# OPINION OF ADVOCATE GENERAL BOT

delivered on 2 April 2009 [1]

1. In this action, the European Parliament requests the Court to annul Council Regulation (EC) No 1968/2006 of 21 December 2006, [2] by means of which the Council of the European Union laid down the arrangements for the Community's financial contribution to the International Fund for Ireland [3] for the period 2007 to 2010. The regulation was adopted on the basis of Article 308 EC.

2. In support of its action, the Parliament submits that Article 308 EC was not capable of being used as the legal basis for the regulation. According to the Parliament, the measures contained in the contested regulation are covered by Title XVII of the EC Treaty, which relates to economic and social cohesion, in particular by the third paragraph of Article 159 EC. The Court is therefore asked to determine whether measures aiming to consolidate the peace process and to promote reconciliation between divided population groups in a region of the Community may be considered to form an integral part of the Community's economic and social cohesion policy governed by Title XVII of the Treaty.

3. In this Opinion, I shall set out the reasons why I consider that this plea that the legal basis chosen was erroneous is well founded.

## I — The legal context

### A — *Primary law*

4. Article 158 EC provides as follows:

'In order to promote its overall harmonious development, the Community shall develop and pursue its actions leading to the strengthening of its economic and social cohesion.

In particular, the Community shall aim at reducing disparities between the levels of development of the various regions and the

1 — Original language: French.

2 — Regulation concerning Community financial contributions to the International Fund for Ireland (2007 to 2010) (OJ 2006 L 409, p. 86; corrigendum at OJ 2007 L 36, p. 31) ('the contested regulation').

3 — 'The IFI'.

backwardness of the least favoured regions or islands, including rural areas.'

5. Under the first paragraph of Article 159 EC:

'… The formulation and implementation of the Community's policies and actions and the implementation of the internal market shall take into account the objectives set out in Article 158 and shall contribute to their achievement. The Community shall also support the achievement of these objectives by the action it takes through the Structural Funds (European Agricultural Guidance and Guarantee Fund [EAGGF], Guidance Section; European Social Fund [ESF]; European Regional Development Fund [ERDF]), the European Investment Bank [EIB] and the other existing [f]inancial [i]nstruments.'

6. Furthermore, the third paragraph of Article 159 EC provides as follows:

'If specific actions prove necessary outside the Funds and without prejudice to the measures decided upon within the framework of the other Community policies, such actions may be adopted by the Council acting in accordance with the procedure referred to in Article 251 and after consulting the Economic and Social Committee and the Committee of the Regions.'

7. In addition, Article 308 EC provides:

'If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community, and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.'

B — *The 1985 Anglo-Irish Agreement and the Agreement concerning the International Fund for Ireland*

8. On 15 November 1985 the Irish Government and the United Kingdom Government signed an agreement [4] at Hillsborough whereby they undertook to work together 'for peace, stability and prosperity throughout the island of Ireland by promoting reconciliation, respect for human rights, cooperation

4 — *United Nations Treaty Series*, Vol. 1413, No I-23668 ('the Anglo-Irish Agreement').

against terrorism and the development of economic, social and cultural cooperation'. [5]

9. One of the areas for action laid down by the Anglo-Irish Agreement is, in accordance with the heading of Title F, cross-border co-operation on economic, social and cultural matters. Article 10(a) thus provides that 'the two Governments shall cooperate to promote the economic and social development of those areas of both parts of Ireland which have suffered most severely from the consequences of the instability of recent years, and shall consider the possibility of securing international support for this work'.

10. In accordance with that provision and to achieve its aim, on 18 September 1986 the Irish Government and the United Kingdom Government concluded an agreement establishing the International Fund for Ireland. [6]

11. In the preamble to the IFI Agreement, the two governments recognise that 'serious underemployment and multiple deprivation create an environment in which instability can flourish, and that instability and conflict in turn create conditions which are inimical to social and economic progress'.

12. Article 2 of the agreement states that 'the objectives of the [IFI] are to promote economic and social advance and to encourage contact, dialogue and reconciliation between nationalists and unionists throughout Ireland'.

13. Article 3 of the IFI Agreement states that 'in pursuance of these objectives, the [IFI] shall stimulate private investment and enterprise, supplement public programmes and encourage voluntary effort … Because of the special problems in Northern Ireland associated with the instability of recent years, approximately three quarters of the resources of the [IFI] shall be spent there'.

14. Article 4 of the agreement lists the types of project to which priority is to be given for the purpose of IFI financing. Basically, these are private sector investment, cross-border cooperation projects in the economic, educational and research fields, projects to improve the conditions of life for people in areas facing serious economic and/or social problems, such as high unemployment or lack of infrastructures, and projects to provide vocational training overseas.

15. It follows from Articles 5 and 6 of the agreement that the IFI is an international organisation of which Ireland and the United Kingdom of Great Britain and Northern

5 — Article 4(a)(ii) of the Anglo-Irish Agreement.

6 — *United Nations Treaty Series*, Vol. 1515, No I-26244 ('the IFI Agreement').

Ireland are members, and that it has legal personality. It is managed by a board whose chairman and other members are appointed jointly by the two governments. Donor countries (the United States of America, Canada, New Zealand, Australia and the European Community) may, if they so wish, send observers to participate in board meetings. [7]

16. The European Community has contributed to the financing of the IFI since 1989. [8] The work of the IFI is planned to continue until 2010.

C — *The contested regulation*

17. The purpose of the contested regulation is to lay down the framework within which the Community's financial contributions to the IFI are paid for the financial years 2007, 2008, 2009 and 2010. The reference amount for the period 2007 to 2010 is EUR 60 million.

18. The contested regulation was adopted on the basis of Article 308 EC. [9]

19. Recital 2 in the preamble to the regulation states that the Community recognises 'that the objectives of the [IFI] are a reflection of those pursued by itself'.

20. According to recital 3, 'the assessments carried out in accordance with Article 5 of Regulation (EC) No 177/2005 [10] have confirmed the need for further support for activities of the [IFI], while continuing reinforcing synergy of objectives and coordination with Structural Fund interventions, in particular with the Special Programme for Peace and Reconciliation in Northern Ireland and the Border Counties of Ireland (hereinafter the PEACE programme) set up in accordance with Council Regulation (EC) No 1260/1999 of 21 June 1999 laying down general provi-

7 — The Commission, represented by the Director-General for Regional Policy, attends board meetings of the IFI. See the communication of 12 October 2006 from the Commission containing the report on the International Fund for Ireland pursuant to Article 5 of Council Regulation (EC) No 177/2005 (COM(2006) 563 final, point 2.2). See also the first paragraph of Article 3 of the contested regulation.

8 — Since the Community's decision to contribute to the IFI, its financial contributions have totalled EUR 15 million per year between 1989 and 1994, EUR 17 million per year between 1995 and 1999 and EUR 15 million per year from 2000.

9 — The same legal basis was used for the regulations relating to previous contribution periods (Article 235 of the EC Treaty (now Article 308 EC)).

10 — Council regulation of 24 January 2005 concerning Community financial contributions to the International Fund for Ireland (2005-2006) (OJ 2005 L 30, p. 1).

sions on the Structural Funds [11]'. Consequently the Community legislature took the view that the peace process in Northern Ireland required continued Community support for the IFI after 31 December 2006. [12]

21. According to recital 6 in the preamble to the contested regulation, 'the main purpose of this Regulation is to support peace and reconciliation through a wider range of activities than those covered by the Structural Funds, and which extend beyond the scope of the Community's policy on economic and social cohesion'.

22. Recital 15 in the preamble states that '[t]he [IFI] strategy launched for the final phase of its activities (2006 to 2010) and entitled Sharing this Space focuses on four key areas: building foundations for reconciliation in the most marginalised communities, building bridges for contact between divided communities, moving towards a more integrated society and leaving a legacy. Consequently, the ultimate aim of the [IFI] and of this Regulation is, therefore, to encourage inter-community reconciliation'.

23. In recital 16 in the preamble, the Community legislature observes that 'the Community support will contribute to reinforcing solidarity between the Member States and between their peoples'.

24. Article 2 of the contested regulation provides:

'The contribution shall be used by the [IFI] in accordance with the [IFI] Agreement. …

In allocating the contribution the [IFI] shall give priority to projects of a cross-border or cross-community nature, in such a way as to complement the activities financed by the Structural Funds, and especially those of the PEACE programme operating in Northern Ireland and the border counties of Ireland.

The contribution shall be used in such a way as to bring about sustainable economic and

11 — OJ 1999 L 161, p. 1. This regulation was last amended by Council Regulation (EC) No 173/2005 of 24 January 2005 (OJ 2005 L 29, p. 3) and was then repealed and replaced by Council Regulation (EC) No 1083/2006 of 11 July 2006 (OJ 2006 L 210, p. 25) from 1 January 2007.

12 — See, concerning the reasons for the continued Community contribution, the abovementioned Commission communication of 12 October 2006, which states that '[t]he political and social situation of the region remains fragile and the continuing level of violence and division calls on the EU to sustain its efforts to promote peace and reconciliation in this part of the European Union' (point 6) and that '[g]iven that reinforcing the solidarity between Member States and between their peoples is a core EU objective, it is therefore important for the EU to remain committed to these objectives, alongside other international donors, and to renew its contribution to the IFI' (p. 10).

social improvement in the areas concerned. It shall not be used as a substitute for other public and private expenditure.'

25. Under Article 7(1) of the regulation, the Commission is to administer the Community contributions to the IFI. Subject to Article 7(2), the annual contribution is to be paid in instalments as follows:

'(a) a first advance payment of 40% shall be made after the Commission has received an undertaking, signed by the Chairman of the [IFI]'s Board, to the effect that the [IFI] shall comply with the conditions for the grant of the contribution set out in this Regulation;

(b) a second advance payment of 40% shall be made six months later;

(c) a final payment of 20% shall be made after the Commission has received and accepted the [IFI]'s annual activity report and audited accounts for the year in question.'

D — *The PEACE programme and Regulation No 1083/2006*

26. The PEACE programme is a Community initiative which falls within the framework of the Structural Funds and aims to promote progress towards a peaceful and stable society, as well as to promote reconciliation in Northern Ireland and the border regions of Ireland. The PEACE programme was first set up during the programming period 1995 to 1999 (PEACE I) and was then renewed for the periods 2000 to 2006 (PEACE II) and 2007 to 2013 (PEACE III).

27. With regard to the current programming period (2007 to 2013), the PEACE programme is implemented as a cross-border programme for the purposes of Article 3(2)(c) of Regulation No 1083/2006.

28. Article 3 of Regulation No 1083/2006 describes the objectives of the Structural Funds as follows:

'1. The action taken by the Community under Article 158 of the Treaty shall be designed to strengthen the economic and social cohesion of the enlarged European Union in order to promote the harmonious, balanced and sustainable development of the Community.

… It shall be aimed at reducing the economic, social and territorial disparities which have arisen particularly in countries and regions whose development is lagging behind and in connection with economic and social restructuring and the ageing of the population.

The action taken under the Funds shall incorporate, at national and regional level, the Community's priorities in favour of sustainable development by strengthening growth, competitiveness, employment and social inclusion and by protecting and improving the quality of the environment.

2. To that end, the ERDF, the ESF, the Cohesion Fund, the EIB and the other existing Community financial instruments shall each contribute in an appropriate way towards achieving the following three objectives:

…

(c) the European territorial cooperation objective, which shall be aimed at strengthening cross-border cooperation through joint local and regional initiatives, strengthening transnational cooperation by means of actions conducive to integrated territorial development linked to the Community priorities, and strengthening interregional cooperation and exchange of experience at the appropriate territorial level.

…'

29. Paragraph 22 of Annex II to Regulation No 1083/2006 states that the PEACE programme, 'in order to promote social and economic stability in the regions concerned, will include, notably, actions to promote cohesion between communities. The eligible area will be the whole of Northern Ireland and the border counties of Ireland. This programme will be implemented under the European territorial cooperation objective'.

**II — The legislative procedure leading to the adoption of the contested regulation**

30. As I have already said, the Community has contributed to the financing of the IFI since 1989. Regulation No 177/2005 contained the provisions applicable to the period 2005 to 2006. Under Article 5 of that regulation, the Commission had to submit, by 31 March 2006, a report to the budgetary authority, assessing the results of the activities of the IFI and the need for continuing contributions beyond 2006, taking into

account developments in the peace process in Northern Ireland.

31. On 12 October 2006 the Commission submitted that report, [13] in which it concluded that the Community contribution should be renewed. On that basis the Commission at the same time submitted to the Council a proposal for a regulation [14] to continue the Community contribution to the IFI for the period 2007 to 2010.

32. The Commission's proposal was based on Article 308 EC, which requires unanimity within the Council and consultation of the Parliament. The proposal was put before the Parliament which, after obtaining the assent of its Committee on Legal Affairs, approved the proposal by a legislative resolution of 13 December 2006, [15] subject to a single amendment aiming to substitute Article 159 EC for Article 308 EC as the legal basis for the contested regulation.

33. On 21 December 2006 the Council adopted the Commission's proposal on the basis of Article 308 EC.

13 — Commission communication of 12 October 2006, mentioned above.

14 — Proposal for a Council regulation concerning Community financial contributions to the International Fund for Ireland (2007-2010) (COM(2006) 564 final).

15 — P6_TA-PROV(2006)0562.

## III — Forms of order sought

34. The Parliament claims that the Court should:

— annul the contested regulation on the ground that it was not adopted on an appropriate legal basis, and

— order the Council to pay the costs.

35. The Council contends that the Court should:

— dismiss the application as unfounded, and

— order the applicant to pay the costs;

— alternatively, in accordance with the second paragraph of Article 231 EC, maintain the effects of the contested

regulation until the adoption of a new regulation and rule that annulment does not affect the validity of payments made or that of the commitments entered into on the basis of the contested regulation.

36. By order of the President of the Court of 20 September 2007, the Commission, Ireland and the United Kingdom were given leave to intervene in support of the form of order sought by the Council.

## IV — The main arguments of the parties

37. The Parliament relies on a single plea in law in support of its action, alleging an incorrect choice of legal basis for the contested regulation. According to the Parliament, the Community legislature was wrong to adopt the regulation on the basis of Article 308 EC when it had the necessary powers for that purpose by virtue of the third paragraph of Article 159 EC.

38. First of all, the Parliament refers to the Court's settled case-law to the effect that Article 308 EC may be used as the legal basis for a measure only where no other provision of the Treaty gives the Community institutions the necessary power to adopt it. [16] The Parliament then states that the third paragraph of Article 159 EC confers upon the institutions the power to adopt specific actions that prove necessary outside the Structural Funds in order to achieve the aims referred to in Article 158 EC of strengthening the economic and social cohesion of the Community. The term 'strengthening of … economic and social cohesion' in that article covers any action in any legal form whatsoever, and whatever its territorial scope, aiming to promote the Community's overall harmonious development, the strengthening of social and territorial cohesion and solidarity between the Member States and the peoples of the Community. That is the sense in which the aims of Article 158 EC have been pursued in numerous Community measures, both within the framework of the Structural Funds and outside them.

39. According to the Parliament, the aims pursued by the Community, both with its contribution to the IFI and in the framework of the PEACE programme, coincide. The aims are concerned with strengthening social cohesion and solidarity between the populations of Northern Ireland and the border

16 — See, inter alia, Case 45/86 *Commission* v *Council* [1987] ECR 1493, paragraph 13; Case 242/87 *Commission* v *Council* [1989] ECR 1425, paragraph 6; Case C-295/90 *Parliament* v *Council* [1992] ECR I-4193, paragraph 11; Case C-350/92 *Spain* v *Council* [1995] ECR I-1985, paragraph 26; Case C-271/94 *Parliament* v *Council* [1996] ECR I-1689, paragraph 13; Case C-22/96 *Parliament* v *Council* [1998] ECR I-3231, paragraph 22; and Case C-436/03 *Parliament* v *Council* [2006] ECR I-3733, paragraph 36.

regions of Ireland. Such aims fall within the 'economic and social cohesion' of Article 158 EC. The Parliament considers that there can be no strengthening of economic and social cohesion in the regions in question if reconciliation and mutual understanding between communities are not achieved. On that point the Parliament explains that the lack of reconciliation between the communities is at the same time one of the effects of a situation of economic and social underdevelopment and the reason why such a situation persists. Therefore addressing the problem of reconciliation would mean strengthening economic and social cohesion within the meaning indicated by Article 158 EC.

40. The Parliament also stresses that the operations of the IFI complement those of the Structural Funds, in particular of the PEACE programme. In the current programming period, it is planned to align the work of the PEACE programme with the priorities defined by the IFI in the framework of the 'Sharing this Space' strategy, which should guide IFI activities until 2010. Thus, the PEACE programme should follow essentially two strategic priorities, namely reconciliation between the communities and contribution to a shared society. Those priorities correspond to the fundamental issues upon which the IFI should concentrate its activities. The Parliament also points out that the homogeneity and cohesion between IFI operations and those of the Structural Funds are also reflected in the practical management of those operations.

41. To establish whether Article 308 EC could serve as the legal basis for the contested regulation, it is necessary to determine the objectives that the regulation sought to pursue in making financial contributions to the IFI, and not the objectives of the IFI. The second and third paragraphs of Article 2 of the contested regulation make the use of the Community's financial contributions subject to precise conditions which seek to ensure that the actions financed in that way do remain within the scope of the aims pursued by the Community under its policy of economic and social cohesion. The Parliament points out that, under Article 7(1)(a) and (c) of the contested regulation, fulfilment by the IFI of those conditions is necessary in order for it to obtain payment of the Community contributions in question. Consequently, even if the ambit of the IFI's activities, as defined by the IFI Agreement, extends beyond the scope of the Community's economic and social cohesion policy, the Community financial resources must nevertheless be assigned by way of priority to projects intended, in accordance with the second and third paragraphs of Article 2 of the contested regulation, 'to complement the activities financed by the Structural Funds' and, in any case, to projects capable of bringing about 'sustainable economic and social improvement in the areas concerned', that is to say, projects which are clearly within the scope of the aims of Article 158 EC. Therefore the contested regulation does not pursue aims other than or broader than those described in Article 158 EC. Far from

reflecting the regulation's content and aims, recital 6 in the preamble to the regulation is merely a declaration of intent by the Council designed to justify recourse to Article 308 EC.

42. The Parliament also observes that the third paragraph of Article 159 EC specifies neither the sectors in which specific actions can be instituted nor the forms which those actions may take. Furthermore, there is nothing in the wording of Article 159 EC to indicate that specific actions cannot take the form of ad hoc or occasional projects such as those in issue in the present case, should that prove necessary.

43. Finally, the Parliament submits that neither Article 159 EC nor Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities [17] precludes the financing of a specific action within the meaning of the third paragraph of Article 159 EC through an international organisation. While noting that the rules in the abovementioned Financial Regulation cannot affect in any way the choice of the legal basis for a Community measure, the Parliament points out that several provisions of that regulation expressly provide for the possibility of financial contributions by the Community to funding vehicles external to the Community and the possibility of implementing a budget through international organisations.

44. The Council considers, on the other hand, that Title XVII of the EC Treaty does not provide for the powers to act required by the IFI's activity and cannot therefore supply an appropriate legal basis for the grant of financial contributions by the Community to the IFI.

45. First of all, the Council states that the structure and the general arrangement of Articles 158 EC and 159 EC are such that the concept of specific actions must be understood as forming part of the aims referred to in Article 158 EC. Consequently, according to the Council, the adoption of a specific action outside the Structural Funds is a means to be

17 — OJ 2002 L 248, p. 1, as amended by Council Regulations (EC, Euratom) No 1995/2006 of 13 December 2006 (OJ 2006 L 390, p. 1) and (EC) No 1525/2007 of 17 December 2007 (OJ 2007 L 343, p. 9) ('the Financial Regulation').

used, in the same way as Community participation through those funds, for strengthening the economic and social cohesion of the Community in order to promote its overall harmonious development.

46. The Council observes that the encouragement of contact, dialogue and reconciliation between nationalists and unionists on the island of Ireland is a central element of the contested regulation. According to the Council, it is an aim which, quite obviously, cannot be included in the scope of Article 158 EC, which aims to promote harmonious development and, in particular, to reduce disparities between the levels of development of the various regions of the Community.

47. In the historical and political context which has given rise to the international initiative to which the Community contributes by means of the contested regulation, the lack of reconciliation between nationalists and unionists in the territories covered by the IFI is regarded as an obstacle to an effective policy of economic and social cohesion. Helping to remove that obstacle must be regarded as a prerequisite for an effective cohesion policy.

48. Next, the Council observes that, unlike the IFI, the PEACE programme is a Community initiative whose measures are financed under the ERDF. The legal basis of the PEACE programme does not give it powers to cover all the actions at present covered by the IFI, in spite of the fact that certain actions that are eligible for funding by both those vehicles are in practice so funded. The two vehicles address in parallel two aspects of the Irish problem, namely, on the one hand, instability and conflict and, on the other, economic and social development, although they have a different starting point. The IFI aims at reconciliation in order to facilitate cohesion, whereas the PEACE programme aims at cohesion in order to facilitate reconciliation.

49. The Council and Ireland point out that the IFI is an international organisation in which the Community participates only financially by means of the contested regulation, that the Community is not a member of the IFI and that the IFI was established independently of the Community's will. However, Title XVII of the EC Treaty relates to means of action which are the Community's own and are administered in accordance with the rules of the Community regulatory frame-

work, including the Community's Financial Regulation. According to the Council, neither Title XVII nor the Community regulatory framework can apply to an international organisation of which the Community is not a member, even supposing that, at a given date, it is found that the IFI's priority is economic cohesion rather than reconciliation.

50. Should the Court decide to annul the contested regulation, the Council, like the Commission, Ireland and the United Kingdom, requests in the alternative in accordance with the second paragraph of Article 231 EC — on important grounds of legal certainty connected both with current projects and with the legitimate expectations of the management of the IFI — that the effects of the regulation be maintained until the adoption of a new regulation and that annulment should not affect the validity of payments made or that of commitments entered into on the basis of the contested regulation.

51. The Commission also submits that Article 308 EC is the appropriate legal basis for the adoption of the measures contained in the contested regulation.

52. The Commission claims that economic and social development as envisaged by the Anglo-Irish Agreement, important though it is, has never been an aim in itself. It was chosen as one means, among others, of securing a lasting peace and stability in a region afflicted by divisions between the main traditions represented there. From that point of view, the IFI Agreement is founded primarily on the existence of political instability and the IFI established by the agreement has the aim of reducing or even eliminating that instability by economic and social means among others. It would therefore be mistaken to treat the economic and social aspect as an aim in itself because that would effectively ignore the political and legal context of the IFI Agreement.

53. In short, the contested regulation has the object of providing for a financial contribution to the IFI which is to be used in accordance with the IFI Agreement, and that agreement, like the Anglo-Irish Agreement from which it originated, has the sole object of peace and reconciliation. Therefore the Commission considers that the Community legislature was right, first, to declare, in recital 15 in the preamble to the contested regulation, that 'the ultimate aim of the [IFI] and of this Regulation is, therefore, to encourage inter-community reconciliation' and, second,

to take the view that, since a mission aiming to promote peace and political stability is involved, the EC Treaty provides no legal basis other than Article 308 EC for adopting the contested regulation.

54. Furthermore, the Commission considers that the general nature of the policy established by Article 158 EC is not reconcilable with a specific project which is from the outset limited to a single region of the Community and which cannot be implemented generally. The term 'specific actions' in the third paragraph of Article 159 EC is by no means synonymous with ad hoc or occasional projects. This view of the general purpose of the third paragraph of Article 159 EC accords with legislative practice in this area. [18]

55. In addition, the Commission recognises that there is a possibility of an overlap between the activities of the IFI and those of the Structural Funds. This is explained by the fact that the promotion of cross-border cooperation, particularly by way of the promotion of economic and social development of the areas of both parts of Ireland most affected by instability, is one of the paths preferred by the Anglo-Irish Agreement for achieving its sole aim, namely peace and reconciliation. The Commission observes, however, that the IFI is entitled to support actions which could not be financed on the basis of the Community's economic and social cohesion policy. The Commission cites, for example, the scheme for the IFI to share the expertise and know-how acquired over 20 years with those who seek to build peace in other regions of the world, and also a programme intended to facilitate contacts between local communities, the police and District Policing Partnerships. [19] Finally, the Commission submits that the divergence between the potential areas for action of the Structural Funds and the IFI is reflected in the second paragraph of Article 2 of the contested regulation. The statement that, in allocating the Community's financial contributions, the IFI is to complement the activities of the Structural Funds signifies that it is a matter of financing activities which are different but complementary.

56. The United Kingdom submits that Articles 158 EC and 159 EC are designed to address economic and social imbalances between the regions of the Community and not to promote peace and reconciliation

18 — In support of its argument, the Commission cites three regulations adopted on the basis of that provision which are all, according to the Commission, of a horizontal nature. They are Council Regulation (EC) No 2012/2002 of 11 November 2002 establishing the European Union Solidarity Fund (OJ 2002 L 311, p. 3), Regulation (EC) No 1082/2006 of the European Parliament and of the Council of 5 July 2006 on a European grouping of territorial cooperation (EGTC) (OJ 2006 L 210, p. 19), and Regulation (EC) No 1927/2006 of the European Parliament and of the Council of 20 December 2006 on establishing the European Globalisation Adjustment Fund (OJ 2006 L 406, p. 1). It may be noted that Regulation No 2012/2002 was adopted on a dual legal basis, namely the third paragraph of Article 159 EC and Article 308 EC.

19 — Local partnerships relating to the maintenance of order.

between different communal groups within a region. The programmes financed by the IFI in the framework of its 'Sharing this Space' strategy very clearly emphasise the aim of mutual understanding and reconciliation between the communities. In addition, although the United Kingdom does not deny that the IFI and the PEACE programme are in some respects complementary, that they assist in many cases the same categories of people and that some projects are financed by both the IFI and the PEACE programme, it nevertheless considers that the two initiatives pursue different aims.

Ireland considers that Articles 158 EC and 159 EC are primarily concerned with economic development and not with issues of reconciliation, political dialogue and peace-building.

## V — Assessment

57. Ireland states that in its opinion the IFI, which, it stresses, is specific and unique, has the core objective of peace-building and intra-community reconciliation. In so far as it may be said that the IFI is also concerned with economic and social development, that concern is an instrumental one. In the context of the IFI, economic and social development is not a goal in itself but a facilitator of reconciliation and political progress. Considered in this way, it is evident that the IFI cannot be characterised as a mechanism for strengthening economic and social cohesion. The four fundamental areas of the IFI strategy for the period 2006 to 2010 illustrate the IFI's principal function as a mechanism for achieving reconciliation between nationalists and unionists. Finally,

58. First of all, it must be remembered that Article 308 EC may be used as the legal basis for a measure only where no other provision of the EC Treaty gives the Community institutions the necessary power to adopt it. [20] Consequently, Article 308 EC is designed to fill the gap where no specific provisions of the EC Treaty confer on the Community institutions express or implied powers to act, if such powers appear none the less to be necessary to enable the Community to carry out its functions with a view to attaining one of the objectives laid down by the Treaty. [21]

20 — See the case-law cited in footnote 16.

21 — Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation* v *Council and Commission* [2008] ECR I-6351, paragraph 211 and the case-law cited.

59. In addition, it has consistently been held that the choice of the legal basis for a Community measure must rest on objective factors amenable to judicial review, which include the aim and content of that measure, and not on the legal basis used for the adoption of other Community measures which might, in certain cases, display similar characteristics. [22] I would add that, according to the Court, the fact that an institution wishes to participate more fully in the adoption of a given measure, the work carried out in other respects in the sphere of action covered by the measure and the context in which the measure is adopted are irrelevant to the choice of the measure's legal basis. [23]

60. In view of the abovementioned case-law, it is necessary to determine whether, as the Parliament maintains, the contested regulation should have been adopted on the basis of the third paragraph of Article 159 EC. Thus, before examining the aim and content of the regulation, I shall make a few preliminary observations on the Community's economic and social cohesion policy.

22 — Case C-155/07 *Parliament* v *Council* [2008] ECR I-8103, paragraph 34 and the case-law cited.

23 — Case C-269/97 *Commission* v *Council* [2000] ECR I-2257, paragraph 44.

A — *Preliminary observations on the Community's economic and social cohesion policy*

61. There are now several references to economic and social cohesion in the EU and EC Treaties. Strengthening such cohesion is an objective both of the European Union (Article 2 EU) and the European Community (Article 2 EC). In the words of Article 3(1)(k) EC, the activities of the Community include the strengthening of economic and social cohesion. Title XVII of the EC Treaty, consisting of Articles 158 EC to 162 EC, confers upon the Community power to pursue a Community economic and social cohesion policy in order to promote the overall harmonious development of the Community.

62. The recognition and development of that policy has been gradual. In the beginning, it took the form of a number of Community initiatives designed to establish a regional policy. In that respect, the true turning point came upon the enlargement of the Community to include the Kingdom of Denmark, Ireland and the United Kingdom. At that time,

the two last-mentioned States were calling for regional action, Ireland for almost all its regions and the United Kingdom for its disadvantaged regions of Scotland and Northern Ireland. [24]

63. As the EEC Treaty, signed on 25 March 1957, contained no provisions conferring upon the Community legislature the powers of action necessary for implementing a regional policy, Article 235 of the EC Treaty (now Article 308 EC) in particular had to be used by the legislature in order to develop its work in the regional area, particularly to establish the ERDF. [25]

64. Regional policy acquired the status of a Community policy enshrined in primary law with the Single European Act of 1986 which added to the EEC Treaty a Title V, entitled 'Economic and social cohesion', specifying the aims and setting out the means of implementing that policy.

65. Therefore, after the Single European Act came into force on 1 July 1987, the Community legislature no longer needed to use Article 235 of the EC Treaty as a general empowering clause in order to take action on the basis of the economic and social cohesion policy.

66. However, Article 235 remained relevant as a means of strengthening the Community's powers when it had to confront situations not provided for by the EC Treaty. [26] If the powers conferred upon the Community are insufficient, the Community legislature will therefore have to use Article 308 EC as the only basis, or as an additional basis beside the other relevant articles of the EC Treaty.

24 — See Blumann, C., 'Historique de la politique communautaire de cohésion économique et sociale', *L'Europe et les régions: quinze ans de cohésion économique et sociale*, Bruylant, Brussels, 2003, p. 5, especially p. 10.

25 — Council Regulation (EEC) No 724/75 of 18 March 1975 establishing a European Regional Development Fund (OJ 1975 L 73, p. 1).

26 — See Flaesch Mougin, C., 'Commentaire de l'article 235', *Traité instituant la CEE: commentaire article par article*, edited by Constantinesco, V., Jacqué, J.-P., Kovar, R. and Simon, D., Économica, Paris, 1992.

67. Regulation No 2012/2002 is an illustration of this practice. According to Article 1, read in conjunction with recital 1 in the preamble, the object of that regulation is to establish a solidarity fund to enable the Community to respond in a rapid, efficient and flexible manner to emergency situations, mainly in the case of natural disasters. The regulation has a dual legal basis, namely the third paragraph of Article 159 EC and Article 308 EC. The additional use of Article 308 EC is justified as follows in recital 3: '[t]he European Union should also show solidarity with the countries currently negotiating their accession. Extending this Regulation to cover those countries entails recourse to Article 308 [EC]'. The Community legislature thus took the view that it did not have sufficient powers under the third paragraph of Article 159 EC to extend that aspect of the economic and social cohesion policy to countries which had not yet acceded to the Union. [27]

68. The main question raised by the present case also relates to the extent of the powers of the Community legislature under the third paragraph of Article 159 EC, but this time in the particular context of financial contributions which are made by the Community to an international organisation consisting of two Member States and the beneficiaries of which are exclusively regions of the Community, principally Northern Ireland, in circumstances where, according to the Council and the interveners, the reasons for making the contributions go beyond the objectives pursued by Title XVII of the EC Treaty. Must the view be taken that, as the Community has no, or insufficient, powers under the third paragraph of Article 159 EC to take such action, the Community legislature was constrained to use Article 308 EC as the legal basis for the contested regulation?

69. In order to reply to that question, it is necessary, first, to examine the purpose and content of the regulation and, second, to ascertain whether the Community action for which it provides falls within the scope of the third paragraph of Article 159 EC.

B — *The purpose and content of the contested regulation*

70. To begin with, it must be borne in mind that Article 10(a) of the Anglo-Irish Agreement provides that 'the two Governments shall cooperate to promote the economic and social development of those areas of both parts of Ireland which have suffered most

27 — See also, to that effect, Regulation No 1082/2006, which is based exclusively on the third paragraph of Article 159 EC: recital 16 in the preamble states that the third paragraph of Article 159 EC 'does not allow the inclusion of entities from third countries in legislation based on that provision'.

severely from the consequences of the instability of recent years, and shall consider the possibility of securing international support for this work'. The IFI was then established in order to contribute to the actions envisaged in this provision. Article 2 of the IFI Agreement thus provides that 'the objectives of the [IFI] are to promote economic and social advance and to encourage contact, dialogue and reconciliation between nationalists and unionists throughout Ireland'.

71. In 1988 the Irish Government and the United Kingdom Government asked the Community to contribute to the IFI. The Community has thus supported IFI projects financially since 1989. In one of the regulations preceding the contested regulation, namely Regulation (EC) No 2687/94, [28] the Community legislature stated that 'the programmes of the [IFI] encourage cross-border and cross-community cooperation and thereby promote dialogue and reconciliation between nationalists and unionists' [29] and that the IFI 'is an example of successful Anglo-Irish cooperation in advancing economic and social progress and in promoting reconciliation on a cross-border and cross-community basis'. [30]

72. The contested regulation also stresses those aims, the Community contributions being intended to promote economic and social progress in the regions in question and, ultimately, to promote reconciliation between the divided communities.

73. The second and third paragraphs of Article 2 of the contested regulation thus expressly provide that, in allocating the contributions paid by the Community, the IFI is to 'give priority to projects of a cross-border or cross-community nature' and that the contributions must 'be used in such a way as to bring about sustainable economic and social improvement in the areas concerned'. The payment of the Community's annual contribution by instalments in accordance with Article 7(1) of the regulation constitutes a guarantee that the contribution is properly used for that purpose.

28 — Council regulation of 31 October 1994 on Community financial contributions to the International Fund for Ireland (OJ 1994 L 286, p. 5).

29 — Eighth recital.

30 — Eleventh recital.

74. In addition, recital 6 in the preamble to the contested regulation states that the regulation's 'main purpose … is to support peace and reconciliation'. Recital 15 also expresses that objective, stating that it is the ultimate aim. After listing the four key areas of the 'Sharing this Space' strategy which was launched for the final phase of the IFI's activities, covering the period 2006 to 2010, the Community legislature states that 'the ultimate aim of the [IFI] and of this Regulation is … to encourage inter-community reconciliation'.

75. Therefore the Community action provided for by the contested regulation aims to address the economic and social problems of Northern Ireland and the border counties of Ireland in the framework of a peace and reconciliation process.

76. In other words, that action is, like the PEACE programme, intended to consolidate the economic and social foundations of the peace process. While reconciliation and therefore the consolidation of peace are the ultimate aim or, one might say, the ideal, the more specific and immediate purpose of the contested regulation is to contribute to the economic and social development of the region in question.

77. Those two aims of the Community are, at the same time, an illustration of the originality and the *raison d'être* of the Community arrangements which, as indicated in substance by the second and eighth recitals in the preamble to the EC Treaty, aim to safeguard peace by promoting economic and social progress in the various regions of the Community.

78. The question now is whether, in so far as it aims to promote economic and social progress in the regions concerned and, ultimately, reconciliation between divided communities, the contested regulation falls within the scope of the third paragraph of Article 159 EC.

C — *Does the contested regulation fall within the scope of the third paragraph of Article 159 EC?*

79. First of all, it must be recalled that the third paragraph of Article 159 EC is the legal basis for specific actions which prove necessary outside the Structural Funds in order to strengthen the economic and social cohesion of the Community.

80. The task of the Community's economic and social cohesion policy is, according to the first paragraph of Article 158 EC, to promote the overall harmonious development of the Community. In particular, according to the second paragraph of Article 158 EC, the policy aims 'at reducing disparities between the levels of development of the various regions and the backwardness of the least favoured regions or islands, including rural areas'.

81. The general wording of that task permits a degree of flexibility as well as adaptability in the aims pursued by the Community legislature when it wishes to provide for common actions. Consequently, the priority areas of action change regularly in accordance with the economic and social needs which manifest themselves in the various Member States.

82. The protean nature of economic and social cohesion and the general nature of the tasks given to that policy mean that it is difficult to define it exactly. [31] It thus proves difficult to lay down the limits of the area covered by the policy because economic and social cohesion emerges as a broad overall concept with imprecise contours. [32] The Court's case-law offers no decisive guidance in that connection. [33]

31 — See Petit, Y., 'La cohésion économique et sociale: objectif ou politique de la Communauté et de l'Union européenne?', *L'Europe et les régions: quinze ans de cohésion économique et sociale*, op. cit., p. 139, especially p. 142.

32 — See Blumann, C., op. cit., p. 13. According to that writer, 'cohesion formally embraces the economic and the social spheres. But it goes even further because it also affects cultural, intellectual, societal and other dimensions … Cohesion is at the heart of the European project; it aims to strengthen the homogeneity and unity of the European Union. Like fundamental rights and citizenship, cohesion is one of the basic constitutional principles and expresses in the highest degree the solidarity which should prevail within it.'

33 — In Case C-149/96 *Portugal* v *Council* [1999] ECR I-8395 the Court approached economic and social cohesion as follows: 'although it follows from Articles 2 and 3 of the Treaty [now, after amendment, Articles 2 EC and 3 EC], and also from Articles 130a [to] 130e [now, after amendment, Articles 158 EC to 162 EC], that the strengthening of economic and social cohesion is one of the objectives of the Community and, consequently, constitutes an important factor, in particular for the interpretation of Community law in the economic and social sphere, the provisions in question merely lay down a programme, so that the implementation of the objective of economic and social cohesion must be the result of the policies and actions of the Community and also of the Member States' (paragraph 86).

83. However, it is unnecessary to list here the spheres of action within the scope of the Community's economic and social cohesion policy. All that is necessary is to determine whether a Community action aiming to promote economic and social progress in the regions concerned and, ultimately, peace and reconciliation between divided communities forms an integral part of the Community's economic and social cohesion policy.

84. In my view, the reply must be in the affirmative for a number of reasons.

85. First of all, the policy of cohesion may be defined as a device for restoring a balance and for redistribution among the Member States. [34] It is also an expression of solidarity between them and their peoples. In so far as the Community's financial contributions to the IFI are intended, as stated in the third paragraph of Article 2 of the contested regulation, to bring about sustainable economic and social improvement in the areas concerned, in my view they fully form part of a redistribution policy seeking to correct economic and social imbalances in a region of the Community by eliminating the consequences of conflict and violence.

86. Second, as the Community's contributions are, under the second paragraph of Article 2 of the contested regulation, to be allocated by way of priority to projects of a cross-border or cross-community nature, they promote cross-border cooperation which is one of the main aims of the Community's economic and social cohesion policy. [35]

87. Furthermore, measures aiming to promote tolerance and reconciliation between divided population groups have the object of strengthening cohesion between communities which, in my view, is one of the facets of the concept of social cohesion. By setting up concrete projects of a cross-border or inter-community nature and thereby

34 — See Blumann, C., op. cit., p. 18.

35 — As shown by Article 3(2)(c) of Regulation No 1083/2006. See also the Community initiative Interreg, a tool for the promotion of cross-border, transnational and interregional cooperation (Communication from the Commission to the Member States of 28 April 2000 laying down guidelines for a Community initiative concerning trans-European cooperation intended to encourage harmonious and balanced development of the European territory — Interreg III (OJ 2000 C 143, p. 6)). It should also be noted that the Community has taken action under the Northern Ireland-Ireland Interreg II A programme (see the abovementioned communication of 28 April 2000, p. 28).

encouraging entities and individuals to surmount the enduring cultural and social barriers, the Community is participating in the building of a peaceful and stable society and, thus, in strengthening social cohesion in the areas concerned.

88. In addition, there is a close connection between economic and social progress on the one hand and the consolidation of peace and reconciliation on the other. In its opinion of 23 October 2008 on the role of the EU in the Northern Ireland peace process, the European Economic and Social Committee clearly expressed [36] the nature of that connection as follows: 'stability and prosperity are mutually reinforcing and EU funding programmes helped to address the social and economic conditions which were a consequence of, but also fuelled, the conflict'. [37] The Community's action addresses the economic and social scars left by the conflict as well as the obstacles to the consolidation of peace which still exist. Thus reconciliation and economic and social development appear inseparable and must be considered jointly in the framework of the Community's economic and social cohesion policy. Furthermore, cohesion, which is a property of a whole all the parts of which are closely connected, [38] cannot exist without reconciliation.

89. In short, the fact that the Community action provided for by the contested regulation comes within the framework of a peace process and that it therefore aims, ultimately, to reconcile population groups which are divided is not, in my view, such as to take it out of the field covered by Title XVII of the EC Treaty. I think it would be taking too narrow a view of the Community's economic and social cohesion policy if measures expressly aiming at sustainable economic and social improvements in a region of the Community were excluded from the scope of that policy solely on the ground that those measures form part of a peace process and will potentially contribute to reconciling divided population groups.

90. The concept of economic and social cohesion seems to me sufficiently broad to cover action of that type. Furthermore, the general nature of the task entrusted to the Community through its economic and social cohesion policy permits, in my view, an action such as that provided for by the contested regulation to be included within the scope of Title XVII of the EC Treaty. The overall harmonious development of the Community requires that areas where tensions between

36 — Document SC/029 — EESC 1686/2008.
37 — Paragraph 6.8.5 of the opinion.
38 — See *Le Petit Larousse illustré*, 1994.

communities exist, with the adverse effect on economic and social development which those tensions have, benefit from action by the Community in the framework of its policy aiming at strengthening its economic and social cohesion.

91. Finally, the term used in the third paragraph of Article 159 EC, namely 'specific actions [which] prove necessary outside the [Structural] Funds', seems to me wide enough to include measures such as those provided for by the contested regulation. Contrary to the arguments of the Commission and the Council, neither the fact that the contributions are intended for a particular area of the Community nor the fact that those contributions are paid to an international organisation is, in my view, sufficient to exclude them from the scope of the third paragraph of Article 159 EC.

92. On the first point, there is nothing in the wording of that article that rules out specific action for the benefit of one or more regions of the Community. In addition, if the Community's economic and social cohesion policy is regarded as a device for restoring a balance in order to promote convergence between the regions of the Community, it is perfectly logical that the Community should selectively focus its action on regions which manifest certain economic and social imbalances.

93. On the second point, it should be recalled that the IFI is a funding vehicle created by two Member States to which the Community as well as other, non-member, countries, have decided to contribute. The Community does not share at all in the general administration expenses of that international organisation. Those expenses, organisational costs and provisions for the secretariat are met by the Irish and the United Kingdom Governments. [39] Therefore the annual financial contribution paid by the Community to the IFI is devoted entirely, in accordance with the third paragraph of Article 2 of the contested regulation, to projects enabling sustainable economic and social improvement in the areas concerned. The IFI is therefore, from the Community viewpoint, an additional stage in its action for economic and social cohesion. Even though the Community action is channelled through the IFI, the payment of an annual financial contribution to that international organisation, in the manner laid down by the contested regulation, is above all a means for the Community to implement its economic and social cohesion policy in Northern Ireland and the border counties of Ireland.

39 — See the Commission communication of 12 October 2006, mentioned above, point 2.1.3, fourth paragraph.

94. For the reasons set out above, I consider that the measures provided for by the contested regulation do indeed come within the scope of the Community's economic and social cohesion policy. Examination of the purpose and content of that regulation, and of the scope of the third paragraph of Article 159 EC, does not support the statement in recital 6 in the preamble to the regulation, which is to the effect that the regulation extends beyond the scope of the Community's policy on economic and social cohesion. The Community had, under the third paragraph of Article 159 EC, the necessary powers of action to adopt the measures in the contested regulation. Therefore, in so far as the regulation was adopted on the basis of Article 308 EC, it must, in my view, be annulled.

95. Finally, I must state that, although the parties have made lengthy submissions in their pleadings concerning, depending on their respective opinions, the common points of, or the differences between, the IFI and the PEACE programme, comparison of those two initiatives cannot be decisive with regard to the choice of the legal basis for the contested regulation. [40] On that subject, therefore, I shall confine myself to the following observations.

96. According to the Council, there is a fundamental difference between the aim of the IFI and that of the PEACE programme. The IFI aims at reconciliation in order to facilitate cohesion, whereas the PEACE programme aims at cohesion in order to facilitate reconciliation. I think this is an artificial distinction because the various reports concerning those two initiatives show that there is a close connection, in both cases, between the pursuit of economic and social progress and the consolidation of peace. Furthermore, it would be surprising if, in view of its name, the PEACE programme did not have, like the contested regulation, the aim of encouraging reconciliation between divided population groups.

97. As the Commission indeed recognises in its abovementioned communication of 12 October 2006, 'the strategic aim of PEACE — namely *to reinforce progress towards a peaceful and stable society and to promote reconciliation* — is one of [the] IFI's principal objectives'. [41] Moreover, when the emphasis is placed on the fact that the two initiatives complement each other, it is rather to stress their common points and their convergence. [42]

40 — See the case-law cited in point 59 above.

41 — Point 4.1, first paragraph.

42 — Point 4.1, fourth paragraph ('as regards beneficiaries, the IFI assists basically the same categories of people as the PEACE II programme'). See also point 6, fifth paragraph ('the priorities set by both IFI and EC programmes complement each other and this high potential for synergies needs to be further harnessed'). Reference may also be made to the resolution of the European Parliament of 20 May 2008 on the evaluation of the PEACE programme and strategies for the future [P6_TA (2008) 0205], recital P of which states as follows:
'… many of the actions in the PEACE subprogrammes, the IFI programmes and the Interreg initiative have shown a high degree of similarity and some degree of duplication of activities in certain areas'.

98. Consequently I think it would be more coherent for two Community initiatives that pursue similar aims to form part of the same Community policy, namely the policy of economic and social cohesion governed by Title XVII of the EC Treaty. [43]

## VI — The request that the effects of the contested regulation be maintained

99. Should the Court decide, as I propose, to annul the contested regulation, the Council, like the Commission, Ireland and the United Kingdom, requests in the alternative in accordance with the second paragraph of Article 231 EC — on important grounds of legal certainty connected both with current projects and with the legitimate expectations of the management of the IFI — that the effects of the regulation be maintained until the adoption of a new regulation and that annulment should not affect the validity of payments made or that of commitments entered into on the basis of the contested regulation.

100. I suggest that the Court grant the request that the effects of the contested regulation be maintained.

101. Under the second paragraph of Article 231 EC, the Court may, if it considers this necessary, state which of the effects of a regulation which it has declared void are to be considered definitive. Annulment of the contested regulation without maintaining its effects could have adverse consequences for the activities of the IFI and would be such as to entail prejudicial uncertainty for operations already funded by the IFI or in the process of being funded. In those circumstances, there are, in my opinion, important grounds of legal certainty justifying exercise by the Court of the power conferred on it by the second paragraph of Article 231 EC. [44] Therefore, in my view, the Court should maintain the effects of the contested regulation until the entry into force of a new regulation adopted on the appropriate legal basis.

43 — Other indications, although they cannot be decisive for the choice of the legal basis for the contested regulation, support my belief that the measures in the contested regulation do indeed fall within the Community's economic and social cohesion policy. I thus note that the Community is represented by the Director-General for Regional Policy when it attends board meetings of the IFI. In addition, the services of the European Community which are responsible for audits and on-the-spot checks of the IFI are, in addition to those of the Court of Auditors of the European Communities, those of the Directorate-General for Regional Policy.

44 — For a recent application of this provision, see Case C-155/07 *Parliament* v *Council*, paragraphs 86 to 89.

## VII — Conclusion

102. In view of the foregoing considerations, I propose that the Court should:

(1) annul Council Regulation (EC) No 1968/2006 of 21 December 2006 concerning Community financial contributions to the International Fund for Ireland (2007 to 2010);

(2) maintain the effects of Regulation No 1968/2006 until the entry into force of a new regulation adopted on the appropriate legal basis;

(3) order the Council of the European Union to pay the costs;

(4) order the Commission of the European Communities, Ireland and the United Kingdom of Great Britain and Northern Ireland to bear their own costs.