OPINION OF ADVOCATE GENERAL KOKOTT

delivered on 22 May 2007 [1]

I — Introduction

1. With the present action for annulment, the Parliament is seeking the annulment of Commission Decision ASIA/2004/016-924 approving a project concerning the security of the borders of the Philippines (Philippine Border Management Project) and deciding that it would be financed from budget line 19 10 02 of the general budget of the European Communities ('the contested decision'). The Commission adopted that decision by means of the regulatory procedure for the implementation of Council Regulation (EEC) No 443/92 of 25 February 1992 on financial and technical assistance to, and economic cooperation with, the developing countries in Asia and Latin America [2] ('Regulation No 443/92').

2. The Parliament takes the view that in adopting the contested decision the Commission exceeded its implementing powers. The contested decision relates to the fight against terrorism and international crime; this is not development assistance within the meaning of Regulation No 443/92.

II — Legal framework

A — *Regulation No 443/92*

3. Regulation No 443/92 concerns cooperation with the Asian and Latin American developing countries which are not signatories to the Lomé Convention and do not benefit from the Community's cooperation policy with Mediterranean third countries ('the ALA developing countries').

4. Article 1 of the regulation provides that the Community must continue and broaden Community cooperation with the ALA

1 — Original language: German.

2 — OJ 1992 L 52, p. 1, as amended by Council Regulation (EC) No 807/2003 of 14 April 2003 adapting to Decision 1999/468/EC the provisions relating to committees which assist the Commission in the exercise of its implementing powers laid down in Council instruments adopted in accordance with the consultation procedure (unanimity), OJ 2003 L 122, p. 36.

developing countries. This cooperation will involve financial and technical development assistance and economic cooperation. In this connection, the Community must 'attach the utmost importance to the promotion of human rights, support for the process of democratisation, good governance, environmental protection, trade liberalisation and strengthening the cultural dimension, by means of an increasing dialogue on political, economic and social issues conducted in the mutual interest'.

5. Articles 4 to 6 of Regulation No 443/92 concern financial and technical assistance.

6. Under Article 4 financial and technical assistance is to be targeted 'primarily on the poorest sections of the population and the poorest countries in the two regions'.

7. Article 5 designates the regulatory objects of financial and technical assistance and the principles to be taken into account in implementation. For example, the first paragraph provides that the financial and technical assistance must give priority to 'developing the rural sector and improving the level of food security'. Under the seventh paragraph, aid should be allocated, inter alia, to specific projects for the spread of democracy, good governance and human rights.

8. Article 6 provides that financial and technical assistance is to be extended to the relatively more advanced ALA developing countries, in particular in the fields listed there. One of those fields mentioned in the fifth indent thereof is 'strengthening institutions, especially public authorities'.

9. Articles 7 and 8 of Regulation No 443/92 concern economic cooperation.

10. Under the first paragraph of Article 7, economic cooperation must contribute to 'the development of the ALA developing countries by helping them build up their institutional capacity so as to create an environment more favourable to investment and development and make the most of the prospects opened up by the growth of international trade, including the European single market, and by enhancing the role of businessmen, technology and know-how from all the Member States, particularly in the private sector and in small and medium-sized undertakings'.

11. Article 8 stipulates that economic cooperation includes three sectors: first of all, 'improvement of scientific and technological potential and of the economic, social and cultural environment in general by means of training schemes and the transfer of know-how', secondly 'improvement of the institutional structure, which must go hand in hand

with a closer dialogue with partners, in order to make the economic, legislative, administrative and social climate more conducive to development', and thirdly 'support for undertakings, for example by means of trade promotion, training and technical assistance schemes, by establishing contacts between undertakings and by schemes to facilitate cooperation between them'.

12. Under the first paragraph of Article 14, aid projects and programmes for which Community funding exceeds ECU 1 million, and any substantial modifications and possible overruns of approved projects and programmes which exceed 20% of the amount initially agreed, must be adopted according to the procedure laid down in Article 15(3). Article 15(3) refers in turn to Articles 5 and 7 of Decision 1999/468/EC. [3] Under the second paragraph of Article 14, the same procedure is to be followed for adopting the acts required to establish the indicative multiannual guidelines that apply to the main partner countries or the areas of cooperation according to subject or sector.

13. Article 15(1) of Regulation No 443/92 provides that the Commission is to administer the financial and technical assistance and the economic cooperation. Under Article 15(2), the Commission is to be assisted by a committee.

14. Regulation No 443/92 was repealed by Regulation (EC) No 1905/2006 of the European Parliament and of the Council of 18 December 2006 establishing a financing instrument for development cooperation, [4] which has applied since 1 January 2007. Under the first sentence of Article 39(2) of that regulation, Regulation No 443/92 continues to apply for legal acts and commitments of pre-2007 budget years.

III — Content of the contested decision

15. The first recital refers to the Council Resolution of 22 July 2002 in which it is strongly emphasised that the European Union is to assist third countries in imple-

3 — Council Decision of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission, OJ 1999 L 184, p. 23.

4 — OJ 2006 L 378, p. 41.

menting their obligations under United Nations Security Council Resolution 1373 with the assistance of EU Rapid Reaction Mechanism funding.

16. The second recital in the preamble to the decision refers to the National Indicative Programme for the period 2002-2004 for the Philippines adopted by the Commission, which gives priority to actions aimed at combating terrorism. It is also stated that the Commission would like to focus its support in the field of counter-terrorism on border management, in particular immigration, and the fight against the financing of terrorism.

17. The third recital states that the overall objective of the project approved by the decision is to assist in the implementation of United Nations Security Council Resolution 1373.

18. According to the fourth recital, the purpose of the project is to contribute to the efforts of the Government of the Republic of the Philippines to enhance border security and management in the Philippines in accordance with international norms and protocols.

19. Article 1(1) of the decision provides that the 'Philippines Border Management Project' ('the project'), the text of which is set out in the Annex to the decision, is approved. In Article 1(2) the maximum contribution of the Community is set at EUR 4 900 000, to be financed within the limits of the available resources of budget line 19 10 02 of the general budget of the European Communities for 2004.

20. Article 2 of the decision governs the details for implementation and defines the timetable.

21. According to the project description annexed to the decision, the project is to support the authorities in the Philippines in achieving the following aims:

— promotion of best international standards of border management through the review and analysis of existing national methods and practices;

— setting-up of an integrated and secure IT system for efficiently sharing intelligence between the authorities involved in border management;

— prevention of the circulation of false identity documents by increasing the rate of detection and raising public awareness of the importance of possessing the correct identity documents;

— raising of the performance of senior and technical border management agents through appropriate training activities.

IV — Background to the decision, forms of order sought and procedure

A — *Background to the dispute*

22. The contested decision was discussed at a meeting of the regulatory committee provided for in Regulation No 443/92 held on 17 and 18 November 2004. Since some Member States had doubts regarding the chosen legal basis, however, the decision was not approved at that meeting, but was instead transferred to the written procedure. That procedure was concluded on 7 December 2004 with a positive decision taken by qualified majority. The Commission then adopted the contested decision on 21 December 2004.

23. The decision was not published in the Official Journal. On 14 December 2004 the Parliament was sent the minutes of the meeting of 17 and 18 November 2004.

24. Subsequently, two Members of Parliament addressed written questions to the Commission [5] in order to obtain further information about the contested decision. The Commission answered those questions on 14 March [6] and on 22 April 2005. [7]

25. By letter of 25 May 2005, the Parliament's Committee on Development asked the Commission to communicate the text of the contested decision. The Commission argues that it responded to that request by letter of 22 June 2005.

26. According to the Parliament, however, it did not receive any response. It was not until

5 — Written Questions No P-0619/05 by Glenys Kinnock MEP and No E-0578/05 by Gay Mitchell MEP.

6 — For the wording of the answer see http://www.europarl.europa.eu/omk/sipade3?L=FR&OBJID=119907&LEVEL=3&SAME_LEVEL=1&NAV=S&LSTDOC=Y.

7 — For the wording of the answer see http://www.europarl.europa.eu/omk/sipade3?L=FR&OBJID=119233&LEVEL=2&SAME_LEVEL=1&NAV=S&LSTDOC=Y.

an enquiry was made on 26 August 2005 that a response, to which a copy of the contested decision was annexed, was received on 9 September 2005. It therefore acquired knowledge of the text of the contested decision for the first time on 9 September 2005.

27. Indisputably there had already previously been correspondence between Parliament and Commission staff concerning the contested decision.

28. For example, on 12 May 2005 a member of staff of the Delegation of the European Commission in Manila sent documents relating to the project to the Secretariat of the Parliament's Committee on Development. However, the parties dispute whether the documents included the text of the contested decision.

29. Following a request by a member of the Parliament's Legal Service, a member of the Commission's Legal Service sent him the text of the contested decision by e-mail on 19 July 2005. The member of the Parliament's Legal Service also confirmed receipt of the text by e-mail on 19 July 2005.

B — *Forms of order sought and proceedings before the Court of Justice*

30. By its action brought on 17 November 2005, the Parliament claims that the Court should:

— annul the decision approving a project concerning the security of the borders of the Philippines, to be financed by budgetary line 19 10 02 of the general budget of the European Communities (Philippine Border Management Project; No ASIA/2004/016-924), adopted in compliance with Regulation (EEC) No 443/92 on financial and technical assistance to, and economic cooperation with, the developing countries in Asia and Latin America;

— order the Commission to pay the costs.

31. The Commission claims that the Court should:

— dismiss the action as inadmissible, or in any event as unfounded, and

— make an appropriate order as to costs.

32. The Kingdom of Spain was granted leave to intervene in support of the Commission's submissions by an order of the President of the Court of 28 March 2006.

33. In the proceedings before the Court the parties submitted written and oral observations; the intervener took part in the written procedure.

V — Assessment

A — *Admissibility of the action*

Time-limit for bringing an action

34. The Commission claims that the action is inadmissible on the ground that it was not brought within two months of the date on which the contested decision came to the Parliament's knowledge.

35. In so far as the Commission states at the same time, however, that it does not contest admissibility, this is irrelevant since observance of the time-limit for bringing an action is to be examined by the Court of its own motion as a matter of public policy. [8]

36. Pursuant to the fifth paragraph of Article 230 EC, proceedings for annulment must be instituted within two months. This period within which the action must be brought runs from the date of publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter.

37. The contested decision was not published in the Official Journal. There is also no obligation under Article 254(1) and (2) EC to publish the contested decision. Since the Parliament is not the addressee of the contested decision, it was not formally notified to it pursuant to Article 254(3) EC either. As a result, the two-month period for bringing an action in the present case commenced on the day on which the contested decision actually came to the knowledge of the Parliament.

38. According to the case-law of the Court, an applicant actually has knowledge of a decision from the date on which he acquires precise knowledge of the content of the decision in question and of the reasons on which it is based. [9] Only then is he placed in a position meaningfully to exercise his right to bring an action. Knowledge of a mere summary of the contested decision is not

8 — See Case 33/72 *Gunella* v *Commission* [1973] ECR 475, paragraph 3 et seq., Case 227/83 *Moussis* v *Commission* [1984] ECR 3133, paragraph 12, and Case C-246/95 *Coen* [1997] ECR I-403, paragraph 21.

9 — See Case 76/79 *Koenecke* [1980] ECR 665, paragraph 7, and Case C-180/88 *Wirtschaftsvereinigung Eisen- und Stahlindustrie* [1990] ECR I-4413, paragraph 22.

sufficient but must relate to the text of the decision. [10]

39. It must therefore be determined from what date the Parliament acquired precise knowledge of the content of the decision and of the reasons on which it is based, that is to say the text of the contested decision.

40. The sending of the minutes of the comitology committee meeting of 17 and 18 November 2004 to the Parliament cannot be regarded as acquisition of knowledge of the decision as such, since it is clear from those minutes that the contested decision had not yet been adopted, but — because no agreement could be reached — was transferred to the written procedure. The Parliament did not therefore acquire knowledge of the contested decision through those minutes.

41. The Parliament's Committee on Development indisputably obtained the text of the contested decision by a letter from the Commission of 2 September 2005, received by the Parliament on 9 September 2005. On that date the committee and therefore the Parliament, to which that knowledge can be attributed, acquired knowledge of the precise content of the decision. If that date is taken as the basis, the European Parliament brought its action in due time on 17 November 2005, taking into account the 10-day distance period under Article 81(2) of the Rules of Procedure of the Court of Justice.

42. The action could therefore be regarded as inadmissible on grounds of failure to observe the time-limit for bringing an action only if the view were taken that the Parliament acquired knowledge of the decision earlier, that is to say before 9 September 2005. However, none of the facts submitted by the Commission suggest that the Parliament acquired knowledge of the decision at an earlier date.

43. A letter of 22 June 2005 from the responsible Commissioner to the Parliament's Committee on Development cannot be used as the basis for concluding that the Parliament acquired knowledge at an earlier date, since the Commission has not produced any evidence, in response to the Parliament's challenge, to show that the Committee on Development actually received that letter to which the text of the decision is claimed to have been annexed.

44. Similarly, in the absence of proof of receipt it cannot be assumed in the present case that the Secretariat of the Committee on Development received the text of the contested decision from the Delegation of the European Commission in Manila on 12 May

10 — See Case C-143/95 P *Commission* v *Sociedade de Curtumes* [1997] ECR I-1, paragraph 32.

2005. The Parliament disputes in this regard that it received the text of the contested decision. The Commission has not produced any evidence of receipt thereof either.

45. Lastly, the Parliament did not acquire knowledge of the text of the decision as a result of the communication between members of the Commission and Parliament Legal Services either. In this connection, a member of staff of the Parliament did indisputably receive a copy of the contested decision on 19 July 2005. If that date were taken as the basis for the acquisition of knowledge, the action brought by the Parliament would be out of time.

46. However, such knowledge on the part of a member of the Parliament's Legal Service cannot be attributed to the Parliament, since the underlying contact was indisputably purely informal. The informally acquired knowledge of an individual member of staff cannot be attributed to the Parliament, since it cannot be assumed that informally acquired information is passed on directly to the competent departments in the Parliament, in particular because, as can be seen from the papers in the case, the member of staff assumed that the information would also be communicated officially to the Parliament.

47. A different assessment could be given of the admissibility of the action, however, having regard to the case-law of the Court, according to which, irrespective of the date on which knowledge is actually acquired, an action is to be regarded as out of time if the party who learns of the existence of a decision concerning it fails to request the full text thereof within a reasonable period. [11]

48. It must be examined, first of all, whether such a period within which a request must be made also applies to an institution as a privileged applicant. [12] In the negative, it can be argued that the contested decision is not a 'decision concerning' the Parliament within the meaning of that case-law. The Parliament is not directly *concerned* by a decision to the same extent as, for example, a private undertaking. Accordingly, it is much easier for an undertaking to notice that a measure concerning the undertaking has been adopted, which requires it to request the text of the measure. The Parliament's position as a privileged applicant is not comparable with that situation since many decisions are adopted which may potentially give cause for the Parliament to bring an action for annulment. If the existence of knowledge of a measure which may potentially be chal-

11 — See Case C-180/88 *Wirtschaftsvereinigung Eisen- und Stahlindustrie* (cited in footnote 9, paragraph 22), Case 236/86 *Dillinger Hüttenwerke* [1988] ECR 3761, paragraph 14, and Case C-48/96 *Windpark Groothusen* [1998] ECR I-2873, paragraph 20.

12 — In Case C-309/95 *Commission* v *Council* [1998] ECR I-655, paragraph 18, mention is made of the period within which a request must be made also in connection with proceedings in which institutions are parties, but it is not specifically examined.

lenged imposes an obligation on the Parliament to request the text of the measure, that obligation imposes considerable requirements on the organisation of parliamentary work. The existence of a period within which a request must be made may thus be an additional obstacle to the effective protection of the Parliament's right to bring proceedings.

49. On the other hand, it is possible to cite in support of the need for a time-limit for bringing an action — and the connected further obligation on an applicant to request the text of a measure within a reasonable period — the high-ranking interest served, which is legal certainty. [13] The present case illustrates clearly that bringing an action in good time is of great importance to legal certainty. In the present case, on the basis of the contested decision the Community gave undertakings to an international organisation in relation to project management and certainly also made payments in good time.

50. It is possible to reconcile these two opposing interests — the requirement of legal certainty on the one hand and the need for an effective right for the Parliament to bring proceedings on the other — by imposing high requirements, where the Parliament is an applicant, on the level of knowledge of a legal act that must exist in order to initiate the period within which a request must be made. The particular features of an institutional applicant can also be taken into consideration in determining the period that may be regarded as reasonable.

51. In the present case, the Parliament indisputably had knowledge from 14 March 2005 of the answer by the responsible Commissioner to the written question by an MEP regarding the contested decision. In that answer, the Commission made clear that the contested decision was adopted on 21 December 2004 and explained its legal basis and overall objectives. Even applying a strict criterion for the quality of the knowledge of the existence of a decision to be challenged, it must therefore be assumed that the Parliament had knowledge of the main aspects of the decision to be challenged from that date and it was therefore under an obligation to request the text of the decision within a reasonable period.

52. The Parliament did not request the text of the contested decision until 25 May 2005, more than two months after it acquired knowledge of the existence of the contested decision.

13 — See Case 156/77 *Commission* v *Belgium* [1978] ECR 1881, paragraphs 21 to 24. Furthermore, the Community rules on procedural time-limits serve the need to avoid any discrimination or arbitrary treatment in the administration of justice; see inter alia the judgment in Case 42/85 *Cockerill-Sambre* v *Commission* [1985] ECR 3749, paragraph 10, and the order in Case C-239/97 *Ireland* v *Commission* [1998] ECR I-2655, paragraph 7.

53. A period of more than two months cannot be regarded as reasonable even taking into consideration the particular situation of an institutional applicant, [14] since the period within which a request must be made cannot in any case be longer than the period for bringing proceedings, which is likewise only two months in the case of institutional applicants.

54. The European Parliament did not therefore bring the action in good time. The action is therefore inadmissible.

B — *Substance of the action*

55. In case the Court takes a different view regarding the admissibility of the action, the substance of the action is examined below in the alternative.

56. In its action, the Parliament raises just one plea in law. It takes the view that the Commission exceeded the implementing powers conferred on it under Regulation No 443/92. The contested decision relates to the fight against international terrorism and international crime. Since those aims are not explicitly mentioned in Regulation No 443/92, the contested decision could not have been adopted on that legal basis.

57. The Commission, on the other hand, takes the view that the absence of an express reference to measures to combat terrorism in Regulation No 443/92 does not mean that the contested measure may not be based on it.

58. According to the Court's case-law, an implementing measure adopted without consultation of the Parliament must respect the provisions enacted in the basic legal act after consultation of the Parliament. [15] It must be examined below whether the contested decision could be effectively adopted on the basis of Regulation No 443/92. In the contested decision it is stated that the decision is based on 'in particular Articles 7 and 8' of the regulation. In the proceedings before the Court, however, the Commission has also relied on the seventh paragraph of Article 5 and Article 6 of the regulation.

14 — See the order in Case C-102/92 *Ferriere Acciaierie Sarde* [1993] ECR I-801, paragraph 19.

15 — See Case C-303/94 *Parliament* v *Council* [1996] ECR I-2943, paragraph 23.

1. Article 6 of Regulation No 443/92

59. Articles 4 to 6 concern financial and technical assistance. Under Article 6, financial and technical assistance is extended to the relatively more advanced ALA developing countries, in particular in the fields listed there. One of those fields mentioned in the fifth indent of Article 6 is 'strengthening institutions, especially public authorities'.

60. The components of the project approved by the contested decision are the review and analysis of existing national border management practices, the setting-up of an IT system for intelligence sharing, the reduction of the circulation of false identity papers, and training for border management agents.

61. In a broad sense, 'public authorities' covers any authority that performs the functions of the State. Adopting such a broad interpretation, border management and the authorities responsible for border management can also therefore be regarded as 'institutions' or 'public authorities' and the measures covered by the project as assistance for strengthening institutions or public authorities.

62. Proceeding from the wording of Article 6 alone, it does not therefore entail any restriction regarding the nature of the public authorities which may receive financial and technical assistance within the meaning of the regulation. However, on that basis, measures to support military authorities would also be covered by Article 6 and the scope of Article 6 would thus be almost limitless. The question therefore arises whether this broad interpretation of Article 6 is consistent with the *ratio legis* of Regulation No 443/92.

63. That is not the case because, although there is no restriction based on the wording of Article 6, such a restriction does follow from Regulation No 443/92 itself. Even within the framework of Article 6, support for authorities must be consistent with the understanding of development assistance which underlies Regulation No 443/92. Support for public authorities cannot be an end in itself, but such support must directly pursue a development aim mentioned in Regulation No 443/92. Article 6 therefore covers only support for authorities of the kind which serves primarily the development aims of the regulation. For example, measures in support of authorities responsible for

organising elections serve the development aim of spreading democracy [16] referred to in the regulation, or support for agricultural authorities serves the aim of food security [17] referred to in the regulation.

64. It must therefore be examined below whether the aim pursued by the contested decision is among the development aims of Regulation No 443/92.

65. The contested decision states that its purpose is to assist the Government of the Republic of the Philippines in enhancing border security and management. It states that its overall objective is to assist the Government of the Republic of the Philippines in the implementation of United Nations Security Council Resolution 1373 (2001) ('UN Resolution 1373 (2001)') in the fight against terrorism and international crime.

66. The contested decision and the project description do not contain any substantiated information on a connection between the specific problem of international terrorism and international crime, on the one hand, and the development situation in the Philippines, on the other.

67. However, the project description at one point refers to terrorist threats to which the Government of the Philippines has been exposed in particular since the last election and at another point mentions the Province of Mindanao, where there is instability. The contested decision therefore indicates that it also aims to improve the internal stability and security of the Philippines.

68. It must therefore be examined below whether Article 6 of the regulation covers measures which essentially serve to improve internal stability and security.

69. It is possible to concur with the Commission's view that stability and security may be basic requirements for any further development. It can also be inferred from the statements made by the Parliament at the hearing that it does not wish to deny a connection between stability and development in principle.

70. However, there are no references to stability or security in Regulation No 443/92. The regulation does state in its seventh recital that the regulation seeks not only to confirm traditional fields of action of development assistance, but also to identify

16 — Cf. seventh paragraph of Article 5 of Regulation No 443/92.

17 — Cf. first paragraph of Article 5 of Regulation No 443/92.

new priorities. Stability and security are not mentioned under the new fields of activity listed there, however.

71. Admittedly, the new priorities are not listed exhaustively in the regulation. However, without further indications in the text of the regulation it certainly cannot be inferred from the fact that the list is non-exhaustive that any conceivable new field of action falls within the scope of the regulation. Rather, there would also have to be some basis in the text of the regulation.

72. However, there is no such basis in the text of the regulation. The Commission itself even argues along these lines in the proceedings before the Court, stating that the notion of development assistance has changed only in the last few years so as to include measures to improve security and stability in order to guarantee the basic requirement for further development. In this connection it refers to various documents, such as a Commission communication from 2003 [18] and the United Nations Millennium Declaration from 2000. [19] Nevertheless, the Commission itself thus concedes that Regulation No 443/92 is not based on this broader understanding of development assistance.

73. There is therefore nothing to suggest that the original notion of development assistance on which Regulation No 443/92 is based and to which that regulation relates also covers measures to combat terrorism and to promote internal stability and security.

74. Whilst it is possible to concur with the view taken by the Kingdom of Spain that the Commission can enjoy a broad discretion in the implementation of Regulation No 443/92, this can extend only to the type of assistance measures, that is, where, how many and which specific projects are implemented.

75. That discretion is not so broad that the Commission can develop the notion of development assistance and extend it to new fields of activity in connection with the

18 — Communication on 'Governance and Development', COM(2003) 615 final.

19 — Millennium Declaration A/RES/55/2, available at http://www.un.org/millennium/declaration/ares552e.pdf.

implementation of the regulation in order to encompass the latest developments in the notion of development assistance.

76. It would not be possible to interpret the implementing powers conferred on the Commission by Regulation No 443/92 as also covering the Commission's power to develop the notion of development assistance.

77. In its case-law, the Court gives the concept of implementation a wide interpretation. [20] However, it has found that regulation of the 'essential elements' must be reserved to the basic instrument. [21] The 'essential elements' include those provisions which are intended to give concrete shape to the fundamental guidelines of Community policy. [22]

78. An extension of the scope of the regulation to a new field of action of development assistance in the form of 'security and stability' is to be counted as belonging to the 'essential elements of the matter to be regulated' and not just to the sphere of 'implementation', having regard to the extent of the resulting implications.

79. This is a question of the fundamental guidelines of development assistance policy which cannot be delegated to the Commission. Such an extension of the notion of development assistance could have been made only through an amendment of the basic regulation using the legislative procedure provided for in the Treaty which, by contrast with the comitology procedure, is characterised by greater transparency and markedly increased democratic legitimacy.

80. The inclusion of new fields of action in development assistance is therefore to be reserved to the basic instrument and Regulation No 443/92 is thus to be interpreted to the effect that it does not confer on the Commission the power, in the implementation of the regulation, to incorporate a new field of action into the scope of the regulation.

81. It should also be pointed out in this connection that in 2002 the Commission had submitted to the Parliament a proposal amending Regulation No 443/92, in which the fight against terrorism was explicitly

20 — See Case C-159/96 *Portugal* v *Council* [1998] ECR I-7379, paragraph 40, Case 23/75 *Rey Soda* [1975] ECR 1279, paragraph 10, Case 22/88 *Vreugdenhil* [1989] ECR 2049, paragraph 16, and Case C-478/93 *Netherlands* v *Commission* [1995] ECR I-3081, paragraph 30.

21 — See Case C-240/90 *Germany* v *Commission* [1992] ECR I-5383, paragraph 36, Joined Cases C-63/90 and C-67/90 *Portugal and Spain* v *Council* [1992] ECR I-5073, paragraph 14, Case 46/86 *Romkes* [1987] ECR 2671, paragraph 16, and Case 25/70 *Köster* [1970] ECR 1161, paragraph 6. See also my Opinion in Case C-66/04 *United Kingdom* v *Council* [2005] ECR I-10553, point 50 et seq.

22 — Case C-240/90 *Germany* v *Commission* (cited in footnote 21, paragraph 37).

listed as a field of activity of development assistance. [23] That legislative procedure was terminated, however. Only with Regulation (EC) No 1717/2006 of the European Parliament and of the Council of 15 November 2006 establishing an Instrument for Stability [24] did a basic instrument enter into force which now provided for measures to improve stability and security and to combat terrorism in the context of development assistance.

82. The fact that Regulation No 443/92 was adopted on the basis of Article 235 of the EC Treaty (now Article 308 EC) does not alter that conclusion. In the view of the Commission, it follows that the regulation is to be given a broad interpretation. However, that view is not convincing. It cannot be inferred simply from the fact that a regulation was adopted on the basis of the supplementary power laid down in Article 308 EC that the regulation must also be interpreted broadly as constituting a basis for powers to take implementing measures which can be extended at any time.

83. In summary, it can therefore be stated that the contested decision does not have a legal basis in Article 6. The object of the project approved by the contested decision does, at first sight, come under the broad notion of 'strengthening public authorities'; however, with its aim of combating terrorism, it pursues an aim which is not consistent with the notion of development assistance which underlies Regulation No 443/92.

84. Contrary to the view taken by the Commission, it certainly does not follow from the understanding of the regulation explained above that many development assistance projects run by the Community which are connected with security issues — such as measures to clear land mines — do not have a sufficient basis in Regulation No 443/92. The example of mine clearance projects shows particularly clearly that security-related measures may certainly have a legal basis in the regulation, provided they directly serve an aim explicitly mentioned by the regulation, including developing the rural sector, improving the level of food security, and child protection under the first and ninth paragraphs of Article 5.

85. It must also be stated in this connection that these arguments have no bearing on the understanding of development assistance under Article 177 et seq. EC.

86. In particular, in interpreting the Treaty, in contrast with implementing a regulation, account can be taken of developments in the understanding of development assistance.

23 — COM(2002) 340 final, 2 July 2002.

24 — OJ 2006 L 327, p. 1.

Under Article 177(3) EC, account is to be taken of the new and broader objectives of development assistance defined in the context of the United Nations and other international organisations. The international context can therefore influence the understanding of the Community's collective powers, but not necessarily the distribution of institutional powers within the Community system.

87. Under the Treaty, measures which relate to internal security and stability may therefore also be based on the development assistance powers in so far as, in accordance with the judgment in *Portugal* v *Council*,[25] the essential object of those measures is the economic and social development of developing countries and the campaign against poverty. Where the internal security and stability of a country represent the basic requirement for further development, measures to guarantee stability may also be development assistance measures for the purposes of Article 177 EC.

2. The seventh paragraph of Article 5 of Regulation No 443/92

88. The contested decision cannot be based on the seventh paragraph of Article 5 of Regulation No 443/92 either, according to which financial and technical assistance 'should accordingly be allocated, inter alia, to specific projects for the spread of democracy, good governance and human rights'.

89. The wording of the seventh paragraph of Article 5 highlights the conditionality of support for authorities, since through the word 'accordingly' the seventh paragraph makes reference to the two preceding paragraphs, which concern the human and cultural dimension of development. Support for authorities within the meaning of the seventh paragraph of Article 5 must therefore be placed in a context of human and cultural development.

90. This is further underlined by the context in which support for authorities is mentioned in the seventh paragraph. Alongside it, mention is made of projects for the spread of democracy and human rights. It is also indicative that [in the German version] reference is made to not only efficient, but also fair governance. Support for authorities within the meaning of Article 5 is therefore placed in the context of human rights, democracy and the rule of law.

25 — Case C-268/94 *Portugal* v *Council* [1996] ECR I-6177, paragraph 2 of the summary and paragraph 39.

91. Not any kind of support for authorities can therefore be based on the seventh paragraph of Article 5, but only support which primarily pursues the aims and values referred to therein, essentially cultural and human development, democracy and human rights.

92. The contested decision states that its objective is the fight against terrorism and international crime.

93. Terrorism and international crime may have implications for processes of democratisation and human rights with the result that measures to combat them contribute indirectly to the spread of democracy and human development. However, if such indirect connections were regarded as sufficient to classify a measure as a measure to support authorities within the meaning of the seventh paragraph of Article 5 of the regulation, the scope of that provision could not really be limited. In particular, however, it could not be understood why the regulation distinguishes between financial and technical assistance on the one hand and economic cooperation on the other, since economic measures simply to promote prosperity certainly have implications for moves towards the spread of democracy and human rights and would be covered by a broad understanding of support for authorities.

94. The contested decision does not have the close connection with support for cultural and human development which is necessary under the seventh paragraph of Article 5 of the regulation with the result that the decision cannot be based on that provision either. In so far as the project description presents human rights stereotypically as a 'crosscutting issue' and the curbing of human trafficking as a possible consequence of effective border management, this identification of a mere hypothetical side-effect does not alter the fact that the measure must be assessed on its essential substance, which — as has been explained — is not covered by the seventh paragraph of Article 5 in the present case.

3. Articles 7 and 8 of Regulation No 443/92

95. It must still be examined whether the contested decision could be effectively adopted on the basis of Articles 7 and 8 of Regulation No 443/92.

96. Articles 7 and 8 of the regulation relate to Community *economic cooperation* with the ALA developing countries. The first paragraph of Article 7 provides that economic cooperation, devised to serve the mutual interests of the Community and its partner countries, must contribute to the development of the ALA developing countries by helping them build up their institutional capacity so as to create an environment more favourable to investment and development. Article 8(2) mentions one of the three sectors to which economic cooperation extends, 'improvement of the institutional structure ... in order to make the economic, legislative, administrative and social climate more conducive to development'.

97. As has already been explained, adopting a broad interpretation, the measures approved by the contested decision may be considered to help build up institutional capacity or to improve the institutional structure in the context of Articles 7 and 8.

98. However, Articles 7 and 8 do not see measures to build up institutional capacity as an end in themselves either. The institutions should be built up in the ALA developing countries specifically 'to create an environment more favourable to investment and development' or 'in order to make the economic, legislative, administrative and social climate more conducive to development'. Articles 7 and 8 of the regulation cannot therefore serve as the legal basis for any help to build up institutional capacity, but only that which primarily serves to support the economy and investment. A close, specific connection is needed between the measure and the economic support. Measures which affect economic development only indirectly — for example by creating a stable security situation — do not fulfil that requirement.

99. The requirement of such a connection follows first of all from the fact that Articles 7 and 8 of the regulation are to be found in the section on 'Economic Cooperation' and, on a conventional understanding of the terms, 'economic cooperation' does not cover all areas of cooperation merely because any cooperation ultimately has effects on economic relations and the economic situations of partners.

100. Above all, however, looking at the hypothetical consequences of a broad interpretation, it is clear that measures to create an environment more favourable to investment and development within the meaning of Articles 7 and 8 of the regulation certainly cannot encompass all conceivable measures which affect the investment and development environment. Such a broad interpretation would amount to a *general authorisation* conferred on the Commission by the

legislature to support any State projects in developing countries under the banner of 'development cooperation'. Any State measure ultimately represents an element of the investment and development environment and, to varying degrees and with a varying intensity, has at least indirect effects on the economy.

101. This essential, direct link between the contested decision and the investment and development environment, required by Articles 7 and 8 of Regulation No 443/92, cannot be inferred either from the recitals in the preamble to the decision or from the project description. There is no substantiated reference to the economic or investment situation in the Philippines. The project description likewise deals almost exclusively with the subjects of terrorism and security.

102. It cannot be seen from the contested decision what problems exist for the investment and economic situation in the Philippines or to what extent enhancing border management would bring improvements in this regard. It cannot therefore be deduced what direct effects the approved project has on the investment and economic situation. That is not to say that support for border management might not also have direct effects on the economic situation: measures to improve border clearance of goods would undoubtedly support the economy, for example. However, it cannot be inferred from the contested decision that it serves essentially to develop the economy and investment.

103. However, as has been explained, merely indirect implications for the investment and economic situation are not sufficient within the framework of Articles 7 and 8.

104. Therefore, in so far as the project description points out in connection with Filipinos working abroad that the 'sustainability of international travel' is crucial for the national economy and the general stability of the Philippines, interactions between the effectiveness of border management and protection against illegal entry and the associated security threats are perfectly conceivable. However, in the present case it is neither proven nor is there the slightest indication of the extent to which more modern passport and border controls are supposed to have a direct influence on the economic situation of immigrant workers or on the economy of the Philippines as a whole.

105. Bearing this in mind, the border project is therefore possibly not devoid of any influence on the investment and development environment since measures which support internal stability and security can contribute indirectly, as one of many factors, to economic prosperity.

106. However, a measure aimed at improving internal and external security and stability does not have any close, direct connection to economic development, but concerns only in general terms the basic condition of social, political and economic life. The investment and development environment is not the focus of such measures.

107. The same also applies to the connection between internal security and tourism, to which the Commission has referred in the proceedings before the Court. The Commission rightly states that the contested measures can make a contribution to strengthening democracy and thus a basic requirement for the economy and development in general, and tourism in particular. However, this indirect link and side-effect does not allow the contested decision to be classified as a measure to support investment and the economy within the meaning of Articles 7 and 8 of the regulation.

108. The contested decision does not therefore have the necessary close, direct connection to economic development and thus does not have any basis in Articles 7 and 8 either.

4. Budgetary powers

109. Lastly, it must be considered that in its reply the Parliament developed arguments relating not only to the Commission exceeding its implementing powers, but also to the infringement of budgetary powers.

110. Those submissions are out of time in accordance with Article 42(2) of the Rules of Procedure. They are new pleas which were adduced only in the reply. In the application the Parliament had raised only one plea in law and only alleged that the implementing measures had infringed Regulation No 443/92.

C — *Summary*

111. In summary it must be stated that the action is inadmissible because the time-limit for bringing the action was not observed. If, however, the Court should examine the substance of the case, the contested decision should be annulled.

VI — Limitation of the effects of the judgment

112. If the Court takes the view that the action is admissible, it would still have to be decided, in the event that action was granted, whether the effects of the judgment must be limited. The Commission has not claimed that the effects of the annulled decision should be preserved in the event that the action is granted.

113. Nevertheless, the Court may, of its own motion, use its power under the second paragraph of Article 231 EC to preserve the effects of the decision. The annulment of the decision takes place at a time when payments have already been made in connection with the project approved by the contested decision and undertakings have been given in particular to the International Organisation for Migration, which is responsible for implementing the project.

114. Thus, important considerations of legal certainty, comparable with those arising where certain regulations are annulled, justify the Court in exercising the power conferred on it by the second paragraph of Article 231 EC when it annuls a regulation and in stating which of the effects of the contested decision must be preserved. [26]

115. In the specific circumstances of this case, it is appropriate to rule that the annulment should not affect the validity of payments made or undertakings given under the contested decision. [27]

VII — Costs

116. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the action must be dismissed as inadmissible, the Parliament must be ordered to pay the costs. Pursuant to Article 69(4) of the Rules of Procedure, the Kingdom of Spain must bear the costs occasioned by its intervention.

26 — See Case C-106/96 *United Kingdom* v *Commission* [1998] ECR I-2729, paragraph 39 et seq.

27 — See Case C-106/96 *United Kingdom* v *Commission* (cited in footnote 26, paragraph 42).

VIII — Conclusion

117. On the basis of the above considerations, I propose that the Court should:

(1) Dismiss the application;

(2) Order the European Parliament to pay the costs, with the exception of the costs incurred by the Kingdom of Spain, which must bear its own costs.