OPINION OF ADVOCATE GENERAL LA PERGOLA

delivered on 5 May 1998 *

1. In these proceedings, the European Parliament seeks the annulment of Council Decision 96/664/EC of 21 November 1996 on the adoption of a multi-annual programme to promote linguistic diversity of the Community in the information society. [1] The Parliament's objection concerns the legal basis of the decision, which was adopted on the basis of Article 130 of the Treaty. According to the applicant institution, the decision should instead have been based on Article 128, concerning Community action in the cultural field.

Facts and legislative background

2. The procedure prior to the adoption of the measure may be summarised as follows. On 8 November 1995, the Commission submitted to the Council a proposal for a decision on the adoption of a multi-annual programme to promote the linguistic diversity of the Community in the information society (hereinafter 'the MLIS programme'). [2] By resolution of 21 June 1996, [3] the Parliament stated that the decision should have been based not only on Article 130 but also on Article 128 in order to stress the cultural aspects of the programme. The Commission, however, maintained its initial proposal as regards the choice of legal basis and, on 21 November 1996, the Council adopted the contested measure on the basis of Article 130 alone. The Parliament then commenced proceedings before this Court for annulment of the decision.

3. To appraise the appropriateness of the legal basis for the measure in question, it is necessary first, according to settled case-law of the Court, [4] to examine its purpose and content.

The first recital in the preamble states:

'The advent of the information society provides industry and in particular the language industry with new prospects for communication and trade on European and world mar-

* Original language: Italian.

1 — OJ 1996 L 306, p. 40.

2 — The proposal formed part of the plan of action adopted by the Commission on 19 July 1994 entitled 'Europe's way to the information society. An action plan' (COM(94) 347).

3 — OJ 1996 C 198, p. 248.

4 — See, amongst many, Case C-268/94 *Portugal* v *Council* [1996] ECR I-6177.

kets which are marked by a rich linguistic and cultural diversity'.

That leads on to the statement that 'industry and all other players concerned must work out specific and adequate solutions to overcome the linguistic barriers if they are to benefit fully from the advantages of the internal market and remain competitive on world markets'. [5]

The third recital is concerned with those who are principally affected by the decision:

'The private sector in this field consists mainly of small and medium-sized enterprises (SMEs), which face considerable difficulties in addressing different language markets and must thus be supported, especially when their role as a source of employment is considered'.

The fourth recital refers expressly to the need to 'encourage the use of technologies, tools and methods which reduce the cost of transferring information between people or applications using different languages, whilst also assuring the quality of translations, particularly in the case of literary translation, which requires a specific creative effort'.

The seventh recital highlights the need for Community action:

'Language policies are a matter for the Member States, taking account of Community law; ... however, promoting the development of modern language-processing tools and their use is a field of activity in which Community action is necessary in order to achieve substantial economies of scale and cohesion between the various language areas; ... the measures to be taken at Community level must be commensurate with the objectives to be obtained and concern only those fields which are likely to produce an added value for the Community'.

Emphasis is also laid on the positive consequences of the decision for Community citi-

5 — Second recital.

zens regarding both 'equitable access to information', which 'should be available to them in their language', [6] and the 'opportunity for access to the cultural and linguistic wealth and diversity of Europe'. [7]

The preamble then goes on to state that:

'Languages that remain excluded from the information society would run the risk of a more or less rapid marginalisation'. [8]

The most important provisions of the decision are Articles 1 and 2. Article 1 provides as follows:

'A Community programme is hereby adopted, the aims of which shall be:

— to raise awareness of and stimulate provision of multilingual services in the Community, which make use of language technologies, resources and standards,

— to create favourable conditions for the development of the language industries,

— to reduce the cost of information transfer among languages, in particular for the sake of SMEs,

— to contribute to the promotion of the linguistic diversity of the Community.

For the purposes of this Decision:

(a) multilingual services are defined as services allowing communication between users of different languages of the Community;

(b) language industries are defined as companies, institutions and professionals that provide, or enable the provision of, monolingual or multilingual services, in fields

6 — Eleventh recital.
7 — Sixth recital.
8 — Twelfth recital.

such as information retrieval, translation, language engineering and electronic dictionaries.'

Article 2 then defines the content of the programme in detail:

'In order to attain the objectives referred to in Article 1, the following actions shall be undertaken in accordance with the action lines contained in Annex I and the procedures for implementing the programme set out in Annex III:

— support for the creation of a framework of services for language resources and encouragement for the associations involved in such a construction,

— encouragement for the use of language technologies, resources and standards and their incorporation into computer applications,

— promotion of the use of advanced language tools in the Community and Member States public sector,

— accompanying measures.

None of these actions should duplicate the work being carried out in these fields under Community or national programmes.

In all schemes planned, existing national, Community and international resource-pooling cooperation arrangements in the field of translation, terminology, lexica and corpora shall be taken into account in the Community's measures, so as to make use of available facilities and avoid duplication of work.'

The duration of the programme is three years [9] and it is to be implemented by the Commission. [10]

4. Finally, the Treaty provisions relevant to these proceedings are as follows.

9 — See Article 3, which also sets the financial reference amount for its implementation.

10 — See Article 4.

Article 128, appearing in Title IX, concerning culture, is worded as follows:

'The Community shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore.

2. Action by the Community shall be aimed at encouraging cooperation between Member States and, if necessary, supporting and supplementing their action in the following areas:

— improvement of the knowledge and dissemination of the culture and history of the European peoples;

— conservation and safeguarding of cultural heritage of European significance;

— non-commercial cultural exchanges;

— artistic and literary creation, including in the audiovisual sector.

3. The Community and the Member States shall foster cooperation with third countries and the competent international organisations in the sphere of culture, in particular the Council of Europe.

4. The Community shall take cultural aspects into account in its action under other provisions of this Treaty, in particular in order to respect and to promote the diversity of its cultures.'

In order to achieve the above objectives, the Council is vested with authority of two kinds: it may adopt recommendations, 'acting unanimously on a proposal from the Commission'; [11] or adopt 'incentive measures, excluding any harmonisation of the laws and regulations of the Member States'. [12] In such circumstances, provision is made for recourse to the 'co-decision' procedure governed by Article 189b.

Also relevant is Article 130, which appears in Title XIII, which is concerned with industry:

'The Community and the Member States shall ensure that the conditions necessary for the

11 — Second indent of Article 128(5).

12 — First indent of Article 128(5).

competitiveness of the Community's industry exist.

For that purpose, in accordance with a system of open and competitive markets, their action shall be aimed at:

— speeding up the adjustment of industry to structural changes;

— encouraging an environment favourable to initiative and to the development of undertakings throughout the Community, particularly small and medium-sized undertakings;

— encouraging an environment favourable to cooperation between undertakings;

— fostering better exploitation of the industrial potential of policies of innovation, research and technological development.

...

3. The Community shall contribute to the achievement of the objectives set out in paragraph 1 through the policies and activities it pursues under other provisions of this Treaty. The Council, acting unanimously on a proposal from the Commission, after consulting the European Parliament and the Economic and Social Committee, may decide on specific measures in support of action taken in the Member States to achieve the objectives set out in paragraph 1.

...'

Legal analysis

5. At the outset, it must noted that the Parliament does not dispute the appropriateness of Article 130 as a legal basis for the contested measure; however, it does not consider that it constitutes the only basis; [13] that provision should be accompanied by another, Article 128. The central issue in these proceedings, therefore, is whether, in the light of the aim and content of the contested measure, recourse was required to the dual legal basis contended for by the Parliament.

13 — The Parliament submits, however, that the Council, in accentuating the industrial aspects of the measure, improperly used expressions such as 'language industries', which the Parliament does not consider to exist. The Council, for its part, replies correctly that that expression, used in Article 1(2)(b), refers collectively to all economic operators which, in various ways, are engaged in that sector of activity. A sector, I would add, of which it seems to me to be difficult to deny the existence.

The parties differ. The Parliament's affirmative answer is based essentially on the view that the contested decision is intended to safeguard linguistic diversity, as an essential part of European culture. [14] The cultural aspect is not secondary or incidental, in its view, to the industrial aspect. The measure in question should therefore have been based on Article 128 as well.

The Council takes the opposite view. It recognises that the promotion of linguistic diversity also has a cultural impact but considers that to be an indirect result as compared with the immediate purpose of the decision, which is of an industrial nature. The cultural aspect, in short, is merely incidental and it is therefore unnecessary to have recourse to Article 128 to justify adoption of the contested decision.

6. I cannot agree with the Parliament's argument. I do not consider that in this case 'linguistic diversity' displays the cultural importance attached to it by the applicant institution. The promotion and safeguarding of such linguistic diversity is intrinsically neutral; it only involves ensuring that the groups of people concerned have an opportunity to express themselves in their own language. It remains to be seen whether the provisions of the decision were inspired by cultural aims, in the sense that linguistic plurality was seen as an element 'of cultural heritage of European significance' under the second indent of Article 128(2); or whether such linguistic diversity was taken into account as regards its commercial applications: it represents a cost for undertakings and sometimes an obstacle to the penetration of foreign markets, particularly for small and medium-sized economic operators.

It seems to be that the decision under review purports to pursue the second aim, and not the first. The legislature starts from the premiss that '*industry and all other players concerned* must work out specific and adequate solutions to overcome the linguistic barriers if they are *to benefit fully from the advantages of the internal market and remain competitive on world markets*'. [15] Particular importance is then attached to the fact that 'small

14 — The Parliament, at the hearing, observed that the cultural aspects of the decision are also apparent from the fact that the financial resources necessary for its implementation were included in the Commission budget under the heading 'culture'; the Council did not respond by dealing with the substance of that contention, merely stating that it was put forward at a late stage. However, the Parliament's argument, whether late or not, does not seem to me to be pertinent. I do not see how the allocation of the programme concerned within the Commission budget can affect the Court's view of the legal basis of the decision: in the first place, the budget was approved after the measure in question here was adopted; moreover, it is quite possible that there was a mistake in budgetary allocation rather than in the choice of the legal basis for the measure.

15 — Second recital. Emphasis added.

and medium-sized enterprises ... face *considerable difficulties in addressing different language markets* and must thus be supported ...'. [16]

That conclusion is then supported by Article 2, which describes the Community actions intended to achieve the abovementioned objectives:

'Support for the creation of a framework of services for language resources and encouragement for the associations involved in such a construction' (first indent);

Finally, the measure is intended 'to encourage the use of *technologies, tools and methods which reduce the cost of transferring information between people applications using different languages* ...'. [17]

'Encouragement for the use of language technologies, resources and standards and their incorporation into computer applications' (second indent);

'Promotion of the use of advanced language tools in the Community and Member States public sector' (third indent);

Essentially, the Community programme is clearly inspired by considerations of an economic nature, as, moreover, is expressly stated in Article 1 of the decision, which sets out its purposes: 'to raise awareness of and stimulate provision of multi-lingual services in the Community, which make use of language technologies, resources and standards' (first indent); 'to create favourable conditions for the development of the language industries' (second indent); 'to reduce the cost of information transfer among languages, in particular for the sake of SMEs' (third indent).

'Accompanying measures' (fourth indent).

Here again we are concerned with technical action focusing on commercial applications and, therefore, designed to help undertakings operate on a trans-national basis. And that therefore must be the context for evaluating the scope to be attributed to the fourth indent

16 — Third recital. Emphasis added.

17 — Fourth recital. Emphasis added.

of Article 1, on which the Parliament's thesis is based: 'to contribute to the promotion of linguistic diversity of the Community' means nothing more than guaranteeing economic operators the possibility of participating in a global market without being compelled to resort to the use of a vehicular language, bearing the huge resultant costs, which would have a negative impact on their competitiveness. In can readily be observed that here there is no aspect of a cultural nature, merely a concern of a commercial nature: the intention is to make available to small and medium-sized undertakings a set of technical facilities enabling them to penetrate foreign markets by overcoming linguistic barriers. In other words, language is not seen as a vehicle of culture but as a medium for the exchange of economic information, a means of a communication between entrepreneurs of different nationalities.

I consider that the twelfth recital should be read in that light, where it states that 'languages that remain excluded from the information society would run the risk of a more or less rapid marginalisation'. That phrase is referred to by the Parliament, which considers that the protection of less-widely spoken languages has a clearly cultural dimension. It is wrong to do so, however: the danger which the legislature sought to ward off is that of marginalisation in the commercial sphere, not the cultural sphere. And it is for that reason that Community action was undertaken in order to create technical conditions to ensure that all the languages concerned were present in the market.

7. Essentially, it seems to me that 'linguistic diversity' is treated in the contested decision in the context of economic, rather than cultural, integration. Unlike the Parliament, I do not therefore consider that the reference to 'promotion of linguistic diversity' which we find in the fourth indent of Article 1 of the contested measure is such as to bring the decision — as the Parliament would contend — within the sphere of 'conservation and safeguarding of cultural heritage of European significance', within the meaning of the second indent of Article 128(2): and that is so — I repeat — because language is not treated by the decision as part of the 'cultural heritage' but as a means by which undertakings conduct business. [18]

I do not thereby mean to exclude the possibility that the Community programme in question, once implemented, may have reper-

18 — It need hardly be pointed out that there is no merit in the Parliament's view that part of the decision does not come within the scope of Article 130 and therefore necessitated recourse to Article 128. More specifically, the applicant institution refers to the third indent of Article 2, which includes among the programme's actions 'promotion of the use of advanced language tools in the Community and Member States public sector'. In its opinion, the actions at issue here relate to the public sector, and thereby fall outside the scope of Article 130, which concerns the private sector alone. However, the Council was right to reply that the provision just referred to is intended to ensure 'the conditions necessary for the competitiveness of industry'; and the proper functioning of the Community administration, and of the national administrations, constitutes one of those conditions; moreover, the term 'public sector' embraces not only administrations properly so called but also public undertakings.

cussions in the cultural sphere and more specifically regarding the use of the various national languages. In other words, the result of the programme will be to make available to economic operators language processing technologies which reduce the obstacles deriving from plurality of languages. This will, in the medium or long-term, facilitate the safeguarding of languages less widely spoken in international commerce. [19] However, as the Council rightly points out, that is only an indirect consequence which, for the present purposes, does not justify categorising the decision at issue as a cultural measure. And that indeed is the only point at issue here. To adopt the contested measure, it was unnecessary to have recourse to Article 128. The Court has, moreover, already made it clear that the use of a dual legal basis is not required where the measure to be adopted falls within the scope of a provision of the Treaty and serves, but only indirectly, the purposes covered by another provision. [20] That principle is also applicable to this case, in my view. For a measure to be able to be based on Article 128, it must directly and specifically have as its 'subject-matter' the cultural actions to which that provision of the Treaty relates.

The foregoing considerations are also confirmed by the very wording of Article 128(4), according to which 'the Community shall take cultural aspects into account in its action under other provisions of this Treaty'. That shows that culture is regarded, in the Treaty, as a, so to speak, 'transversal' value, which potentially touches upon every sector of activity in the Community. However, not every cultural impact can justify recourse to Article 128. The measures to be adopted in implementation of that provision must *specifically* govern cultural action. Article 128 does not apply, therefore, when the measure adopted in pursuit of certain objectives of specific Community action or policy has effects in the cultural sphere as well — but only indirect and incidental effects. The Parliament's thesis entails the result that every measure in which cultural aspects might be identified would be brought within the scope of Article 128. That result, it seems to me, is contrary to Article 128(4).

8. In conclusion, I do not perceive in the decision any purposive factor or substantive content such as to render it classifiable as Community action in the area of culture and to make it necessary to have recourse also to Article 128 for the adoption of the measure. The promotion of 'linguistic diversity' is, I repeat, treated in the decision as a commercial matter; and the cultural aspects of the decision are merely an indirect consequence incidental to the purpose and content of the measure in question.

19 — The possibility likewise cannot be excluded of repercussions outside the strictly commercial sphere, albeit of an indirect nature and affecting future developments: see the sixth recital, which lays emphasis on the opportunities of access to culture which will become available to European citizens with the advent of the information society.

20 — See Case C-271/94 *Parliament* v *Council* [1996] ECR I-1689.

Conclusions

In view of the foregoing considerations, I suggest that the Court:

— dismiss the European Parliament's action;

— order the applicant to pay the costs.