# OPINION OF ADVOCATE GENERAL STIX-HACKL delivered on 13 September 2005 [1]

## I — Introduction

1. The dispute which has been referred to the Court for a decision concerns the scope of the exemption from which the European Central Bank ('the ECB') benefits in relation to the payment of indirect taxes in the State in which it has its seat, namely the Federal Republic of Germany. The dispute centres on the extent to which the Court of Justice has jurisdiction and on whether turnover tax that was not invoiced separately should be refunded.

1 — Original language: German.

## II — Legal framework

### A — *Community law*

#### 1. The Statute of the European System of Central Banks and of the European Central Bank

2. Article 35.4 of the Protocol on the Statute of the European System of Central Banks and of the European Central Bank ('the ECB Statute') provides that:

'The Court of Justice shall have jurisdiction to give judgment pursuant to any arbitration clause contained in a contract concluded by or on behalf of the ECB, whether that contract be governed by public or private law.'

2. The Protocol on the Privileges and Immunities of the European Communities

3. According to the second paragraph of Article 3 of the Protocol on the Privileges and Immunities of the European Communities [2] ('the Protocol on privileges and immunities'):

'The Governments of the Member States shall, wherever possible, take the appropriate measures to remit or refund the amount of indirect taxes or sales taxes included in the price of movable or immovable property, where the Communities make, for their official use, substantial purchases the price of which includes taxes of this kind. ...'

3. The headquarters agreement

4. According to the fifth recital in its preamble, the Agreement between the Government of the Federal Republic of Germany and the European Central Bank concerning the seat of the European Central Bank ('the headquarters agreement'), [3] the agreement is intended to define the privileges and immunities of the European Central Bank in the Federal Republic of Germany, as laid down in the Protocol on the Privileges and Immunities of the European Communities.

5. Article 8(1) of the headquarters agreement provides:

'Pursuant to the second paragraph of Article 3 of the Protocol, the Bundesamt für Finanzen (Federal Finance Office) shall refund on demand, out of the revenue received in the form of turnover tax, the turnover tax invoiced separately to the ECB by undertakings for the various supplies of goods and services made to the ECB, where those supplies are intended for the official use of the ECB. The amount of tax due in respect of those supplies must exceed DEM 50 in each case and must have been paid to the undertaking by the ECB. ...'

B — *National law*

6. The Sixth VAT Directive (Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1) was transposed into German law by the Umsatzsteuergesetz (German Law on the imposition of turnover tax) ('the UStG') the version of which is applicable to this dispute being that of 9 June 1999. [4]

2 — Protocol on the Privileges and Immunities of the European Communities of 8 April 1965 (OJ 1967 L 152, p. 13).

3 — Agreement of 18 September 1998 (BGBl. 1998 II, p. 2745).

4 — BGBl. 1999 I, p. 1270.

7. Paragraph 4 of the UStG is based on Article 13B(b) of the Sixth VAT Directive and provides:

'The following transactions covered by Paragraph 1(1)(1) shall be exempt:

...

12 (a) the leasing or letting of immovable property ...'

8. However, Paragraph 9(1) of the UStG provides for the following possibility:

'A trader may treat a transaction which is exempt under Paragraphs 4(8)(a) to (g), 9(a), 12, 13 or 19 as taxable if the transaction is carried out with another trader for his business.'

9. Paragraph 15 of the UStG regulates the deduction of input tax in such a way that a trader may deduct the taxes identified separately on invoices for supplies of goods and services which have been effected by other traders for his business. However, no deduction of input tax may be made in respect of, inter alia, the tax on the supply, importation and purchase in intra-Community trade of goods and services used by the trader to carry out exempt transactions.

## III — Facts

10. By its application, the ECB has asked the Court to find both that there is a specific duty to refund the turnover tax and that Article 8(1) of the headquarters agreement, read in conjunction with the second paragraph of Article 3 of the Protocol on privileges and immunities, must be interpreted as meaning that the former provision requires that such a refund be made.

11. By its action, the ECB is seeking a ruling that, as the State in which the ECB has its seat, the Federal Republic of Germany is obliged to refund to the ECB the taxes the ECB considers to have been indirectly levied on rental payments and services provided for its official use. The ECB has, in particular, asked the Court to rule that the Federal Republic of Germany has a duty to refund sums some of which were specifically invoiced and others only notionally determined.

## IV — Admissibility

### A — *Submissions of the parties*

12. The German Government challenges the admissibility of the action in terms of both the Protocol on privileges and immunities and the headquarters agreement.

13. In the first place, the arbitration clause in Article 21 of the headquarters agreement expressly applies only to disputes relating to the interpretation or application of 'this Agreement'. Consequently, the German Government contends that the Court of Justice does not have jurisdiction in relation to the interpretation and application of the Protocol on privileges and immunities, or, indeed, the indirect application of the second paragraph of Article 3 thereof, and the action is, to that extent, inadmissible.

14. In the second place, the arbitration clause, which has, pursuant to the Court's case-law, to be interpreted strictly, is also not applicable in relation to the headquarters agreement, since 'differences of opinion ... concerning the interpretation or application of this Agreement' are not at issue. The German Government submits that both that government and the ECB are of the view that, taken in isolation, Article 8(1) of the headquarters agreement provides only for the refund of separately invoiced turnover taxes and is not, therefore, applicable because the present circumstances do not involve the refund of separately invoiced turnover taxes.

15. The ECB contends that the application is admissible on the basis of the arbitration clause, read in conjunction with Article 35.4 of the ECB Statute.

16. As far as the interpretation of the headquarters agreement is concerned, an agreement must always be interpreted in the light of its context in relation to the applicable Community law. Article 8(1) of the headquarters agreement expressly refers to the second paragraph of Article 3 of the Protocol on privileges and immunities, and both those provisions are inextricably linked with one another. The provisions of the headquarters agreement in fact give specific definition to the provisions of the Protocol on privileges and immunities and, consequently, have always to be interpreted and applied in conjunction with that protocol.

17. The ECB further contends, as regards Article 8(1) of the headquarters agreement,

that there is clearly a dispute between the ECB and the Federal Republic of Germany concerning the interpretation and application of that provision in conjunction with the second paragraph of Article 3 of the Protocol on privileges and immunities, which is covered by the arbitration clause. According to the ECB, the Federal Republic of Germany is infringing the provisions on exemption by refusing to refund to the ECB the turnover tax included in the increased rental and the ancillary charges because input tax could not be deducted. But the German Government claims that a right to refund of that nature does not arise out of Article 8(1) of the headquarters agreement, since the latter requires, in this case, that the amounts of turnover tax should be separately invoiced.

B — *Analysis*

18. Each of the forms of order sought by the ECB relies on both the headquarters agreement and the Protocol on privileges and immunities, with the result that it is first necessary to establish whether the Court has jurisdiction under those two instruments.

1. Jurisdiction of the Court to interpret Article 3 of the Protocol on privileges and immunities

(a) Jurisdiction based on general provisions

19. The Protocol on privileges and immunities, which applied at the material time in the version amended by Article 9 of the Treaty of Amsterdam, [5] forms an integral part of the EC Treaty, in accordance with Articles 311 EC and 291 EC, [6] and, therefore, shares its legal nature.

20. The general provisions of the EC Treaty concerning the Court's jurisdiction (Article 220 et seq. EC) therefore also apply to the Protocol on privileges and immunities. In addition, Article 11 of the Treaty of Amsterdam expressly provides that the 'provisions of the Treaty establishing the European Community ... relating to the powers of the Court of Justice of the European Communities and to the exercise of those powers shall apply to ... the Protocol on privileges and immunities ...'. Objectively speaking, the Court's jurisdiction is, therefore, already established on the basis of these general provisions, without it being necessary to have recourse to the arbitration clause contained in the headquarters agreement. However, disputes concerning the applica-

5 — Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts (OJ 1997 C 340, p. 1).

6 — On this point, see Grabitz and Hilf-Schweitzer, *EU-Kommentar*, 'Art. 291', paragraph 3; see also Von der Groeben and Schwarze-Schmidt, *EG*, 'Art. 291', paragraph 3.

tion and interpretation of the Protocol on privileges and immunities may be referred to the Court of Justice only in so far as the Court may admissibly be seised of them. [7] In that context, jurisdiction is generally determined according to Article 220 et seq. EC. Consequently, the decisive factor is whether the EC Treaty lays down a procedure by virtue of which the ECB can assert its claim for a refund and obtain the forms of order it is seeking. [8]

21. The EC Treaty makes provision in Article 220 et seq. EC both for direct actions, such as Treaty infringement proceedings (Articles 226 EC and 227 EC) as well as laying down a procedure for actions for annulment (Article 230 EC) and actions for failure to act (Article 232 EC).

22. Neither of the last two forms of direct action is relevant here, because they are not capable of securing the legal protection the applicant requires. In particular, an action for annulment is inappropriate, since the present action does not seek to establish the invalidity of the headquarters agreement. Furthermore, since the Protocol on privileges and immunities forms part of primary Community law, issues as to its validity are, in any event, exempt from scrutiny by the Court.

23. In so far as there is any such obligation, the obligation to refund, which the ECB assumes to exist, is a consequence of the alleged prohibition on the levying of turnover taxes. Thus, as well as claiming that there is an obligation to refund, the ECB is also claiming that the Member State is in breach of the provisions on which its action relies. Since the Protocol on privileges and immunities forms an integral part of the EC Treaty, the ECB can bring an action alleging an infringement of Article 3 of the Protocol (in conjunction with Article 8 of the headquarters agreement) only by way of infringement proceedings under Articles 226 EC and 227 EC. However, only the Commission is authorised to bring an action using the procedure under Article 226 EC and, under Article 227 EC, any Member State may bring an action. It follows that none of the remaining bodies referred to in Article 7 EC is entitled to bring an action by way of such procedure, and a fortiori not the ECB, which is referred to in Article 8 EC.

24. Under Article 234 EC, there is, in addition, the possibility of referring a matter for a preliminary ruling. However, since the present case is not the result of a reference for a preliminary ruling — and the ECB would not, in any event, be entitled to make such a reference — it is not covered by that procedure either.

25. Finally, Article 238 EC establishes the Court's jurisdiction to give judgment on the basis of an arbitration clause. It is true that, since the Treaty of Nice, the Court of First

7 — Von der Groeben and Schwarze-Schmidt, *EG*, 'Art. 291', paragraph 5.

8 — See also Schmidt, 'Le protocole sur les privilèges et immunités des Communautés européennes', *Cahiers de droit européen*, 1991, pp. 67 and 68.

Instance has had jurisdiction in relation to actions under Article 238 EC, in accordance with Article 225(1) EC. However, that provision is not applicable to this dispute.

26. Since the Protocol on privileges and immunities does not itself contain an arbitration clause, Article 238 EC cannot be used to establish the jurisdiction of the Court of Justice either.

27. Accordingly, none of the procedures available within the exhaustive list contained in Article 220 et seq. EC can be utilised for the purposes of this dispute. In fact, the provisions of the EC Treaty actually indicate the reverse, namely that Article 220 et seq. EC do not confer on the Court of Justice jurisdiction to give judgment on a direct action by the ECB against the State in which it has its seat regarding the interpretation of the Protocol on privileges and immunities. [9]

28. The jurisdiction of the Court of Justice to interpret Article 3 of the Protocol on privileges and immunities could therefore be based, if at all, on the arbitration clause set out in the headquarters agreement.

9 — See also regarding the — in this respect — similar circumstances of the direct action by an official against a Member State regarding the situation prior to the Amsterdam Treaty, that is to say still in accordance with the Merger Treaty, Case 1/82 *D* v *Luxembourg* [1982] ECR 3709, paragraph 8.

(b) Jurisdiction based on the arbitration clause

29. According to the arbitration clause contained in Article 21 of the headquarters agreement, 'any differences of opinion between the Government and the ECB concerning the interpretation or application of this Agreement ... may be submitted ... by either party to the European Court of Justice'. The authority to agree an arbitration clause of this kind flows from Article 35.4 of the ECB Statute.

30. The question is whether this arbitration clause must be broadly interpreted, to the effect that it also embraces differences of opinion relating to other provisions outside the headquarters agreement, to the extent that such provisions — as, in this case, Article 3 of the Protocol on privileges and immunities — may be relevant to disputes arising out of the headquarters agreement.

31. According to the case-law of the Court which the German Government cites, arbitration clauses must be given a restrictive interpretation, since the Court's jurisdiction based on an arbitration clause represents a departure from the general law. However, in Case 426/85, which the German Government cites, the issue was whether the facts on which a counterclaim was based were covered by the arbitration clause at issue. That clause provided that the Court had jurisdiction in relation to all disputes con-

cerning the performance of the contract. The Court ruled that the claims advanced in the counterclaim must (at least) be 'directly connected with the obligations arising from that contract'. [10]

32. The circumstances of this case differ because the issue is not whether specific events are covered by the arbitration clause but whether, under the arbitration clause in the headquarters agreement, the Court has the authority to provide a binding interpretation of a provision of Community law that lies outside the headquarters agreement. [11]

33. In addition, in contrast to the situation in Case 426/85, in this case, the actual wording of the arbitration clause restricts the scope of that clause. By adopting the form of words 'concerning the interpretation or application of *this* Agreement', [12] Article 21 of the headquarters agreement itself determines that the Court of Justice can have no jurisdiction as regards the interpretation of provisions which lie outside that agreement.

34. Moreover, an arbitration clause can, generally, establish jurisdiction only in relation to the agreement of which it forms part. At most, it might be possible to extend it to treaties or agreements in which the contracting parties were the same as the parties to the headquarters agreement containing the arbitration clause. To allow it to be further extended to agreements concluded between different parties, such as in this case the Protocol on privileges and immunities, would, in practice, amount to forcing on to the contracting parties an arbitration clause, and thus the Court's jurisdiction, although they had — possibly deliberately — not actually made provision for this.

35. The contracting parties to the headquarters agreement are the ECB and the Federal Republic of Germany; the contracting parties to the Protocol on privileges and immunities are the Member States. For that reason alone, Article 21 of the headquarters agreement cannot serve to establish any, even indirect, jurisdiction of the Court in relation to the interpretation of the Protocol on privileges and immunities.

36. That is not altered by the fact that — as the ECB has also pointed out — the headquarters agreement must be interpreted 'in the light of' the Protocol on privileges and immunities. [13] To take into account the rules

10 — Case 426/85 *Commission* v *Zoubek* [1986] ECR 4057, paragraph 11; see also in relation to similar circumstances (admissibility of a counterclaim) Case C-114/94 *IDE* v *Commission* [1997] ECR I-803, paragraph 82.

11 — Nor is the issue which of the two Community Courts has jurisdiction or whether the arbitration clause is invalid; see Case C-294/02 *Commission* v *AMI Semiconductor Belgium and Others* [2005] ECR 1-2175.

12 — Emphasis added.

13 — Case C-69/97 *Commission* v *SNUA* [1999] ECR I-2363, paragraph 19.

with which the provision to be interpreted is related is not the same as to establish that the Court has jurisdiction to give a (binding) interpretation of those rules at the same time and, more particularly, does not require this.

37. It is immaterial here that the Court's jurisdiction to interpret the Protocol on privileges and immunities already exists, from a purely objective perspective, on the basis of the Protocol on privileges and immunities itself and the EC Treaty. As demonstrated above, that jurisdiction exists only within the limits of the forms of procedure for which the Treaty provides and of the persons entitled to bring actions within the context of those procedures. Establishing jurisdiction on the basis of the arbitration clause at issue here would, consequently, imply extending *ratione personae* the possibilities for legal action for which the Protocol on privileges and immunities provides.

38. An arbitration clause that provided for more extensive jurisdiction than the above-mentioned jurisdiction of the Court would, in addition, represent a departure from the general rules on jurisdiction set out above and, consequently, those of the EC Treaty. Such an amendment to the Treaty provisions is, however, not covered by the authority contained in Article 35.4 of the ECB Statute.

39. It can therefore be established that the Court does not have jurisdiction to interpret Article 3 of the Protocol on privileges and immunities in this case. This does not, however, mean that it cannot be taken into account indirectly.

2. The Court's jurisdiction to interpret Article 8 of the headquarters agreement

40. Article 21 of the headquarters agreement establishes the Court's jurisdiction to rule on 'differences of opinion between the Government and the ECB concerning the interpretation or application of this Agreement ...'. In this case, the parties are in dispute, among other things, as to whether the ECB's disputed entitlement to a refund must be assessed exclusively under Article 8 of the headquarters agreement or whether, by mentioning Article 3 of the Protocol on privileges and immunities, that article is complementing that protocol and, consequently, the dispute falls to be resolved by having regard to the Protocol as well. Consequently, the matter in dispute relates directly to the meaning of Article 8 of the headquarters agreement. There is accordingly a difference of opinion between the Federal Republic of Germany and the ECB regarding the interpretation of the agreement, within the meaning of Article 21 thereof, so that — contrary to the view of the German Government — that article is applicable and establishes the jurisdiction of the Court.

3. Conclusion

41. It follows that the action is inadmissible on the ground that the Court lacks jurisdiction in so far as the action is based on the Protocol on privileges and immunities. However, in so far as it is based on the headquarters agreement, it is admissible.

## V — Merits

A — *Arguments of the parties*

1. Arguments of the ECB

42. The ECB claims that it has to pay to its landlords rent and ancillary charges which include the turnover taxes that the landlords have paid to their suppliers for intermediate services. It is therefore required to pay those turnover taxes indirectly. Furthermore, as acknowledged in the Court's case-law, this is an intrinsic part of the system of deducting input tax and tax exemption under the Sixth VAT Directive and the German legislation on turnover tax.

43. The ECB takes the view that it is incompatible with Article 8(1) of the headquarters agreement, read in conjunction with the second paragraph of Article 3 of the Protocol on privileges and immunities, that it should have to pay turnover tax indirectly. By its legal practice, that is to say by applying the national rules on turnover tax, the German Government is in breach of those provisions.

44. It is true that, according to its wording, Article 8(1) of the headquarters agreement applies only to turnover tax for which 'individual enterprises have invoiced the ECB'. However, Article 8(1), read in conjunction with the second paragraph of Article 3 of the Protocol on privileges and immunities, provides not only for the refund of the turnover taxes for which the ECB has been invoiced separately, but also for the refund of all turnover tax included in the prices paid by the ECB for goods and services for its official use, including, therefore, the turnover tax which the ECB has to pay indirectly as a result of the passing-on of turnover tax by its landlords. That results from the wording of the second paragraph of Article 3 of the Protocol on privileges and immunities which expressly requires that the Member States refund turnover tax 'wherever possible', and, furthermore, generally requires that 'the amount of indirect taxes ... included in the price' be refunded.

45. That interpretation is confirmed by the aim and object of the second paragraph of Article 3 of the Protocol on privileges and immunities. The general aim of the Protocol on privileges and immunities is to enhance the independence of the agencies of the European Union — including, therefore, the ECB — in relation to the national authorities. If it is to achieve that aim effectively, its provisions have to be interpreted in the light of that objective. Not only do those provisions prohibit national rules which directly undermine the tax exemptions and privileges accorded, they also, pursuant to the Court's settled case-law, preclude those national rules which lead indirectly to the imposition of taxes or thwart the exercise of privileges. The aim and object of the provisions is to prevent a Member State deriving a tax benefit from the fact that a body has its seat in its territory, at the expense of that body's financial resources (furnished directly or indirectly jointly by all of the Member States).

46. Such a conclusion is also necessary in the light of the fact that, within the legislative hierarchy, the headquarters agreement is of lesser importance than the Protocol on privileges and immunities. The right under the Protocol on privileges and immunities to have turnover tax refunded by the Member States 'wherever possible' cannot be restricted by a provision of the headquarters agreement, according to which turnover tax can be refunded only if it has been separately invoiced. On the contrary, a right to a refund always exists where it can be proved that the turnover tax has resulted in a financial burden and that burden can be quantified. In that context, in accordance with the principle of loyal cooperation laid down under Article 10 EC, the Member State is under a duty to cooperate, in particular in terms of developing a refund procedure which allows any practical difficulties in proving the tax paid to be overcome.

2. Arguments of the German Government

47. The German Government contends that any entitlement to a refund must be assessed exclusively in accordance with Article 8(1) of the headquarters agreement. According to the wording of that provision, only turnover tax which has been separately invoiced can be refunded. Since there are no invoices addressed to the ECB concerning rental or ancillary charges in respect of which turnover tax has been invoiced separately, the ECB is not entitled to a tax refund.

48. The requirement that the turnover tax be invoiced separately is based on the first sentence of Paragraph 15(1)(1) of the UStG, read in conjunction with Articles 18(1)(a) and 22(3) of the Sixth VAT Directive. An invoice in which turnover tax figures separately serves an important documentary function within the common system of value added tax, in particular in that it determines the amount of the consideration agreed from

the point of view of the recipient of the service. Documentation of that nature also performs an important role in the context of the auditing responsibilities of the financial authorities.

49. Furthermore, the refund mechanism under Article 8(1) of the headquarters agreement is consistent with the Sixth VAT Directive, and excluding the deduction of input tax by the landlord is not a special feature of letting to the ECB, since it also applies to leases to private sector banks and insurance companies.

50. Pursuant to Article 13B(b) of the Sixth VAT Directive, which was transposed into German law by Paragraph 4(12)(a) of the UStG, letting services are expressly exempt from turnover tax. The Federal Republic of Germany submits that it has made use of the right of option for taxation, which was given to Member States, to be used at their discretion, by Article 13C of the Sixth VAT Directive, to provide for a right of option under Paragraph 9 of the UStG. Although, as far as the ECB is concerned, there can be no possibility of an option to tax, simply because it is not a 'trader' within the meaning of the relevant provisions, the same would apply were the ECB acknowledged to have the status of 'trader', because, just like the private sector banks and insurance companies, the ECB is not engaged in any activity that would give rise to a right to deduct input tax.

51. An interpretation of Article 8(1) of the headquarters agreement that goes beyond its wording is not permissible. More particularly, an extensive interpretation of that provision is not required by the second paragraph of Article 3 of the Protocol on privileges and immunities, contrary to what the ECB contends.

52. As far as the ECB is concerned, the Protocol on privileges and immunities is an authorising instrument, on the basis of which it is able independently to conclude agreements governed by public international law with the Member States. The ECB used that authority to negotiate the headquarters agreement, whose provisions give specific definition to the more general provisions of the Protocol on privileges and immunities. It follows that Article 8(1) of the headquarters agreement of itself incorporates the rules of the Protocol on privileges and immunities by making them specific and giving them definitive and, for both parties, binding form. In addition, the headquarters agreement was negotiated in detail by experts from both sides, and those experts were aware that the letting to the ECB would be exempt from turnover tax and that it would not be possible to opt for the imposition of turnover tax because the ECB does not have the status

of a trader. Those clear rules notwithstanding, at no time during the negotiations did the ECB request special treatment for the lease.

53. The German Government rejects the ECB's view that the aim and object of the second paragraph of Article 3 of the Protocol on privileges and immunities requires a more extensive interpretation of Article 8(1) of the headquarters agreement. The aim of the Protocol on privileges and immunities in the present case is to guarantee and secure the independence of the ECB, and to ensure that the State in which it has its seat does not derive an unfair advantage from the fact that the ECB's seat is located in its territory. Neither of those aims is prejudiced. In particular, the Federal Republic of Germany derives no fiscal advantage to the detriment of the ECB from the fact that the letting is exempt from turnover tax, since the letting of the office premises to the ECB takes place under the same conditions as letting to other traditional lessees, such as private sector banks and insurance companies. The revenue from turnover tax, which is obtained because the landlord is not able to deduct the input tax, flows to the German exchequer, not on the basis of a corresponding payment by the ECB, but on the basis of the service relationship between the upstream service provider and the landlord. The upstream service provider pays to the German exchequer the turnover tax on the service it provides. That tax remains permanently with the exchequer because the landlord could not deduct the input tax. Consequently, the exchequer obtains the tax revenue independently of the service relationship between the ECB and its landlord.

54. The second paragraph of Article 3 of the Protocol on privileges and immunities cannot, in any event, be directly applied because there is no possibility of verifying the exact amount of the indirect taxes which the landlord had in fact to bear in relation to the ancillary services provided to the ECB specifically and not to other tenants; and it is equally impossible to prove that this actually involves the passing-on of this tax to the ECB rather than a general rent increase. Moreover, in so far as the ECB is arguing for the direct application of the Protocol on privileges and immunities, the Court of Justice lacks jurisdiction under the arbitration clause in the headquarters agreement.

## B — *Analysis*

### 1. The relationship between Article 8(1) of the headquarters agreement and the second paragraph of Article 3 of the Protocol on privileges and immunities

55. The second paragraph of Article 3 of the Protocol on privileges and immunities pro-

vides that 'wherever possible' there should be exemption for any indirect taxes included in the price of all movable or immovable property.

56. In providing for refund, Article 8(1) of the headquarters agreement determines the form of the tax exemption and lays down further conditions by requiring that a refund must be applied for, by establishing a minimum sum and by requiring that the tax actually paid should be invoiced separately. In addition, Article 8(1) of the headquarters agreement identifies the indirect taxes and sales taxes covered by the second paragraph of Article 3 of the Protocol on privileges and immunities as turnover tax. The scope of Article 8(1) of the headquarters agreement is, consequently, narrower than Article 3 of the Protocol on privileges and immunities. Compared with Article 3 of the Protocol on privileges and immunities, Article 8(1) of the headquarters agreement constitutes a special provision and, therefore, takes precedence.

57. In any event, given the Court's limited jurisdiction, whether or not this action is well founded depends solely on whether the right the ECB claims flows from Article 8 of the headquarters agreement. As far as the construction to be placed on that provision is concerned, the parties disagree, in particular, on whether, by referring to the second paragraph of Article 3 of the Protocol on privileges and immunities, Article 8 of the headquarters agreement complements that provision and, as a result, incorporates that article into the headquarters agreement.

58. According to the fifth recital in the preamble to the headquarters agreement, that agreement is intended to 'define' the privileges and immunities. The very fact that this is the form of words selected shows that the agreement establishes definitive rules in regard to the privileges and immunities of the ECB; consequently, recourse cannot be had to the Protocol on privileges and immunities.

59. The turnover tax paid by the ECB is to be refunded in accordance with Article 8(1) of the headquarters agreement 'in application of Article 3, paragraph 2 of the Protocol', but subject to further specific conditions. That form of words also shows that Article 8(1) of the headquarters agreement complements the second paragraph of Article 3 of the Protocol on privileges and immunities, and thus constitutes an 'application' of it. Had the headquarters agreement intended to make it possible to have more wide-ranging recourse to the Protocol on privileges and immunities or to establish congruent rules, then other forms of wording, such as for instance 'without prejudice to' or 'in accordance with' could have been used. But the choice of the expression 'in application of' reveals that the headquarters agreement was deliberately intended to provide a specific definition of the provision in question and, in the process, to specify

additional conditions, restricting the possibilities for refund.

60. The conditions laid down in Article 8(1) of the headquarters agreement concern the separate invoicing of turnover tax by the enterprises, the application of the goods supplied or services 'for the ECB's official use', a specific minimum of tax owed and the actual payment of the tax by the ECB to the enterprises. In particular, the stipulation of a minimum amount of tax owed (here, DEM 50 in each case) constitutes, in the same way as the requirement that the tax be invoiced separately, a significant restriction that is not contained in the Protocol on privileges and immunities. The requirement of a minimum amount of tax has not, however, been challenged in this case, unlike the issue of separate invoicing.

61. The second paragraph of Article 3 of the Protocol on privileges and immunities merely lays down a duty on the Member States to provide for the refund of indirect taxes 'wherever possible'. Moreover requiring them to take 'appropriate measures', it also allows the Member States considerable discretion.

62. By contrast, the first paragraph of Article 3 of the Protocol on privileges and immunities provides for an exemption from all taxes, without providing any further specification in that regard. Consequently, like the second paragraph of Article 3, the first paragraph merely supplies a framework which is complemented by the headquarters agreement. Since they are framework conditions, neither of the provisions can be applied directly, with the result that exemption from tax does not actually arise through the Protocol on privileges and immunities itself.

63. In that respect, the provision at issue in this case, that is to say, the second paragraph of Article 3 of the Protocol on privileges and immunities, differs significantly from Article 11(b) of the Protocol in the version of 18 April 1951, on which the judgment in Case 6/60 — which the ECB cites — was based. [14] The earlier rule laid down an unconditional exemption of a very specific nature. But since it concerned the fact that officials were to be 'exempt from any tax on salaries paid by the Communities', it was regulating circumstances very different from the second paragraph of Article 3, which is at issue here.

64. The same also applies to the second paragraph of Article 13 of the Protocol on privileges and immunities, which the ECB cites; it too provides unconditionally that 'officials and other servants shall be exempt ... from national taxes on salaries, wages and

14 — Case 6/60 *Humblet* [1960] ECR 559.

emoluments paid by the Communities'. The case-law handed down in this respect, to which the ECB refers, [15] is therefore equally inapplicable to this case as the case-law relating to Article 12(b) of the Protocol on privileges and immunities. [16] Article 12 of the Protocol on privileges and immunities also provides autonomously and unconditionally, without the need for further definition by the Member States, that 'in the territory of each Member State ... officials and other servants of the Communities shall ... enjoy [privileges and immunities]'.

65. The case cited in that connection, Case 2/68, [17] also concerned a completely different provision, which, unlike the second subparagraph of Article 3 of the Protocol on privileges and immunities, directly accorded rights and guarantees. Article 1 of the Protocol on the Privileges and Immunities of the European Atomic Energy Community ('the EAEC') provided that the national authorities were entitled to request the authorisation to carry out administrative measures of constraint. That did not require the Member States to adopt any further implementing act. That right, which was directly accorded by the EAEC Protocol on privileges and immunities, could not therefore be set aside by an agreement.

66. The abovementioned case-law, according to which a headquarters agreement cannot diminish such rights and guarantees (which have already been granted), [18] applies, however, only in those cases in which the Protocol on privileges and immunities directly confers rights and guarantees.

67. Article 8(1) of the headquarters agreement gives specific definition to the second paragraph of Article 3 of the Protocol on privileges and immunities and, therefore, regulates, comprehensively and exhaustively, the possibility of refunding turnover tax, with the result that recourse cannot be had to the Protocol on privileges and immunities to establish an entitlement in that regard.

2. Entitlement to refund on the basis of Article 8(1) of the headquarters agreement

68. Article 8(1) of the headquarters agreement provides — unequivocally, and this is common ground — that a refund of turnover tax may be obtained only if this has been separately invoiced. That this did not happen in relation to the rental payments and services at issue is not a matter of dispute

15 — Case 260/86 *Commission* v *Belgium* [1988] ECR 955; Case 333/88 *Tither* [1990] ECR I-1133; Case C-263/91 *Kristoffersen* [1993] ECR I-2755; and Case C-229/98 *Vander Zwalmen and Massart* [1999] ECR I-7113.

16 — Case 85/85 *Commission* v *Belgium* [1986] ECR 1149.

17 — Order in Case 2/68 *Ufficio Imposte di Consumo di Ispra* v *Commission* [1968] ECR 435.

18 — Order in *Ufficio Imposte di Consumo di Ispra* v *Commission* (cited in footnote 17).

between the parties. Based on Article 8(1) of the headquarters agreement, there is, consequently, no entitlement to refund of the turnover taxes which the ECB considers to have been paid indirectly.

69. Had the intention been to allow for a refund, the parties could have made appropriate provision in the headquarters agreement, particularly since the problem of so-called 'indirect indirect taxes' is not new. [19] However, since they not only refrained from including provisions to that effect, but, in the end, actually ruled it out through the wording of Article 8(1) of the headquarters agreement, there can be no question of a refund.

70. The parties to the headquarters agreement had the authority to adopt such provisions. In particular, the provisions of the Sixth VAT Directive do not preclude this.

71. The fact is that, in terms of Community law, agreements concluded by the Council on behalf of the Community, pursuant to Article 300 EC, constitute acts of the institutions of the Community within the meaning of subparagraph (b) of the first paragraph of Article 234 EC and, therefore, an integral part of the Community legal order. [20] They lie between primary and secondary law within the hierarchy of Community law (see Article 300(6) and (7) EC).

72. While agreements concluded by the ECB cannot be classified as agreements pursuant to Article 300 EC, they are none the less Community agreements. That fact, and their special status as particular forms of legal act, argues that they should, in a number of respects, be treated as Community agreements for the purposes of Article 300 EC. For example, by analogy with the rules applicable to Community agreements, they could be accorded the same status as the Community agreements. Constituting an agreement between a Member State and the ECB and lying between primary and secondary law in the hierarchy of Community law, the headquarters agreement should not, therefore, be assessed in the light of the Sixth VAT Directive. In the context of this case, which is based on Article 8(1) of the headquarters agreement, it is not necessary to enter into the question whether, in cases of this nature, the Sixth VAT Directive requires that national legislation on taxation should provide for the possibility of deducting input tax.

19 — See, on that issue, Muller, 'International organisations and their officials: to tax or not to tax?', *LIIL*, 1993, pp. 47 and 61.

20 — Case 181/73 *Haegeman* [1974] ECR 449, paragraphs 2 to 6.

73. That does not, of course, imply that corresponding issues of law could not be the subject of a preliminary ruling procedure under Article 234 EC for the interpretation of the Sixth VAT Directive. By contrast, whether German law is in breach of requirements of Community law, and, in particular, the Sixth VAT Directive, could be examined in Treaty infringement proceedings under Article 226 EC.

74. On the basis of all of the above considerations, the action must be dismissed as unfounded.

## VI — Costs

75. Pursuant to 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 Federal Republic of Germany has applied for the ECB to pay the costs and since the ECB has been unsuccessful in all its pleas, the ECB must be ordered to pay the costs.

## VII — Conclusion

76. On those grounds, I propose that the Court should:

(1) dismiss the action;

(2) order the European Central Bank to pay the costs.