeed important elements to be taken into consideration in the present case. However, it must be noted that they are applicable only in so far as they are relevant in the context of the present case, which has specific characteristics which distinguish it from those that allowed the ECtHR to develop its case-law.

94 It must be emphasised that the principles set out in the case-law of the ECtHR were established in view of situations in which restrictive measures, often of a penal nature, were imposed on a person who had made statements or actions considered unacceptable by a State which had acceded to the ECHR, and that person invoked the freedom of expression as a defence against that State.

95 However, in the present case, the applicant is a Russian citizen, residing in Russia, who was appointed by a decree of President Putin as Head of the news agency RS, which is a 'unitary enterprise' of the Russian State.

96 In his role as a journalist, which cannot be separated from his role as Head of RS, the applicant addressed the situation that the Russian Government created in Ukraine on several occasions and, according to the Council, he presented the events relating to that situation in a light favourable to the Russian Government.

97 That is the context in which the applicant invokes the right to freedom of expression. Thus, he does not rely on that right in order to defend himself against the Russian State, but rather to protect himself against restrictive measures, of a precautionary, rather than penal, nature, which the Council adopted in reaction to the actions and policies of the Russian Government destabilising Ukraine. It is well known that those actions and policies are the subject of extensive media coverage in Russian and are often presented to the Russian people, through propaganda, as being fully justified.

98 In particular, the Court notes that, on 13 February 2014, the Russian Public Collegium for Press Complaints ('the Russian Collegium') adopted a resolution concerning the applicant following a complaint relating to the 'Vesti Nedeli' (News of the Week) programme which he presents. In that resolution the Russian Collegium considered that the Vesti Nedeli programme broadcast on 8 December 2013 contained propaganda which presented the events that took place on 30 November and 1 December 2013 on Independence Square in Kiev (Ukraine) in a manner which was biased and contrary to the journalistic principles of social responsibility, harm minimisation, truth, impartiality and justice, in order to manipulate Russian public opinion through disinformation techniques.

99 The applicant does not deny making the remarks mentioned by the Russian Collegium in its resolution, but argues that propaganda is protected by the freedom of expression.

100 Moreover, it must be noted that the fact that the applicant engaged in propaganda activities in support of the actions and policies of the Russian Government destabilising Ukraine is also clear from the decision of the Nacionālā elektronisko plašsaziņas līdzekļu padome (Latvian National Electronic Mass Media Council) of 3 April 2014 ('the Latvian decision'), and from the decision of the Lietuvos radijo ir televizijos komisija (Radio and Television Commission of Lithuania) of 2 April 2014, as upheld by the Vilniaus apygardos administracinis teismas (Vilnius Regional Administrative Court, Lithuania) on 7 April 2014 ('the Lithuanian decision'), concerning the suspension, in their respective countries, of the broadcasting of, inter alia, the Vesti Nedeli programmes, in which the applicant participated.

101 According to the applicant, the Latvian and Lithuanian decisions are unilateral rulings on which neither he nor RS were able to present their views, with the result that the Council cannot rely on those decisions.

102 First, it must be noted that the Council, in its written response to a question put to it by the Court, indicated that those decision had been formally added to the administrative file on 1 February 2016.

103 Thus, although it is clear that those decisions form part of the evidence on which the measures of March 2016 are based, that is not the case as regards the measures of March 2015 and of September 2015.

104 In that respect, the Court cannot accept the Council's argument that it was already aware of the content of the Latvian and Lithuanian decision when it adopted the measures of March 2015, since those decision had been published, including in English, in April and October 2014. It cannot be presumed that the Council was aware of every document concerning the applicant merely because those documents were public.

105 As regards the content of those decision, first, it must be pointed out that the Latvian National Electronic Mass Media Council — on the basis of a report drawn up by the Latvian police, which had examined the Vesti Nedeli programmes, in particular the programmes of 2 and 16 March 2014, in which the applicant participated — considered that those programmes contained war propaganda justifying the Russian military intervention in Ukraine and comparing defenders of Ukrainian democracy to Nazis, sending the message that, if those defenders of democracy were in power, they would repeat the crimes committed by the Nazis.

106 Secondly, the Vilniaus apygardos administracinis teismas (Vilnius Regional Administrative Court) approved the conclusion of the Radio and Television Commission of Lithuania that the Vesti Nedeli programme of 2 March 2014, which the latter had examined, incited hatred between Russians and Ukrainians and justified Russian military intervention in Ukraine and the annexation by Russia of a part of Ukrainian territory.

107 Such findings, from authorities in two Member States which examined the programmes in question, constitute solid evidence that the applicant engaged in propaganda activities in support of the actions and policies of the Russian Government destabilising Ukraine.

108 That is especially so since, before the Court, the applicant did not call into question the findings set out in the Latvian and Lithuanian decisions, but merely raised formal objections (see paragraph 101 above).

109 In that respect, it must be observed that the circumstances invoked by the applicant did not affect his ability to put forward, during the proceedings before the Court, arguments and evidence calling into question the substance of the findings contained in those decisions.

110 Furthermore, it must be noted that neither the applicant nor RS contested the Latvian and Lithuanian decisions before the competent national authorities, even though, at least as regards the Latvian decision, it is apparent from the file that it was open to appeal.

111 In those circumstances, it must be concluded that, by relying on the decision of the Russian Collegium and — as regards the measures of March 2016 — on the Latvian and Lithuanian decisions, the Council was entitled to consider that the applicant had engaged in propaganda.

112 The Council's adoption of restrictive measures relating to the applicant because of his propaganda in support of the actions and policies of the Russian Government destabilising Ukraine cannot be regarded as a disproportionate restriction of his right to freedom of expression.

113 If that were the case, the Council would be unable to pursue its policy of exerting pressure on the Russian Government by addressing restrictive measures not only to persons who are responsible for the actions and policies of that government as regards Ukraine or to the persons who implement those actions or policies, but also to persons providing active support to those persons.

114 In accordance with the case-law cited in paragraph 74 above, the concept of active support concerns forms of support which, by their quantitative or qualitative significance, contribute to the continuance of the actions and policies of the Russian Government destabilising Ukraine.

115 That concept is not limited to material support; it also covers the support that can be provided by the Head of RS, a 'unitary enterprise' of the Russian State, who is appointed by the President of that State, the person who bears ultimate responsibility for the actions and policies condemned by the Council, to which it seeks to react by adopting the restrictive measures at issue.

116 In that respect, it is indeed true that, in the assessment of the proportionality of the restrictive measures concerning the applicant, it must be examined whether they dissuade Russian journalists from freely expressing their views on political issues of public interest, such as the actions and policies of the Russian Government destabilising Ukraine. That would be a detrimental consequence for society as a whole (see, to that effect, ECtHR, 17 December 2004, *Cumpănă and Mazăre v. Romania*, CE:ECHR:2004:1217JUD003334896, paragraph 114).

117 However, that is not so in the present case, given the specific, or even unique, feature of the applicant's situation, namely that he engages in propaganda in support of the actions and policies of the Russian government destabilising Ukraine by using the means and power available to him as Head of RS, a position which he obtained by virtue of a decree of President Putin himself.

118 Other journalists who wish to express their views, even views that may shock, offend or disturb (see paragraph 90 above), on issues that fall within the realm of political discourse and are of public interest (see paragraph 91 above), such as the actions or policies of the Russian Government destabilising Ukraine, are not in a situation comparable to that of the applicant, who is the sole occupant of the post of Head of RS, as a result of a deliberate choice made by President Putin.

119 Furthermore, no other journalist is included on the lists at issue and only the statement of reasons concerning a member of the so-called 'Donetsk People's Republic' relates to propaganda activities.

120 The foregoing considerations are sufficient, in view of the broad discretion enjoyed by the Council (see paragraph 88 above), to establish that the limitations on the right to freedom of expression that the restrictive measures are liable to entail are necessary and are not disproportionate, and there is no need to examine the other evidence on which the Council relied showing that the applicant incited violence or engaged in hate speech.

121 Since the limitations on the applicant's freedom of expression that the restrictive measures at issue are liable to entail are necessary and proportionate to the objective pursued, it is appropriate to examine the condition that the substance of that freedom must not be impaired.

The absence of any impairment of the substance of the applicant's freedom of expression

122 As regards the condition that the substance of the applicant's freedom of expression must not be impaired, it must be borne in mind that the restrictive measures at issue provide that (i) the Member States are to take the necessary measures to prevent his entry into, or transit through, their territories, and (ii) all of his funds and economic resources in the European Union are to be frozen.

123 The applicant is a national of a third country, the Russian Federation, and resides in that State, where he carries out his professional activity as Head of RS. Accordingly, the restrictive measures at issue do not impair the substance of the applicant's right to exercise his freedom of expression, particularly in the context of his professional activity in the media sector, in the country in which he resides and works (see, by analogy, judgment of 4 December 2015, *Sarafraz* v *Council*, T-273/13, not published, EU:T:2015:939, paragraph 190 and the case-law cited).

124 In addition, those measures are by nature temporary and reversible. Article 6 of Decision 2014/145 provides that that decision is to be kept under constant review and Article 14(4) of Regulation No 269/2014 provides that the list annexed to that regulation is to be reviewed at regular intervals and at least every 12 months.

125 It follows that the restrictive measures imposed on the applicant do not impair the essence of his freedom of expression.

126 In the light of the foregoing considerations, the first and second pleas must be rejected.

D – *The fifth plea in law, alleging that the criterion at issue would be incompatible with the right to freedom of expression and therefore unlawful, if it allowed the adoption of restrictive measures in respect of journalists exercising that right*

127 In the alternative, the applicant raises an objection of illegality pursuant to Article 277 TFEU against the criterion at issue, should it be interpreted as permitting restrictive measures to be adopted in respect of journalists who have expressed views which the Council regards as objectionable. According to the applicant, that criterion, thus interpreted, would be disproportionate and lack a legal basis. In the reply, the applicant states that Article 29 TEU and Article 215 TFEU do not permit the adoption of measures contrary to the right to freedom of expression.

128 In the first place, the Council submits that this plea in law is inadmissible since it does not satisfy the conditions laid down in Article 76(d) of the Rules of Procedure.

129 In the second place, the Council states that the criterion at issue applies to propaganda or disinformation activities which provide active support to the Russian Government in destabilising Ukraine and that such a criterion is not contrary to freedom of expression.

130 It follows from the examination of the first and second plea in law that the criterion at issue must be interpreted in accordance with primary law, which includes provisions protecting the right to freedom of expression (see paragraphs 64 to 70 above).

131 The Court has concluded that the criterion at issue can be interpreted and applied in a manner consistent with primary law, including the right to freedom of expression. Furthermore, it has been found that the application of that criterion in the present case as regards the applicant did not infringe his right to freedom of expression, since the Council respected the legal conditions to which limitations of that freedom are subject.

132 In those circumstances, the present plea in law must be rejected, and it is not necessary to rule on the plea of inadmissibility raised by the Council.

E – *The third plea in law, alleging infringement of the rights of the defence and of the right to effective judicial protection*

133 The applicant, after recalling principles developed in case-law in relation to respect for the rights of the defence in connection with restrictive measures, asserts that, although the measures of March 2015 maintained, and did not include for the first time, his name on the lists at issue, he was not notified in advance of the reasons for maintaining his inclusion and was not given serious, credible and concrete evidence to justify that maintenance.

134 In particular, the applicant submits, first, that the measures of March 2015 were adopted before the Council responded to his request for access to the file contained in the letter of 4 February 2015. Thus, he was unable to express, in full knowledge of the facts, his views on the Council's intention to maintain the application of restrictive measures against him.

135 Secondly, the applicant argues that his letter of 25 February 2015 was not carefully and impartially examined.

136 The Council, in addition to challenging the substance of the applicant's arguments alleging the infringement of his rights of defence, submits that the applicant's invocation of a breach of the right to effective judicial protection is inadmissible in so far as it does not meet the minimum requirements laid down in Article 76(d) of the Rules of Procedure.

137 As a preliminary point, the objection of inadmissibility raised by the Council must be upheld, since the applicant has not raised arguments relating specifically to the breach of his right to effective judicial protection.

138 It must be recalled that, under Article 76(d) of the Rules of Procedure, which is essentially the same as Article 44(1)(c) of the Rules of Procedure of the General Court of 2 May 1991, the application must contain a summary of each plea in law relied on. In addition, it is settled case-law that that summary must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to rule on the action, if necessary without having to seek further information. 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, in order to guarantee legal certainty and the sound administration of justice. It is also settled case-law that any plea which is not adequately articulated in the application initiating the proceedings must be held inadmissible. Similar requirements apply where a submission is made in support of a plea in law. That objection constitutes an absolute bar to proceedings which must be raised by the Court of its own motion (see, to that effect, judgment of 12 May 2016, *Italy* v *Commission*, T-384/14, EU:T:2016:298, paragraph 38 (not published) and the case-law cited).

139 As regards the complaint concerning a breach of the rights of defence, it should be borne in mind that the fundamental right to observance of the rights of the defence during a procedure preceding the adoption of a restrictive measure is expressly affirmed in Article 41(2)(a) of the Charter (see judgment of 5 November 2014, *Mayaleh* v *Council*, T-307/12 and T-408/13, EU:T:2014:926, paragraph 102 and the case-law cited).

140 In that context, it must be noted that Article 3(2) and (3) of Decision 2014/145 and Article 14(2) and (3) of Regulation No 269/2014 provide that the Council is to communicate its decision, including the grounds for listing, to the natural or legal person, entity or body concerned, either directly, if the address is known, or by the publication of a notice, providing the opportunity to present observations. Where observations are submitted, or where substantial new evidence is presented, the Council is to review its decision and inform the natural or legal person, entity or body accordingly.

141 In addition, it must be pointed out that, in accordance with the third paragraph of Article 6 of Decision 2014/145, that decision is to be kept under constant review. Next, the second paragraph of Article 6 of that decision provided, in its initial version, that that decision would apply until 17 September 2014; that period was extended several times by subsequent measures. Lastly, Article 14(4) of Regulation No 269/2014 states that the list annexed to that regulation is to be reviewed at regular intervals and at least every 12 months.

142 In the present case, the applicant has challenged neither Implementing Decision No 2014/151 nor Implementing Decision No 284/2014, by which the Council first included his name (see paragraph 3 above). As he acknowledged in his written reply to a question from the Court, his first response to the adoption of those measures was the letter sent on 4 February 2015, even though the Council had, on 22 March 2014, published a Notice for the attention of the persons subject to the restrictive measures provided for in Decision 2014/145, as implemented by Implementing Decision 2014/151 and in Regulation (EU) No 269/2014 as implemented by Council Implementing Regulation (EU) No 284/2014 (OJ 2014, C 84, p. 3).

143 That notice stated, inter alia, that the persons and entities concerned could submit a request to the Council, together with supporting documentation, that the decision to include their names on the lists annexed to the first contested measures should be reconsidered.

144 It follows that the applicant waited for a long time before requesting the Council to grant him access to the documents concerning him and to review his situation.

145 Furthermore, it must be pointed out that, by the measures of March 2015, the applicant's name was maintained on the lists at issue with the same statement of reasons as before. In that respect, it should be borne in mind that although, according to the case-law, the Council was not required to hear the applicant before he was first listed, so that the restrictive measures against him would have a surprise effect (see, to that effect and by analogy, judgment of 5 November 2014, *Mayaleh* v *Council*, T-307/12 and T-408/13, EU:T:2014:926, paragraphs 110 to 113 and the case-law cited), it was in principle required to hear him before deciding to maintain his name on the lists at issue. However, the right to be heard prior to the adoption of acts which maintain restrictive measures against persons already subject to those measures applies where the Council has admitted new evidence against those persons and not where those measures are maintained on the basis of the same grounds as those that justified the adoption of the initial act imposing the restrictive measures in question (see, by analogy, judgment of 28 July 2016, *Tomana and Others* v *Council and Commission*, C-330/15 P, not published, EU:C:2016:601, paragraph 67 and the case-law cited; see also, to that effect and by analogy, judgment of 7 April 2016, *Central Bank of Iran* v *Council*, C-266/15 P, EU:C:2016:208, paragraph 33).

146 In the present case, the statement of reasons concerning the applicant in the contested measures has not changed by comparison with that of the measures by which his name was first included on the lists at issue.

147 In those circumstances, first, the Council was not required to hear the applicant before adopting the contested measures.

148 Secondly, it must be noted that, by letter of 13 February 2015 (see paragraph 10 above), the Council, in any event, asked the applicant to state his views on the possible extension of the duration of the restrictive measures concerning him.

149 It is true that the applicant, despite his request of 4 February 2015, had not been granted access to the documents justifying the inclusion of his name when he presented his observations in response to the Council's invitation.

150 However, it must be observed that, even if that request, although formally based on Regulation No 1049/2001, could be regarded as having been presented in the context of the review procedure referred to in the provisions mentioned in paragraphs 140 and 141 above and could therefore be relevant in assessing whether the applicant's rights of defence were observed in the present case, the Council cannot be criticised for not having dealt with that request, within a very brief period, before adopting the measures of March 2015, when the applicant had waited almost 11 months before reacting to the first inclusion of his name and making such a request.

151 In that regard, it must be noted that, when sufficiently precise information has been communicated, enabling the person concerned effectively to state his point of view on the evidence adduced against him by the Council, the principle of respect for the rights of the defence does not mean that the institution is obliged spontaneously to grant access to the documents in his file. It is only at the request of the party concerned that the Council is required to provide access to all non-confidential official documents concerning the measure at issue (see judgment of 14 October 2009, *Bank Melli Iran* v *Council*, T-390/08, EU:T:2009:401, paragraph 97 and the case-law cited).

152 In the present case, since, as found in the context of the examination of the fourth plea in law, the statement of reasons for the contested measures concerning the applicant — which was the same as that for the measures by which his name was first included — was sufficient, the Council was not required to take the initiative in granting the applicant access to the file or to await the outcome of the request that the latter finally made, before deciding to maintain his name on the lists at issue. The applicant knew, well before he received the letter of 16 March 2015, that he was the subject of restrictive measures as a result of his activities as a journalist and as Head of RS and he was necessarily aware of the manner in which he had carried out those activities.

153 Thirdly, for the sake of completeness, it must be recalled that, before an infringement of the rights of the defence can result in the annulment of an act, it must be demonstrated that, had it not been for that irregularity, the outcome of the procedure might have been different. In the present case, the applicant has not explained what arguments and evidence he could have relied on if he had received the documents in question earlier, nor has he demonstrated that such arguments and evidence could have led to a different result in his case, that is to say, to the restrictive measures at issue not being renewed (see, to that effect and by analogy, judgment of 18 September 2014, *Georgias and Others* v *Council and Commission*, T-168/12, EU:T:2014:781, paragraphs 106 to 108 and the case-law cited). Accordingly, the present plea in law could not, in any event, have led to the annulment of the contested measures.

154 In the light of those considerations the present plea in law must be rejected.

155 Since all the pleas in law relied on by the applicant have been rejected, the action must be dismissed in its entirety.

Costs

156 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, he must be ordered to pay the costs in accordance with the form of order sought by the Council.

On those grounds,

THE GENERAL COURT (Ninth Chamber)

hereby:

1. Dismisses the action;

2. Orders Mr Dmitrii Konstantinovich Kiselev to pay the costs.

Berardis Tomljenović Spielmann

Delivered in open court in Luxembourg on 15 June 2017.

E. Coulon
Registrar

G. Berardis
President

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