OPINION OF ADVOCATE GENERAL SAGGIO

delivered on 18 May 2000 *

1. By an application lodged at the Court Registry on 28 July 1998, the Commission is claiming that the Republic of Austria has failed properly to fulfil a number of obligations arising out of Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering [1] (hereinafter: 'the Directive'). The obligations in question concern the need to ensure that money laundering is prohibited and to guarantee that credit or financial institutions undertake customer identification.

The relevant Community law

Scope and substance of the money laundering directive

2. The directive in question was adopted on the basis of Article 57(2), second and third sentences, and Article 100a of the EEC Treaty (subsequently, following the amendments introduced by the Treaty on European Union, Article 57(2), second and third sentences, and Article 100a of the EC Treaty and, now, following the amendments introduced by the Treaty of Amsterdam, Article 47(2) EC, first and second sentences, and Article 95 EC). Those provisions basically lay down that the Council, acting by a qualified majority, on a Commission proposal and in cooperation with the European Parliament, shall issue 'directives for the coordination of the provisions laid down by law, regulation or administrative action in the Member States concerning the taking-up and pursuit of activities as self-employed persons' as well as 'measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their objective the establishment and functioning of the internal market.'

3. The scope of the directive is twofold: on the one hand, it is designed to regulate the conditions governing access to credit and financial activities, on the premiss that 'when credit and financial institutions are used to launder proceeds from criminal activities... soundness and stability of the institution concerned and confidence in the financial system as a whole could be seriously jeopardised thereby losing the

* Original language: Italian.

1 — OJ 1991 L 166, p. 77.

trust of the public';[2] on the other, it seeks to guarantee the proper functioning of the internal market, on the ground that 'lack of Community action against money laundering could lead the Member States, for the purpose of protecting their financial systems, to take measures which could be inconsistent with the completion of the single market'.[3] That is the reason why the directive was adopted using two separate legal bases. More generally, the directive is designed to prevent circumstances in which 'in order to facilitate their criminal activities, launderers could try to take advantage of the freedom of capital movement and freedom to supply financial services which the integrated financial area involves, if certain coordinating measures are not adopted at Community level.'[4]

4. In that context, the directive's definition of money laundering — perceived as a 'criminal activity, which constitutes a particular threat to Member States' societies'[5] — is taken word for word from the 'United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, adopted on 19 December 1998 in Vienna... and [extended] more generally [in relation] to all criminal activities, by the Council of Europe Convention on laundering, tracing, seizure and confiscation of proceeds of crime, opened for signature on 8 November 1990 in Strasbourg'.[6] The definition, contained in Article 1, third indent, of the directive, includes four types of 'conduct when committed intentionally': (a) 'the conversion or transfer of property, knowing that such property is derived from criminal activity or from an act of participation in such activity, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such activity, to evade the legal consequences of his action'; (b) 'the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from criminal activity or from an act of participation in such activity'; (c) 'the acquisition, possession or use of property, knowing, at the time of receipt, that such property was derived from criminal activity or from an act of participation in such activity'; (d) 'participation in, association to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the actions mentioned in the foregoing paragraphs.' In regard to such criminal activity, knowledge, intent or purpose may be inferred from objective factual circumstances. Furthermore, according to the directive, money laundering also includes cases in which 'the activities which generated the property to be laundered were perpetrated in the territory of another Member State or in that of a third country'.

5. Having made those preliminary points of a general nature, I shall consider briefly the

2 — See the first recital.

3 — See the first part of the second recital.

4 — See the second part of the second recital.

5 — See the second part of the third recital.

6 — See the fourth and ninth recitals.

provisions of the directive which have a direct bearing on this case.

6. Article 2 of the Directive prohibits any form of money laundering, a prohibition which, if backed by 'appropriate measures and penalties is a necessary condition for combating this phenomenon'. [7]

7. Article 3 of the Directive meantime requires credit and financial institutions to require identification of their customers 'to avoid launderers' taking advantage of anonymity to carry out their criminal activities'. [8] More especially, Article 3 lays down different requirements for *regular* and *occasional* customers of the credit and financial institutions. In the case of *regular* customers, Article 3(1) requires the Member States to ensure that the credit and financial institutions establish identification of such customers 'by means of supporting evidence when entering into business relations, particularly when opening an account or savings account, or when offering safe custody facilities'. In the case of *occasional* customers, Article 3(2) requires identification 'for any transaction... involving a sum amounting to ECU 15 000 or more, whether the transaction is carried out in a single operation or in several operations which seem to be linked'; it further requires that, where the sum is not known at the time when the transaction is undertaken, the credit or financial institution 'shall proceed with identification as soon as it is apprised of the sum and establishes that the threshold has been reached'.

8. Article 3(5) and (6) contain two provisions designed to boost the effectiveness of the Directive. Article 3(5) provides that, in the event of doubt as to whether customers are acting on their own behalf, or where it is certain that they are not acting on their own behalf, 'the credit or financial institutions shall take reasonable measures to obtain information as to the real identity of the persons on whose behalf those customers are acting'. Article 3(6) requires the credit and financial institutions to identify the client, even where the amount of the transaction is lower than the threshold laid down, 'wherever there is suspicion of money laundering'.

9. In connection with the latter provision, it should also be pointed out that Articles 5 and 6 of the Directive lay down a general requirement for the Member States to ensure that 'credit and financial institutions examine with special attention any transac-

7 — See the 10th recital.
8 — See the 11th recital.

tion which they regard as particularly likely, by its nature, to be related to money-laundering', [9] and 'cooperate fully with the authorities responsible for combating money laundering'.

10. Article 14 of the Directive then provides that the Member States are to take 'the appropriate measures to ensure the full application of all the provisions of this Directive' and determine 'the penalties to be applied for infringement of the measures adopted pursuant to this Directive'.

11. Under Article 16(1) of the Directive, the deadline for adjusting the national legal systems to meet the requirements of the directive was 1 January 1993.

Other relevant provisions

12. As we know, the first paragraph of Article 5 of the EC Treaty (now the first paragraph of Article 10 EC) provides that: 'Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations... resulting from action taken by the institutions of the Community'; whilst the third paragraph of Article 189 of the EC Treaty (now the third paragraph of Article 249 EC) lays down that a directive 'shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to national authorities the choice of form and methods'.

13. By Decision 94/1/ECSC, EC of the Council and the Commission of 13 December 1993 on the conclusion of the Agreement on the European Economic Area between the European Communities, their Member States and the Republic of Austria, the Republic of Finland, the Republic of Iceland, the Principality of Liechtenstein, the Kingdom of Norway, the Kingdom of Sweden and the Swiss Confederation, [10] and Decision 94/2/ECSC, EC of the Council and the Commission of 13 December 1993 on the conclusion of the Protocol adjusting the Agreement on the European Economic Area between the European Communities, their Member States and the Republic of Austria, the Republic of Finland, the Republic of Iceland, the Principality of Liechtenstein, the Kingdom of Norway and the Kingdom of Sweden, [11] the Agreement on the European Economic Area (hereinafter: 'the EEA Agreement') and the adjusting Protocol were approved. The EEA Agreement entered into force on 1 January 1994. [12]

9 — The 13th recital specifies that the credit or financial institutions 'should pay special attention to transactions with third countries which do not apply comparable standards against money laundering to those established by the Community or to other equivalent standards set out by international fora and endorsed by the Community'.

10 — OJ 1994 L 1, p. 1.

11 — *Ibidem*, p. 571.

12 — See the information on the date of the entry into force of the European Economic Area and the adjusting Protocol (OJ 1994 L 1, p. 606).

14. Article 7 of the EEA Agreement provides that: 'Acts referred to or contained in the Annexes to this Agreement... shall be binding upon the Contracting Parties and... be made part of their internal legal order'; according to Article 36(2) meantime, Annexes IX to XI contain specific provisions on the freedom to provide services. Section II(iii)(23) of Annex IX to the EEA Agreement, on financial services, refers to the money laundering directive.

15. Article 108 of the EEA Agreement provides that the EFTA States, which have signed it, are to establish an independent surveillance authority, called the 'EFTA Surveillance Authority', as well as procedures similar to those existing in the Community, including procedures for ensuring the fulfilment of obligations under the EEA Agreement. In that connection, the Agreement between the EFTA States of 2 May 1992 on the establishment of a Surveillance Authority and a Court of Justice [13] creates, *inter alia*, an infringement procedure broadly similar to that laid down in Article 169 of the EC Treaty (now Article 226 EC). For the purposes of this case, it should be pointed out that Article 31 of that Agreement authorises the Surveillance Authority to invite an EFTA State to submit its observations on any failure to fulfil obligations under the EEA Agreement by means of a letter of formal notice.

16. The Treaty between the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Portuguese Republic, the United Kingdom of Great Britain and Northern Ireland (Member States of the European Union) and the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden, concerning the Accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden to the European Union [14] entered into force on 1 January 1995, as provided for in Article 2(2) of that Treaty. Article 2 of the Act concerning the conditions of accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded [15] (hereinafter: 'the Act of Accession'), annexed to the aforementioned Treaty and forming an integral part of it, provides that from the date of accession 'the provisions of the original treaties and the acts adopted by the institutions before accession shall be binding on the new Member States and shall apply in those States under the conditions laid down... in this Act.' According to Article 166 of the Act of Accession: 'Upon accession, the new Member States shall be considered as being addressees of directives... within the meaning of Article 189 of the EC Treaty... provided that those directives... have been addressed to all the present Member States', adding that: 'the new Member States shall be considered as having received notification of such directives... upon accession'. Finally, in accordance

13 — OJ 1994 L 344, p. 1.

14 — OJ 1994 C 241, p. 21.

15 — OJ 1994 C 241, p. 21, and OJ 1995, p. 1.

with Article 168 of the Act of Accession: 'The new Member States shall put into effect the measures necessary for them to comply, from the date of accession, with the provisions of directives... within the meaning of Article 189 of the EC Treaty... unless a time-limit is laid down in the list of Annex XIX or in any other provisions of this Act'. The money laundering directive is not mentioned in Annex XIX nor does it form the subject-matter of specific provisions of the Act of Accession.

17. I would finally draw attention to a number of transitional provisions concerning infringement proceedings instigated by the EFTA Surveillance Authority before the new Member States acceded to the European Union. According to Article 172(6) and (7) of the Act of Accession, from the date of accession, 'the new Member States shall ensure that all other cases, where the EFTA Surveillance Authority has been seised in the framework of the surveillance procedure under the EEA Agreement before accession, are transmitted without delay to the Commission which shall continue to deal with them under the relevant Community provisions while ensuring that the right of defence continues to be observed', on the understanding that 'the decisions taken by the EFTA Surveillance Authority remain valid after accession unless the Commission takes a duly motivated decision to the contrary in accordance with the basic principles of Community law.'

The relevant national legislation

Preliminary remarks

18. I shall confine myself here to furnishing the relevant information on the national legislation applicable to this case. That legislation basically includes certain provisions of the Austrian Penal Code [16] (hereinafter: the 'StGB'), of the Austrian Bank Law [17] (hereinafter: the 'BWG') and of the Austrian Deposit Law [18] (hereinafter: the 'DG'), as well as a number of official communications of the Austrian National Bank. [19]

Criminal law

19. In the area of criminal law, Paragraph 165 of the StGB expressly provides for the offence of 'money laundering' ('Geldwäscherei'), largely defined as the act of concealing property derived from criminal

16 — Strafgesetzbuch (BGBl. No 60/1974, as subsequently amended). Material to this case are the amendments of 1993 (BGBl. No 527/1993), of 1996 (BGBl. No 762/1996) and 1998 (BGBl. No 153/1998).

17 — Bankwesengesetz (BGBl. No 63/1979, as subsequently amended). Material to this case are the amendments of 1993 (BGBl. No 532/1993), of 1996 (BGBl. No 446/1996) and of 1998 (BGBl. No 11/1998).

18 — Depotgesetz (BGBl. No 424/1969, as subsequently amended).

19 — Kundmachungen der Österreichischen Nationalbank DL 1/91, DL 2/91 and DL 1/99, transmitted by the Austrian Government on 3 February 2000, at the Court's request.

activity perpetrated by others or disguising its provenance by providing false information as to the origin, nature or ownership of, power of disposal over, transfer or location of the property. [20] Until 1998, that provision made money laundering a punishable offence provided that the property that had been concealed or had its origin changed, was 'of a value in excess of ATS 100 000'. After 1 October 1998, that condition was removed when the definition of the offence was amended to make it easier to prosecute money laundering. The aggravating circumstance provided for in cases where the money that has been laundered is 'in excess of ATS 500 000', or the perpetrator of the offence is the member of a criminal organisation, [21] continue to apply, as well as the extenuating circumstance introduced [22] where the perpetrator of the offence acts voluntarily to hinder its completion.

Banking law

20. Austrian banking law contains provisions designed to combat money laundering. In particular, Paragraph 40 of the BWG requires the credit and financial institutions to identify customers where: (a) permanent business relations are established; (b) transactions are carried out which, although they do not form part of permanent business relations, are of a value of at least ATS 200 000, regardless of whether a single transaction or a series of transactions is involved, provided that, if the value of the transaction is unknown, identification of the customer is undertaken when the value of the transaction is established or it is ascertained that the aforementioned threshold has been reached; (c) there is good reason to suspect that the customer is involved in money laundering. The credit and financial institutions have also to ask their customers whether they intend maintaining business relations on their own behalf or on behalf of a third party and, if so, the identity of their principal.

21. Until 31 July 1996, the abovementioned rules on customer identification permitted derogations concerning, *inter alia*, the opening of 'savings accounts' ('Sparbücher') and 'securities accounts' ('Wertpapierkonten') as well as transactions relating to them, save for the provisions laid down by the Austrian National Bank in regard to residents and 'foreigners' ('Ausländer'). [23] As of 1 August 1996, the identification requirement was extended — with effect from that date — to the opening of securities accounts, [24] although in regard to transactions made from or to such accounts that requirement applies solely

20 — Moreover, Austrian criminal law also penalises the offence of handling stolen goods, provided for in Paragraph 164 of the StGB; the constituent elements of that offence differ from those of money laundering in the sense that the handling of stolen goods requires the offender to have assisted the perpetrator of a crime against property for the purpose of concealing or using the proceeds of the crime.

21 — As provided for in Paragraph 278a of the StGB.

22 — By Paragraph 165a of the StGB.

23 — See, in that connection, paragraphs 8.2.2 and 8.2.3 of the official communication ('Kundmachung') DL 2/91 of the Austrian National Bank, as amended by official communication DL 1/99. According to paragraphs 2.2.1 and 2.2.2 of official communication DL 1/91, 'foreigners' ('Ausländer') basically means persons not resident in Austrian territory.

24 — They fall within the scope of Article 11 of the DG which places a number of specific obligations on credit institutions with which they are opened.

to the acceptance and acquisition of securities. [25] However, the derogation concerning the opening of savings accounts has continued to apply, and also applies to the transactions relating to them.

22. Savings accounts are regulated by Paragraphs 31 and 32 of the BWG. These are basically monetary deposits — opened with credit institutions authorised for that purpose — used not for payments transactions but simply for investment purposes, and from which it is therefore possible to withdraw sums subject only to certain conditions and on presentation of special documents (passbooks), in a registered name or payable to bearer. In the case of passbooks payable to bearer, access to the funds deposited may be subject to presentation of a particular 'password' by the customer. For the purposes of this case, it should be noted that the only transactions allowed in relation to savings accounts are the payments and withdrawals that are entered in the passbook; it is not, in principle, possible to issue cheques or make credit transfers, although it is possible for third parties to make credit transfers to a savings account. The accounts in question yield interest at the agreed rate, and that interest is generally calculated and paid at the end of the calendar year, which is normally when the deposit matures. [26]

25 — See Paragraph 40(5) of the BWG.

26 — Paragraph 32(5) of the BWG. Moreover, savings accounts may have to be opened for a specific period.

The stages in the infringement proceedings

The procedure before the EFTA Surveillance Authority

23. On 1 January 1994, the EEA Agreement entered into force. Consequently, by letter of 17 June 1994, the EFTA Surveillance Authority asked the Austrian Government for detailed information on the national legislation transposing the money laundering directive. The Austrian authorities provided that information by letter of 25 July 1994.

24. Once in receipt of that information, the EFTA Surveillance Authority sent to the Austrian Government, on 9 December 1994, a reasoned opinion in accordance with the abovementioned Article 31 of the Agreement between the EFTA States of 2 May 1992 on the establishment of a Surveillance Authority and a Court of Justice, requesting the Austrian Government to comply as soon as possible with all provisions of the directive that had yet to be implemented. The Austrian Government replied to that letter on 9 January 1995, largely referring back to the statements already contained in its letter of 25 July 1994.

25. Austria acceded to the European Union on 1 January 1995. In accordance with Article 172(6) of the Act of Accession, the

EFTA Surveillance Authority transmitted to the Commission, responsible for such issues, the whole of its correspondence with the Austrian Government.

The procedure before the Commission

26. On 20 December 1995, the Commission decided to resume the infringement proceedings and invited the Austrian Government to submit its own observations on a number of complaints concerning failure to fulfil the obligations laid down in the Directive. The Commission therefore sent to the Austrian Government on 14 February 1996 a letter of formal notice within the meaning of the first paragraph of Article 169 of the EC Treaty. The Austrian Government submitted its own observations by letter of its permanent representative of 12 April 1997, but the Commission did not regard those observations as adequate.

27. Taking the view that there had been a breach of Community law, the Commission decided to send the Austrian Government a reasoned opinion in accordance with and for the purposes of the abovementioned first paragraph of Article 169 of the EC Treaty. That reasoned opinion was served by letter of 21 February 1997. The Austrian authorities responded to the reasoned opinion, first by letter of 4 April 1997 from the Federal Minister for Finance and, subsequently, by letter of 17 April 1997 from the permanent representative. The Commission deemed both those replies to be inadequate.

28. Considering therefore that Austria was still failing to fulfil its obligations under the directive, the Commission decided to bring the present action, in accordance with the second paragraph of Article 169 of the EC Treaty, lodged at the Court Registry on 28 July 1998.

Submissions of the parties

29. In its application in this case, the Commission is essentially claiming that the Court should:

— declare that the Republic of Austria has failed to fulfil its obligations under the EC Treaty and Articles 2 and 3(1), (5) and (6) of the Directive by:

— limiting the prohibition on money laundering contained in Paragraph 165 of the StGB to assets having a value in excess of ATS 100 000;

— requiring customer identification when a securities account is opened

not as of 1 January 1994 (the date on which the EEA Agreement entered into force) but only as of 1 August 1996;

— not requiring customer identification for all transactions into or out of an existing securities account, but only, as provided under Paragraph 40(5) of the BWG, in the case of deposits and purchases of securities for such accounts;

— not requiring customer identification whenever a savings account is opened on or after 1 January 1994;

— not requiring customer identification for all transactions relating to a savings account opened before or after 1 January 1994;

— order the Republic of Austria to pay the costs.

30. In its reply,[27] the Commission amended the first of the complaints addressed to the Austrian Government, and asked the Court to declare that 'the Republic of Austria has failed to fulfil its obligations under the Treaty and Article 2 of the Directive... in so far as it extended the prohibition on money laundering laid down by Paragraph 165 of the StGB to assets with a value of less than ATS 100 000 only as of 1 October 1998'. The Commission is also asking the Court to 'declare inadmissible the objection set out in Section IV of the rejoinder',[28] that is to say the plea of illegality entered by the Austrian Government in relation to Article 3 of the Directive.

31. For its part, the Austrian Government is essentially claiming that the Court should:

— reject the application in full;

— order the Commission to pay the costs.

27 — Reply, paragraph 1.4. Clearly as a result of the failure to make the consequent changes, that amendment is not reflected in the conclusions set out at the end of the reply (paragraph 4.1.1).

28 — Reply, at paragraph 4.2.

The date from which the Austrian Government was required to comply with the provisions of the Directive

Positions of the parties

32. In its application, the Commission argues that 1 January 1994, the date on which the EEA Agreement entered into force, must be assumed to be the date from which the Austrian Government was required to comply with the provisions of the Directive [29] and, therefore, that the unlawful conduct for which it criticises that Government began on that same date. However, the Commission fails — even in its reply [30] — to explain the reasons on which its argument is based, except for a vague reference to the provisions of the abovementioned Articles 7 and 36 of the EEA Agreement concerning the binding nature of the Community acts cited in Annex IX to the actual Agreement — including the money laundering directive — and the obligation on the contracting parties to transpose it into their national legal systems.

33. Although, during the written procedure, the Austrian Government did not specifically challenge the Commission's argument concerning the date from which it was required to comply with the provisions of the Directive, [31] at the hearing of 15 March 2000 it contended that that obligation could apply only from the date of Austria's accession to the European Union, that is to say 1 January 1995, and that it was not within the jurisdiction of the Court of Justice to determine the validity of the alleged failure to fulfil an obligation for the period between 1 January 1994 — the date on which the EEA Agreement entered into force — and 31 December 1994.

Opinion of the Advocate General

34. Although belated, the criticisms of the Commission's argument raised by the Austrian Government at the hearing seem to me to be persuasive, also in relation to the case-law developed by the Court concerning the relationship between the Community legal system and the different legal system arising out of the EEA Agreement.

35. I would point out in that connection that, according to the abovementioned Article 166 of the Act of Accession, the new Member States — including Austria — are deemed to be addressees of pre-existing Community directives *upon*

29 — See paragraph 17 of the application which refers to statements contained in the letter of formal notice of 14 February 1996 and the reasoned opinion of 21 February 1997.

30 — The Commission restates this argument in paragraph 31 of the reply without expanding on it.

31 — See section B.4 of the statement of defence which deals with the problem of retroactive transposition of the directive, but does not raise the issue of the date of transposition.

their accession, and to have been notified of the directives *after accession*. Furthermore, in accordance with the abovementioned Article 168 of the Act of Accession, the new Member States are to put into effect the measures necessary to comply with the provisions of pre-existing directives only *from the date of their accession*, unless other time-limits have been set for the transposition of such directives. According to those provisions, the Austrian Government was not required to comply with the provisions of the money laundering directive until 1 January 1995, the date on which Austria acceded to the European Union, since no other specific time-limit was set in the annexes to the Act of Accession. In the only specific precedent in this area, [32] moreover, the Court appears implicitly to accept the premiss that the Republic of Austria was required to comply with Community law only from the date of its accession to the European Union, on 1 January 1995. [33]

36. Of course, according to Article 7 of the EEA Agreement, the contracting parties — including Austria — were required to transpose the directives mentioned in the annexes to the Agreement — including the money laundering directive — as soon as the Agreement itself entered into force. But that requirement has to be seen in the context of the special legal arrangements set in place between the Community and the EFTA States in the wake of the EEA Agreement, on the basis of which only the EFTA Court was and is competent to hear disputes concerning the EFTA States. However, since its accession, the Republic of Austria has been an integral part of the Community and, since 1 January 1995, it has been subject to Community law, in the light of which its conduct is assessed. From that point of view, to accept that it is possible to ascribe to Austria failures to fulfil obligations which relate in part to periods, albeit of limited duration, during which Austria, although a contracting party to the EEA Agreement, had yet to accede to the European Union, would be to accord the Court of Justice authority to rule on disputes over which it has no jurisdiction *ratione materiae*. That finding is confirmed by the Court's recent decisions in two cases for a preliminary ruling concerning Sweden [34] and Austria [35] respectively, and relating to the Member State's liability for harm caused by the failure properly to transpose certain directives. In the first of those cases, the Court established, among other things, that it did not have the authority to rule on the interpretation of the EEA Agreement in relation to its application within the EFTA States, either on the basis of the EC Treaty or on the basis of the EEA Agreement itself, and that: 'The fact that the EFTA State in

32 — Case C-328/96 *Commission* v *Austria* [1999] ECR I-7479. This judgment concerns Community law on public contracts, with reference to the procedure for the award of contracts for the new Sankt Pölten administrative and cultural centre.

33 — In the abovementioned Case C-328/96, the Court ruled as follows, at paragraph 63: 'The Commission observes first of all that, *as from the time of its accession to the European Union on 1 January 1995*, the Republic of Austria was bound to observe Community legislation, which includes the directives relating to the award of public contracts'. (My emphasis.) Subsequently, when setting out the grounds for its judgment in that case (paragraphs 74-79), the Court makes no further mention of the date from which the obligation to comply with the relevant directives arose, but this is only — in my view — because this seems irrelevant to the judgment in the case, which specifically concerns 'contracts which were concluded before 6 February 1996 but which on 7 March 1996 had still not been performed or could reasonably have been cancelled' (paragraph 79), that is to say activities which wholly take effect only *after* Austria has acceded to the European Union. For his part, Advocate General Alber decided, in his Opinion, to leave aside the question of the date from which the Austrian Government was required to comply with Community law since it in any case became binding on Austria from the time of its accession to the European Union.

34 — Case C-321/97 *Andersson and Wåkerås-Andersson* v *Sweden* [1999] ECR I-3551.

35 — Case C-140/97 *Rechberger and Others* v *Austria* [1999] ECR I-3499.

question subsequently became a Member State of the European Union... cannot have the effect of attributing to the Court of Justice jurisdiction to interpret the EEA Agreement as regards its application to situations which do not come within the Community legal order',[36] and went on to explain that: 'The jurisdiction of the Court of Justice covers the interpretation of Community law, of which the EEA Agreement forms an integral part, as regards its application in the new Member States *with effect from the date of their accession*'.[37] In the second of the abovementioned decisions, the Court specified that it 'does not have jurisdiction, either under Article [234] of the Treaty or under the EEA Agreement, to rule on the interpretation of the EEA Agreement as regards its application by the Republic of Austria during the period prior to the accession of that Member State to the European Union',[38] since it 'only has jurisdiction to rule on the question whether a Member State which acceded to the European Union on 1 January 1995'[39] has properly transposed the provisions of a directive after that date. It follows from those judgments that, from the point of view of Community law, only actions of the Member States which relate to periods subsequent to their accession to the European Union may be subject to investigation by the Commission or a ruling of the Court of Justice. While it is true that the Court acknowledged, in a number of judgments[40] delivered before the abovementioned decisions, that the scope of some provisions of the EC Treaty may extend to 'the future effects of situations arising prior to that new Member State's accession to the Communities',[41] that finding was always based on the principle that the legislation in question was binding on the State only at the date of its accession to the European Union.[42] Moreover, derogations of that nature are justified only because of the principle that is being upheld — in the cases in issue, this was the prohibition of discrimination on grounds of nationality — and the gravity of the breach of that principle, criteria which require the Court to assess particularly assiduously the individual circumstances of operators affected by national measures incompatible with Community law.[43]

37. It is not, in my view, possible to identify effective arguments to contradict the line of reasoning set out above from a reading of the transitional provisions, including Article 172(6) and (7) of the Act of Accession, concerning procedures instituted by the

36 — Case C-321/97, paragraph 30.

37 — *Ibidem*, paragraph 31 (my emphasis).

38 — Case C-140/97, cited in footnote 35 above, paragraph 38.

39 — *Ibidem*, paragraph 40. But see also paragraph 44 in which the Court explicitly refers to 'the Republic of Austria's obligation under Community law to implement the Directive after its accession to the European Union on 1 January 1995.'

40 — Case C-43/95 *Data Delecta and Forsberg* [1996] ECR I-4661 and Case C-122/96 *Saldanha and MTS* [1997] ECR I-5325. Both judgments relate to the compatibility with Article 6 of the EC Treaty (now, after amendment, Article 12 EC) of Swedish and Austrian legislation on security for costs and compliance with the judgment.

41 — Case C-122/96, cited above, paragraph 14.

42 — In both the abovementioned cases, Advocate General La Pergola stresses in his Opinion that issues relating to events prior to the accession of another Member State fall outside the temporal scope of the EC Treaty. See in particular, points 11 and 12 of the Opinion in *Saldanha and MTS* (I-5327).

43 — The Court in fact pointed out that 'the main proceedings relate to the exercise of the fundamental freedoms guaranteed by Community law' (*Saldanha and MTS*, paragraph 17).

EFTA Surveillance Authority. The first of those provisions lays down that cases in which the EFTA Surveillance Authority has been seised in the framework of the surveillance procedure are to be transmitted to the Commission following the accession of a Member State which was previously a contracting party to the EEA Agreement; and the second that the decisions taken by the EFTA Surveillance Authority continue to remain valid after accession. However, those provisions make no stipulation as to the point from which the government of a new Member State is required to comply with Community law, nor as to the point from which infringements of Community law may be prosecuted by the Commission. In that connection, the only reference criteria are the abovementioned Articles 166 and 167 of the Act of Accession, from which it is clear that the relevant date is the date on which the new Member State acceded to the European Union. [44]

38. On the basis of the foregoing, I therefore consider that the Court should declare [45] that it has no jurisdiction to rule on the complaints the Commission addresses to the Austrian Government with reference to the period between 1 January 1994, the date on which the EEA Agreement entered into force, and 1 January 1995, the date on which Austria acceded to the European Union.

The alleged infringement of the obligation to lay down a prohibition on money laundering

The Commission's original accusation and its amendment after the bringing of the action

39. In its application in this case, the Commission first of all asks the Court to declare that the Austrian Government has failed to observe the obligation arising out of Article 2 of the Directive, which requires that the Member States are to ensure that money laundering is prohibited, in that it limited the scope of the offence of money laundering — provided for and made punishable under Paragraph 165 of the StGB — solely to assets having a value in excess of ATS 100 000. In other words, the Commission criticises Austria for having set a *quantitative threshold* above which money laundering is a punishable offence, in contrast to the Directive, under which the Member States are required to prohibit money laundering *in all cases and without restriction*.

44 — That solution is unsatisfactory because it neither allows the Commission to verify nor the Court to judge actions of a new Member State that are incompatible with Community law — of which the EEA Agreement is an integral part — which took place when the latter Agreement was in force but before the State in question acceded to the European Union. This is a limited period during which a Member State is, so to speak, guaranteed a kind of immunity in respect of the past. It is true that, in theory, illegal actions by a Member State which take place during that period could be verified by the EFTA Surveillance Authority and the EFTA Court, but once the new Member States have acceded, that possibility is more or less ruled out by the extremely restrictive provisions of Article 5 of the Agreement on the transitional provisions for the period subsequent to the accession of some EFTA Member States to the European Union.

45 — On the basis of the principle arising out of Article 92(1) of the Rules of Procedure.

40. By letter of the Federal Minister for Justice of 28 August 1998 addressed to the Commission and, subsequently, in its statement of defence [46] submitted on 9 October 1998, the Austrian Government informed the Commission that Paragraph 165 of the StGB had been appropriately amended by a federal law passed by the Nationalrat in July 1998 and published in August 1998. [47] That amendment abolished the quantitative threshold of ATS 100 000 with effect from 1 October 1998.

41. Once it had taken formal note of the amendment to the national legislation in issue, the Commission, in its reply, [48] changed the original wording of its complaint against the Austrian Government and asked the Court: 'to declare that the Republic of Austria had failed to fulfil its obligations under the Treaty and Article 2 of the directive... by failing to extend the prohibition on money laundering, provided for under Paragraph 165 of the StGB, to assets of less than ATS 100 000 in value, until 1 October 1998.' However, the conclusion to the reply makes no mention of that amendment, clearly as a result of a lack of coordination.

42. In its rejoinder, the Austrian Government took note of the amendment to the Commission's complaint but did not express a view on its admissibility.

46 — Defence, at paragraph II.1.

47 — BGBl. No 153/1998.

48 — Reply, at paragraph 1.4.

Opinion of the Advocate General on the admissibility of amending the complaint after the application had been made

43. As I mentioned above, in its reply, the Austrian Government did not raise any objection to the Commission's amendment to the original complaint. However, in accordance with Article 92(2) of the Rules of Procedure, the Court may at any time of its own motion consider whether there exists any absolute bar to proceeding with a case. In this case, the Commission's amendment affects the delimitation of the subject-matter of the dispute and calls into question the procedural guarantees provided for under the Treaty, with the result that the admissibility of that amendment may be analysed on the basis of the above-mentioned rule. [49]

44. I would make the preliminary point that, in accordance with settled case-law: 'The letter of formal notice from the Commission to the Member State, and then the reasoned opinion issued by the Commission, delimit the subject-matter of the dispute, so that it cannot thereafter be extended', [50] since the opportunity for a Member State to defend itself constitutes an essential guarantee of the legality of the procedure for establishing that a Member State has failed to fulfil an obligation. [51] In this case, it is common ground that the

49 — Settled case-law. See, among many, Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203, paragraph 13.

50 — Case C-365/97 *Commission* v *Italy* [1999] ECR I-7773, paragraph 23.

51 — See, among many, Case C-289/94 *Commission* v *Italy* [1996] ECR I-4405, paragraph 15.

complaint originally set out in the application is the same as the complaint addressed to Austria by the Commission in both the letter of formal notice of 14 February 1996 and the reasoned opinion of 21 February 1997. In that regard, the Commission has fully complied with the rules of the infringement procedure. The problem that arises relates solely to the stage after the application was lodged: at issue is whether the relevant amendment to the complaint, made by the Commission, can be deemed to be admissible.

45. I have serious doubts about this. It is settled case-law that, in the context of a procedure designed to establish whether a Member State has failed to fulfil obligations incumbent upon it under Community law, the subject-matter of the dispute may be altered after the application has been lodged as a result of actions attributable to the defendant State, but only in the sense of restricting the complaints, that is to say *limiting* the subject-matter of the dispute. [52] Not permitted, however — since they would infringe the right of defence of the Member State in question — are amendments to the form of order sought which introduce a substantial change or extend the subject-matter of the dispute, introducing new complaints or aggravating the existing complaints. [53] In this case, however, once it had taken formal note of the fact that the national legislation in issue had been amended in accordance with its wishes, the Commission could either have upheld its application unamended and sought a declaration of failure to fulfil an obligation at the time when the reasoned opinion was issued or withdrawn its action in part in relation to that head of claim. However, the Commission chose a third way, one fraught with negative consequences which it had clearly failed to appreciate: it amended the ground of application and asked the Court to declare that Austria had failed to fulfil its obligations under the Directive in so far as it abolished the quantitative threshold under Paragraph 165 of the StGB only as of 1 October 1998, leaving the period prior to that date uncovered. In that way, the Commission amended the substance of its own complaint, changing it from criticism that the prohibition was *inadequate in terms of its quantitative scope* to criticism that the amendment introduced in 1998 *did not have retroactive effect*. In those circumstances, I consider that the amendment introduced in the reply — leaving aside any consideration as to whether it is well

52 — See, simply by way of illustration, Case C-257/94 *Commission* v *Italy* [1995] ECR I-3041, paragraph 4 and Case C-17/95 *Commission* v *France* [1995] ECR I-4895, paragraph 4. In the latter case, Advocate General La Pergola referred to 'discontinuance of part of the action' to define instances in which the complaints are restricted after the application has been made (see footnote 4 of the Opinion in Case C-17/95, [1995] ECR I-4896).

53 — See Case C-243/89 *Commission* v *Denmark* [1993] ECR I-3353, paragraphs 15 and 19, as well as the Opinion of Advocate General Tesauro (I-3373, at point 7). The Court held to be inadmissible the way in which, in its reply, the Commission added to the complaint, with reference to the information supplied by the Danish Government in its statement of defence. In Case C-274/93 *Commission* v *Luxembourg* [1996] ECR I-2019, paragraphs 11 to 13), the Court — taking, in my view, an excessively formalistic approach — held to be inadmissible an application seeking a declaration of the failure, on the part of the Luxembourg Government, to fulfil its obligation to transpose the provisions of a directive because, having referred in the application to 'certain provisions not implemented by the Luxembourg Law', the Commission subsequently asked the Court 'to declare that Luxembourg has not adopted all the measures necessary to comply with the Directive', thereby making it impossible for the defendant Member State — which has not, moreover, submitted pleadings — 'to address the... claims relating to the defective transposition of specific provisions of the Directive'.

founded [54] — constitutes a new head of claim, obviously not preceded by the requisite pre-litigation procedure that ought to have been initiated in accordance with the rules laid down by the EC Treaty.

46. On those grounds, I propose that the Court declare inadmissible the new head of claim set out by the Commission in its reply in place of the original complaint.

The obligation to ensure that credit or financial institutions undertake customer identification

The position of the Commission

47. As we saw above, Article 3 of the Directive provides that the Member States are to ensure that the credit or financial institutions require identification of their regular and — in the case of transactions amounting to ECU 15 000 or more — occasional customers, in order to prevent anonymity benefiting persons engaged in money laundering. The Commission interprets this provision as the expression of a general principle — introduced by the Directive as part of a gradual process of increasing awareness, at an international level, of the risks and dangers of money laundering — inimical to any form of banking or financial anonymity, based on the assumption that anonymity *objectively* encourages the emergence of criminal activity geared to laundering the proceeds of illegal activity. In that context, the Commission refers explicitly [55] to the initiatives undertaken in the main international forums (the United Nations and Council of Europe, for instance) and, more particularly, the recommendations of the Financial Action Task Force on Money Laundering, set up in June 1989 by the Paris summit of the seven most developed countries. [56] Of particular importance from that point of view then are the provisions of Article 6(5) and (6) of the Directive, according to which, in the event of doubt as to whether customers are acting on their own behalf or where it is certain that they are not acting on their own behalf, the credit or financial institutions are to obtain information as to the real identity of the persons on whose behalf those customers are acting and, wherever there is suspicion of money laundering, they are always to identify the customer.

48. Pursuing that line of reasoning, the Commission takes the view that the above-

54 — In point of fact, the Commission is basically asking Austria — perhaps without realising this — to accord retroactive effect to the extension of criminal liability in respect of the money laundering of assets less than ATS 100 000 in value. But that request is incompatible with the principle that 'a provision of the criminal law may not be applied extensively to the detriment of the defendant, which is the corollary of the principle of legality in relation to crime and punishment and more generally of the principle of legal certainty' (see Joined Cases C-74/95 and C-129/95 *Criminal proceedings against X* [1996] ECR I-6699, paragraph 25).

55 — See, in particular, paragraph 44 of the application and paragraph 8 of the reply.

56 — This structure is also mentioned in the seventh recital of the directive.

mentioned Article 3 of the Directive applies to all cases in which a customer establishes regular business relations with a credit or financial institution, or an occasional customer carries out transactions with such an institution. In particular, no account is to be taken of the nature of the business relations or occasional transactions, as their purpose, special features or characteristics are held to have no bearing on the identification requirement established under the Directive. To that end, Article 3(1) of the Directive specifically refers to the opening of accounts or savings accounts and the offering of safe custody facilities, but that list is not exhaustive: the Directive in fact refers to all transactions that involve the movement of capital, [57] so as to guarantee its effectiveness in combating money laundering.

The plea of illegality entered by the Austrian Government

49. The Austrian Government challenges the Commission's interpretation of Article 3 of the Directive with reference to anonymous accounts and transactions. According to the Austrian Government, that provision ought to be interpreted exclusively in the light of the legislation on the basis of which the Council adopted the Directive, namely Article 57(2), first and second sentences, and Article 100a of the EEC Treaty, the former concerning the pursuit of activities as a self-employed person in the context of the right of establishment, and the latter the approximation of national legislation concerning the internal market. Therefore, the obligation to require customer identification provided for and governed by Article 3 of the Directive relates solely to 'transactions which jeopardise the free movement of capital within the internal market by making it possible to launder capital'. [58] Any other interpretation would have the effect of removing the Directive from within the limits of the authority by virtue of which the Council adopted the Directive and, therefore, render illegal the provisions of Article 3 on the general obligation to require identification of the customers of credit or financial institutions. [59]

50. Based on the above observations, the Austrian Government enters a plea of illegality, based on Article 184 of the EC Treaty (now Article 241 EC), in relation to Article 3 of the Directive as construed by the Commission. The Austrian Government contends that a plea of that nature is admissible in the context of these proceedings, the purpose of which is to establish whether there has been a failure to fulfil an obligation under Community law, specifically because the Austrian Government did not have an opportunity to challenge, in the form of an action for

57 — See Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty (OJ 1988 L 178, p. 5), the annexes to which contain a detailed description of the various capital movements and the relevant transactions and operations.

58 — Defence, at paragraph IV.1, citing an opinion by Professor Georg Ress.

59 — The Austrian Government raises the problem of the illegality of only Article 3 of the directive. See, on that point, the statement of defence, at paragraph 3.

annulment, the legal basis of the provision at issue. [60] Moreover, the Austrian Government intimates that the Court could, of its own motion, assess the legality of that provision. [61]

Opinion of the Advocate General on the plea of illegality

51. Let me straight away make the point that, in my view, in the context of proceedings to establish whether it has been in breach of Community law, a Member State cannot enter a plea of illegality in relation to a directive — or an individual provision of a directive — with which it is accused of failing to comply.

52. The Court has had occasion to state, with reference to its case-law, that 'to permit a Member State to whom a decision adopted under the first subparagraph of Article 93(2) has been addressed to call in issue the validity of that decision when an application referred to in the second subparagraph of Article 93(2) has been lodged, in spite of the expiry of the period laid down in the third paragraph of Article 173 of the Treaty, would be impossible to reconcile with the principles governing the legal remedies established by the Treaty and would jeopardise the stability of that system and the principle of legal certainty on which it is based' [62] and that 'the system of remedies set up by the Treaty distinguishes between the remedies provided for in Articles 169 and 170, which permit a declaration that a Member State has failed to fulfil its obligations, and those contained in Articles 173 and 175, which permit judicial review of the lawfulness of measures adopted by the Community institutions, or the failure to adopt such measures. These remedies have different objectives and are subject to different rules. In the absence of a provision of the Treaty expressly permitting it to do so, a Member State cannot therefore plead the unlawfulness of an action for a declaration that it has failed to fulfil its obligations arising out of its failure to implement that decision', [63] it being understood that an objection of that kind 'could be upheld only if the measure at issue contained such particularly serious and manifest defects that it could be deemed non-existent.' [64] In relation to regulations, specifically mentioned in Article 184 of the EC Treaty, the Court has emphasised that the latter provision 'gives expression to a general principle conferring upon any party to proceedings the right to challenge, for the purpose of obtaining the annulment of a decision of direct and individual concern to that party, the validity of previous acts of the institutions which form the legal basis of the decision which is being attacked, if that party was not entitled under Article 173 of the Treaty to bring a direct action challen-

60 — Defence, at paragraph IV.3 and Chapter 3 of the rejoinder, in which the defendant complains that, in this case, 'we are dealing... with a directive the time-limit for the transposition of which had expired long before Austria acceded to the European Union'.

61 — Defence, at the end of paragraph IV.3: 'Article 184 of the Treaty does not make clear whether the Court can, of its own motion, analyse a defect in a legal act in the context of infringement proceedings.'

62 — Case 156/77 *Commission* v *Belgium* [1978] ECR 1881, paragraph 23 and Case 322/82 *Commission* v *Italy* [1983] ECR 3689, paragraph 10.

63 — Case 226/87 *Commission* v *Greece* [1988] ECR 3611, paragraph 14.

64 — *Ibidem*, paragraph 16. See also Case 15/85 *Consorzio cooperative d'Abruzzo* v *Commission* [1987] ECR 1005.

ging those acts by which it was thus affected without having been in a position to ask that they be declared void.'[65] It seems to me to be superfluous to dwell further on the abovementioned decisions which speak for themselves and bar a Member State from availing itself of the procedural mechanism of a plea of illegality in the context of infringement proceedings.[66] I would add that that bar was clearly reiterated by the Court,[67] including with reference to a directive with which the Commission was accusing a Member State of failure to comply. In that case, the Federal Republic of Germany entered a plea of illegality in relation to Article 26 of the Sixth VAT Directive (Directive 77/388/EEC), claiming that the provision was invalid. The Court referred explicitly to paragraph 14 of the judgment in *Commission* v *Greece*, cited above, and added that a Member State cannot 'plead the unlawfulness of a directive which the Commission criticises it for not having implemented',[68] and further pointed out — as it had already done in paragraph 16 of its judgment in *Commission* v *Greece* — that the position could be different 'only if the measure at issue contained such particularly serious and manifest defects that it could be deemed non-existent',[69] a plea which was not, however, entered by the German Government in that case.

53. In accordance with the abovementioned developments in case-law, I am convinced that, in this case, the Austrian Government may not plead the illegality of Article 3 of the Directive, a provision in relation to which the Commission accuses it of failing to fulfil an obligation.[70] It is true that, in its rejoinder, the Austrian Government emphasises that 'it is only according to the interpretation advanced by the Commission that the directive exceeds Community competence'.[71] But that does not change the incontestable fact that the plea entered by the Austrian Government calls into question the legal basis of the provision with which it is accused of failing to comply, and that is precluded for the reasons set out above. Moreover, the Austrian Government does not advance arguments designed to show that the Directive, and in particular Article 3 thereof, contains such particularly serious and manifest defects that it could be deemed non-existent, the only circumstance able to justify resorting to a plea of illegality. The defendant in fact takes the view that Article 3 of the Directive, as interpreted by the Commission, exceeds Community competence, that is to say suffers from lack of competence within the meaning of the second paragraph of Article 173 of the EC Treaty (now, after amendment, the second paragraph of Article 230 EC), but does not appear to view that provision in terms of an 'inexistent act'.

65 — Case 92/78 *Simmenthal* v *Commission* [1979] ECR 777, paragraph 39. That ruling marks the culmination of a process of reflection which began with Case 2/57 *Compagnie des Hauts Fourneaux de Chasse* v *High Authority* [1958] ECR 199 and Case 9/56 *Meroni* v *High Authority* [1958] ECR 133, and continued with Case 32/65 *Italy* v *Council and Commission* [1966] ECR 389. That approach was not always rigorously applied by the Court. For instance, in Case 116/82 *Commission* v *Germany* [1986] ECR 2519, paragraph 8, Germany was allowed to challenge the legality of the regulation with which it was accused of failing to comply.

66 — Although that exclusion is open to criticism in terms of respect of the principle of the legality of Community action; see, in that context, the Opinion of Advocate General Darmon in Case C-258/89 *Commission* v *Spain* [1991] ECR I-3977, points 13 to 31, and the legal literature cited therein.

67 — See Case C-74/91 *Commission* v *Germany* [1992] ECR I-5437.

68 — *Ibidem*, paragraph 10.

69 — *Ibidem*, paragraph 11.

70 — I expressed similar views at point 27 of my recent Opinion of 20 January 2000 in Case C-206/98 *Commission* v *Belgium*, [2000] ECR I-3509.

71 — Rejoinder, Chapter 3.

54. The Austrian Government does, however, claim not to have had an opportunity to challenge, by bringing an action for annulment, the validity of Article 3 of the Directive, since the time-limit for transposition of the latter had already expired when Austria acceded to the European Union. In other words, the Austrian Government contends that the Directive was part of the *acquis communautaire* and that the Act of Accession did not afford the new Member States the possibility of seeking the annulment of Community acts already in force on 1 January 1995, or in relation to which the time-limit for transposition had expired in any event. That argument basically seeks to challenge the validity of obligations which Austria entered into freely by acceding to the European Union; it cannot, therefore, be upheld. I would recall in that connection that, according to case-law: 'Acts of Accession are not acts of the institutions, the validity of whose provisions can be challenged before the Court'. [72] The Commission is, moreover, right to state in its reply [73] that Austria 'never claimed during the accession negotiations that the directive fell outside Community competence to regulate the sector, and made no statement whatsoever to that effect'. If the Austrian Government considered that the Directive should be construed in a particular way, it would have been wiser to request that a specific reference to the interpretative criterion it wished to see applied be inserted into the Act of Accession or at least to attach to the Act of Accession a declaration to that effect. But it is common ground that no such basic precautions were taken at the time of accession; it has therefore to be assumed that the Austrian Government gave its unconditional assent to the legal basis and substance of the directive. Moreover, the Austrian Government never initiated the procedure laid down in Article 13(1) of the Directive for referring to the 'contact committee' problems raised by the Commission's extensive interpretation of the obligations arising out of Article 3 of the Directive.

55. With that in mind, I do not consider it appropriate to raise in this case the sensitive question of the possibility open to the Court of assessing of its own motion the relevant provision of the Directive. It actually seems to me that the real objective of the Austrian Government in this case is to challenge the Commission's *extensive* interpretation of the requirement that the credit or financial institutions undertake identification of their customers, and that the doubts expressed by the Austrian Government concerning the legitimacy of the Directive are basically a means of achieving that objective. In my view, it is not therefore necessary for the purposes of this dispute to dwell further on the legal basis of the Directive. It is, however, necessary positively to establish whether the interpretation the Commission chose to give to the obligation in question is justified in relation to the specific complaints addressed to the Austrian Government. [74] That is what I propose to do below.

72 — Case C-313/89 *Commission* v *Spain* [1991] ECR I-5231, paragraph 10.

73 — Reply, at paragraph 50.

74 — This is the same methodological approach the Court adopted in Case C-258/89, cited in footnote 66 above, in which it examined the interpretation — and not the legitimacy — of the regulation with which the Commission accused Spain of failing to comply.

Opinion of the Advocate General on the interpretation of Article 3 of the Directive

56. I am persuaded that the money laundering directive is fully consonant with the basic substance of the provisions of the EEC Treaty — Articles 57 and 100a — on the basis of which the Council adopted the directive. I base that view on the following considerations.

57. The directive does not exceed Community competence in relation to the freedom of establishment and the internal market; it actually enhances the possibilities they offer in order to guarantee that the integrated financial area created within the Community does not become a field of activity for organised crime but a privileged arena for the economic activity of those operators who, by exercising their right of establishment in a manner compatible with Community interests, enjoy the advantages of an internal market founded on clear-cut and transparent rules. In that way, both access to credit and financial activities and the exercise of those activities are promoted by the provisions designed to combat money laundering, and the operation of the internal market is strengthened by the gradual elimination of illegal capital flows, with positive results designed to have an impact on the whole of the Community's financial system. It is true that combating money laundering is not strictly speaking the aim of the Directive, bearing in mind the legal bases which underpin it, but it certainly represents an essential tool for the effective pursuit of the objectives the Directive itself legitimately pursues. It follows that the provisions of the Directive have, if they are to fulfil their objectives, to be applied across the board, with no possibility of exemptions, gaps, or worse still, special treatment for certain Member States. In other words, I consider that if the system of customer identification provided for in Article 3 of the Directive is to be truly effective, it must be deemed to be an hermetic system and, therefore, apply without distinction to all business relations and all transactions to which the provisions of Article 3 refer, regardless of their nature, their legal or financial features and, above all, their actual or presumed purpose. [75]

58. In that context, the wording of Article 3(1) of the Directive does not seem to me to give rise to doubts of interpretation. The provision actually refers to business relations, of a credit or financial nature, which are entered into on a regular basis between a bank and its customer. The concept of the *stability* of the link thus established emerges from the terminology used for that purpose in the provision at issue which requires customers to be identified when they are 'entering into business relations' with banks, as well as the reference, inserted purely by way of example, to 'savings accounts' and 'safe custody facilities'. In other words, the directive *always* requires identification where an individual becomes a regular customer of a credit or financial institution.

75 — To that same effect, see Case C-28/95 *Leur-Bloem* [1997] ECR I-4161, according to paragraph 36 of which, a directive adopted on the basis of Article 100 of the EC Treaty (now Article 94 EC) applies 'without distinction to all [operations for which it provides]... irrespective of the reasons, whether financial economic or simply fiscal, for those operations.'

59. However, I consider that Article 3(1) of the Directive does not extend to individual transactions carried out as part of a bank's credit or financial activity, whether those transactions are carried out by a regular customer of the bank, who has already been identified for that very reason, or are carried out with the bank by an occasional customer, in which case Article 3(2) applies, together with the quantitative threshold it contains. That interpretation seems to me to follow from logical criteria,[76] as well as the actual wording of Article 3(2), which refers to 'any transaction with customers other than those referred to in paragraph 1'. It would in fact be utterly superfluous for a bank to undertake formal identification of one of its own *regular* customers every time that customer carried out a financial transaction. However, in order to ensure that the aim of the directive is pursued, it is necessary, and reasonable, for the bank to identify an *occasional* customer who undertakes a transaction without entering into a regular relationship with the bank. In that connection, Article 3(2) is of specific assistance because it sets an upper limit — ECU 15 000 — which triggers the requirement for credit or financial institutions to undertake formal identification.

60. From that perspective, the role of Article 3(5) is to guarantee that the identification requirement in the case of customers — whether regular or occasional — who act as fronts is properly carried out: knowledge of the 'real identity of the persons on whose behalf those customers are acting' is in fact essential if the provisions of Article 3(1) and (2) are not to be deprived of effectiveness. For its part, Article 3(6) — which requires identification *in every case* wherever there is 'suspicion of money laundering' — provides added coherence to the whole system of customer identification, by eliminating all gaps within the range of transactions subject to verification of the operator's identity.

The alleged infringement of the identification requirement in relation to the Austrian legislation on savings accounts

The Commission's accusations

61. The Commission first accuses Austria of failing to observe the customer identification requirement, in accordance with Article 3(1), (5) and (6) of the Directive, in the context of the Austrian legislation governing savings accounts ('Sparbücher'). More particularly, in the form of order sought, the Commission directs two specific complaints against the Austrian Government: (a) Austria's failure to provide for

76 — The Council and the Commission also gave the same interpretation of Article 3(1) and (2) of the directive in a number of written and oral statements in the course of the cooperation procedure, emphasising that the customers to whom Article 3(1) refers are entering into long-term relations with the bank, whereas the customers referred to in Article 3(2) have occasional contact with the bank, time-limited because of the occasional nature of the transactions carried out and therefore without lasting effect.

customer identification whenever a savings account is opened as of 1 January 1994, and (b) Austria's failure to provide for customer identification where transactions are undertaken in relation to savings accounts opened before or after 1 January 1994.

62. According to the Commission, Article 3(1) of the Directive requires the credit or financial institutions to undertake identification of their customers 'when entering into business relations', that is to say when they establish lasting links with the institution, without it being possible to make a distinction based on the nature of the business relations. Savings accounts are therefore included without exception in the scope of the Directive. However, Austrian banking legislation, and in particular Paragraph 40 of the BWG, continues to exempt savings accounts from the identification requirement, on spurious grounds. Article 3(2) meantime provides for a general identification requirement covering all credit and financial transactions 'involving a sum amounting to ECU 15 000 or more' entered into with occasional customers. Regardless of the date on which they were opened, transactions relating to savings accounts fall within the scope of that provision from the time it was put into effect by Austria. However, Paragraph 40 of the BWG does not lay down the identification requirement for transactions relating to savings accounts. The sole — albeit limited — exceptions to the system of anonymity relate to 'foreigners', that is to say individuals who are not resident in Austrian territory,[77] whereas once residents have proved that they are resident in Austria, identification is not required unless an account is opened in a foreign currency. Moreover, these are derogations based on acts (the official communications of the Austrian National Bank) of doubtful legal validity.[78]

63. The Commission further contends that the system of anonymity that applies in Austria to savings accounts and the transactions relating to them undermines the effectiveness of Article 3(5) and (6) of the Directive, according to which, in the event of doubt as to whether the customers are acting on their own behalf, or where it is certain that they are not acting on their own behalf, the credit or financial institutions must always obtain information as to the real identity of the persons on whose behalf they are acting and, wherever there is suspicion of money laundering, always carry out customer identification even where the amount of the transaction is lower than the threshold laid down in Article 3(2). In the first example, the national legislation is patently incompatible with the Directive, since the rule on anonymity prevents the bank from setting in motion the procedure for establishing the real identity of the principal.[79] In the second, it would be difficult to confirm suspicions that transactions relating to anonymous savings accounts involve money laundering because 'verifying the

77 — Identification is required if 'foreigners' are opening savings accounts and where funds received from 'foreigners' are being paid into such accounts. See paragraphs 8.2.2 and 8.2.3 of official communication DL 2/91 of the Austrian National Bank.

78 — Reply, at paragraph 14.

79 — Application, at paragraph 39.

identity of a customer undertaking a transaction relating to an anonymous savings account is of no practical use and in no way makes it possible to arrive at conclusions as to the real economic circumstances'. [80]

The Austrian Government's arguments in defence

64. The Austrian Government acknowledges that Paragraph 40 of the BWG provides for a derogation from the customer identification requirement for savings accounts and related transactions, but contends that this derogation is offset by the provisions of official communication DL 2/91 of the Austrian National Bank which require verification of the customer's place of residence, [81] and that this is equivalent to a kind of personal identification. In any event, identification *always* takes place where a savings account is being opened for a non-resident, where residents are opening accounts in foreign currency, and where deposits are being paid into savings accounts from funds received from non-residents for the purpose of administering or maintaining those accounts.

65. The Austrian Government further contends that the savings accounts provided for under the BWG do not fall within the scope of Article 3(1) of the Directive because — since their main purpose is investment — they are in the nature of bearer bonds and ought therefore to be subject to the legal arrangements governing stocks. [82] Maintaining anonymity is not therefore incompatible with the money laundering directive: a customer who opens a savings account is not entering into business relations with the bank, but is actually acquiring a financial product and ought therefore to be identified only if the transaction involves a sum of ECU 15 000 or more, as provided for in Article 3(2) of the Directive.

66. The Austrian Government advances other arguments to demonstrate that the arrangements for savings accounts are compatible with the Directive.

67. In the first place, according to the Austrian Government, the savings accounts cannot be used for money laundering. The only anonymous transactions that are possible, once the account has been opened, are in fact cash payments and withdrawals, carried out on presentation of a passbook, in which they are recorded. Moreover, even for those transactions, Austrian banking law requires identification of the person making the deposit or withdrawal wherever

80 — Application, at paragraph 40. In paragraph 41, the Commission adds that the carrying out of transactions 'on an anonymous account ought, *per se*, to cause the credit or financial institution to entertain justified suspicions of money laundering.'

81 — To be more precise, paragraph 8.2.2 of official communication DL 2/91 refers to 'status in relation to foreign exchange arrangements' ('devisenrechtliche Status'), concerning whether or not the customer is a 'foreigner' ('Ausländer'), that is to say not resident in Austria. See paragraph III.A.1.3 of the statement of defence.

82 — Defence, at paragraph III.A.1.4; rejoinder, at paragraph 2.1.4. The Austrian Government cites an opinion by Professor Markus Achatz.

there is suspicion of money laundering. [83] It is not, however, possible to issue cheques or transfer instructions from such accounts, and non-cash transactions are subject to the normal rules of customer identification. Payments from third parties may be made into a savings account but not from another savings account: that means that the person making the payment is subject to the identification requirement in accordance with the Directive, either if the transaction is made from an account in regard to which he has already been identified or if this is an occasional transaction, in which case he will be identified if the amount of the transaction exceeds the threshold laid down in the directive (ECU 15 000) and transposed into Austrian law (ATS 200 000). [84] In other words, it is impossible for third parties 'to make anonymous payments into a savings account'. [85] The combination of these particular features makes savings accounts unsuited to the requirements of money launderers, who need to be able to transfer substantial amounts of dirty money rapidly and securely from a distance.

68. In the second place, anonymous savings accounts — about 95% of all savings accounts [86] — are widely distributed among all groups within Austrian society and traditionally meet the 'psychological need for security and discretion', a need felt more particularly by the elderly, who associate the idea of a named account with the period of National Socialism when anonymous savings accounts were abolished. [87]

69. Thirdly and finally, according to the Austrian authorities, the aim of the directive is solely to catch financial transactions genuinely likely to promote money laundering. But since savings accounts cannot be used for that purpose, to make them indiscriminately subject to the identification requirement would exceed what is necessary to implement the directive and therefore infringe the principle of proportionality laid down in the third paragraph of Article 3b of the EC Treaty (now the third paragraph of Article 5 EC), according to which: 'Any action by the Community shall not go beyond what is necessary to achieve the objectives of [this] Treaty'. [88]

70. At the hearing of 15 March 2000, the agents for the Austrian Government announced that, following a decision by the Austrian Council of Ministers, the Austrian Government would soon be tabling, in the Nationalrat, a draft law

83 — Defence, at paragraph III.A.1.1.(b).

84 — Rejoinder, at paragraph 2.1.1.

85 — Rejoinder, at paragraph 2.1.3.

86 — According to data supplied by the Commission (application, at paragraph 72), in 1996, there were about 26 million anonymous savings accounts in Austria for a population of approximately 7.5 million.

87 — Defence, at paragraph III.A.1.1(e), and rejoinder, at paragraph 2.1.3. The agents for the Austrian Government devoted some time to explaining these psychological reasons at the hearing of 15 March 2000, and also maintained that the existence of anonymous savings accounts helps protect family requirements in the broad sense, by enabling one partner to conceal from the other the extent of their own savings.

88 — This argument in defence is, moreover, closely linked to the plea of illegality entered by the Austrian Government and analysed above.

abolishing anonymous savings accounts. As of 1 November 2000, it will no longer be possible to open anonymous savings accounts or make anonymous payments into existing accounts and the question of anonymous accounts opened before 1 November 2000 will have been finally resolved by 2002.

Opinion of the Advocate General

71. In order to determine whether the Republic of Austria has in fact failed to fulfil its obligations under the Directive, by retaining the system of anonymous savings accounts, I consider it necessary to ascertain the scope of the complaints raised by the Commission, whether they are well founded and whether, and to what extent, the justification put forward by the defendant government can be upheld.

— Scope of the complaints concerning savings accounts

72. The question of the actual scope of the complaints is particularly important, since the Commission's criticisms are imprecise and ambiguous with regard to the date from which the complaints take effect, the substance of the complaints and the provisions which have been infringed.

73. According to the Commission, the actions it criticises commenced on 1 January 1994, that is to say the date of entry into force of the EEA Agreement. I have already expressed the view that the obligation to comply with the money laundering directive took effect for the Republic of Austria from 1 January 1995, the date on which Austria acceded to the European Union. It is not therefore possible to address to the Austrian Government complaints which refer, albeit in part only, to periods before that date.

74. As regards the substance of the complaints, the situation is more complex and requires a separate analysis of each of the two complaints the Commission has addressed to Austria.

75. In the first place, the Commission accuses the Republic of Austria of failing to provide for the identification of (all) customers when a savings account is being opened, but itself acknowledges [89] that, in practice, the credit or financial institutions *always* establish the identity of the customer if the account is opened by an individual who is not resident in Austria or on that non-resident's behalf, or by an individual resident in Austria but using the account for foreign currency. [90] It is further clear from the documents in the case that identification is also required in instances in which funds received from non-residents are deposited in a savings account in order to administer or maintain it: [91] that is not

89 — Application, at paragraph 69.

90 — It is unclear whether and to what extent it is possible, under Austrian law, to open savings accounts in foreign currency. That point is not, however, material for the purposes of this case.

91 — Paragraph 8.2.3 of official communication DL 2/91 of the National Bank of Austria.

disputed by the Commission. Therefore, the Commission's first complaint actually concerns only the opening of anonymous savings accounts, not held in foreign currency, by and on behalf of Austrian residents.

76. Secondly, according to Austrian legislation, the only transactions which may be carried out anonymously are cash payments and withdrawals, transactions usually carried out on presentation of a passbook (payable to bearer), in which they are recorded. In contrast, Paragraph 32(3) of the BWG lays down that transfers may not be made nor cheques issued from a savings account, and the Commission does not dispute that. The Austrian Government has further demonstrated, [92] without contradiction from the Commission, that transactions relating to savings accounts which are not made in cash are subject to the normal rules of customer identification. It is also possible for third parties to make payments into a savings account but — as the Austrian Government has demonstrated without contradiction from the Commission [93] — *not* from another savings account, as a result of which third parties cannot in any event pay funds anonymously into a savings account. Therefore, the Commission's second complaint can refer only to anonymous cash payments and withdrawals into and from savings accounts.

77. As regards, finally, the provisions of the money laundering directive, which the Commission accuses Austria of failing to observe, I consider that this has to refer exclusively to Article 3(1) and (5). It is true that the Commission accuses the Austrian Government of failing to fulfil its obligations under Article 3(6) of the Directive, according to which the credit or financial institutions are *always* required to identify customers where there is suspicion of money laundering, but it is also true that the Commission furnishes not a shred of evidence in support of that claim. In point of fact, the Austrian Government has demonstrated, [94] without being contradicted by the Commission, that Paragraph 40(1.3) of the BWG, which transposed into Austrian law the abovementioned obligation arising out of the Directive, *always* requires customer identification where there is suspicion of money laundering and therefore applies *also* to savings accounts and the transactions relating to them. Therefore, the Austrian Government's failure to fulfil the obligation in question has not been proven, and that complaint cannot be upheld.

78. To conclude, the two complaints the Commission raises in relation to the system of anonymity provided in Austria in relation to savings accounts need to be reworded. Basically, the Austrian Government is being accused of having failed to observe the obligations laid own in Article 3(1) and (5) of the Directive, in so far as that Government did not make provision, as of 1 January 1995, for the identification of customers resident in Austria whenever: (a)

92 — Defence, at paragraph III.A.1.1.(a).

93 — Rejoinder, at paragraphs 2.1.1 and 2.1.3.

94 — Defence, at paragraph III.A.1.1.(b).

they were opening a savings account in ATS; (b) cash payments and withdrawals were being made into and out of a savings account. It is therefore necessary to examine what foundation these accusations have, once reformulated.

— Validity of the complaints concerning savings accounts

79. The first of the Commission's two complaints, as reworded in accordance with the above considerations, is, in my view, well founded, given that, by retaining, after accession, the system of anonymity whenever savings accounts are opened, the Republic of Austria has failed to fulfil its obligations under Article 3(1) and (5) of the money laundering directive. I base that analysis on the following considerations.

80. Contrary to what the Austrian Government maintains, Austrian savings accounts definitely fall within the scope of Article 3(1) of the Directive. They are in fact covered by the general concept of 'business relations' established between customer and bank, referred to in Article 3(1), and are defined by Paragraph 31 of the BWG as monetary deposits basically intended for investment, that is to say in the same terms the Directive employs to indicate accounts and savings accounts, as examples — but not the only examples — of the concept of business relations. [95] It should also be noted that Paragraph 30(1.1) of the BWG equates savings accounts with the other business relations established between bank and customer, and then provides, in relation to such accounts, a specific derogation from the requirement that the bank undertake customer identification. That provision is patently inconsistent with the Austrian Government's submissions concerning the claim that the savings accounts are in the nature of stocks and shares. In fact, even though the passbooks payable to bearer can be used to move funds deposited in savings accounts, what matters, for the purposes of applying the Directive, is the element of business relations which are being established between the customer, even if that person is anonymous, and the credit or financial institution which holds and pays interest on the funds deposited, as a result of, first, the opening, and then, the administration, of these accounts. Those business relations are long-term and have all the features of accounts or savings accounts to which — by way of illustration — Article 3(1) of the Directive refers. Therefore the customer identification requirement must also apply to savings accounts, since, otherwise, the whole system set in place by the Directive to combat money laundering could be seriously undermined.

81. Furthermore, I consider it to be established that, currently, the opening of savings accounts in Austria is not subject to the customer identification requirement.

95 — See also the *travaux préparatoires* for the directive, in particular the Commission proposal of 28 April 1990 (OJ 1990 C 106, p. 6) as amended on 19 December 1990 (OJ 1990 C 319, p. 9).

The Austrian Government's argument in defence, based on the criterion of verifying residence laid down in official communication DL 2/91 of the Austrian National Bank, does not, in my view, carry conviction. In point of fact, verification of a customer's status in relation to the foreign exchange system ('devisenrechtlicher Status') is used by the bank solely to establish whether or not the customer is a 'foreigner' ('Ausländer'), that is to say is not resident in Austria, in order to apply to that customer, if necessary, the requisite system of compulsory identification. But if the customer somehow proves he is resident, the credit or financial institution is not required to check his identity because of the derogation provided for in Paragraph 40(1.1) of the BWG. That point is not disputed by the Austrian Government. Furthermore, a customer's residence and identity are two different things, and verification of the former does not necessarily involve checking the latter, whatever the actual method a bank uses. In any event, the criterion of verification of residence was laid down by an act — an official communication of the Austrian National Bank — whose legal nature has not been clarified by the Austrian authorities,[96] but which appears, at first sight, to be inappropriate for transposing the content of a directive.[97]

82. Therefore, the infringement of Article 3(1) of the Directive seems to me to be established as regards the retention, after 1 January 1995, of the possibility for customers resident in Austria to open anonymous savings accounts in ATS.

83. I do not, however, consider to be well founded, in the light of Article 3(1) of the Directive, the second of the Commission's complaints concerning the system of transactions relating to savings accounts.

84. It is true that the system of anonymity provided for savings accounts also applies to the cash transactions — the payments and withdrawals — relating to them, as the Austrian Government itself acknowledges. Where these transactions are below the minimum threshold laid down, there is, in fact, no obligation to identify the customer who is carrying out the transactions by presenting a savings passbook payable to bearer, even if that customer is not the named account holder.[98] But it is Article 3(2) — rather than Article 3(1) — of the Directive that seems not to have been properly transposed in relation to these transactions. The Commission is not, however, seeking a declaration that Article 3(2) of the Directive has been infringed, since neither the reasoned opinion nor the application refer to that provision. In fact, for the reasons set out above, Article 3(1) can refer only to the *opening* of savings accounts — interpreted as a means of establishing business relations — and not

96 — Though it would have been in their interest to do so.

97 — Particularly in view of the settled case-law according to which a directive has, as a rule, to be transposed by means of national provisions of a binding nature which are not subject to amendment and which have the same legal force as all other national provisions to be amended or supplemented. See, among many, Case C-207/96 *Commission* v *Italy* [1997] ECR I-6869, paragraph 26.

98 — Paragraph 32(2) of the BWG appears to permit payments into savings accounts to be made even if the passbook is not presented.

the individual 'transactions' which are covered by Article 3(2). Therefore, the Commission's second complaint must be rejected, as being without proper legal basis.

85. However, it seems to me probable — as the Commission claims — that the system of anonymity provided for savings accounts undermines the effectiveness of Article 3(5) of the Directive, according to which, in the event of doubt as to whether the customers are acting on their own behalf, or where it is certain that they are not acting on their own behalf, 'the credit or financial institutions shall take reasonable measures to obtain information as to the real identity of the persons on whose behalf those customers are acting'. In point of fact, if the customer is allowed to remain anonymous, the banks have no way of knowing whether or not he is acting on his own behalf. In that context, I would go so far as to say that customer anonymity is inimical *per se* to the practical effectiveness of Article 3(5). In those terms, it seems significant that, in transposing the provision in question, Paragraph 40(2) of the BWG made specific provision for a derogation when savings accounts are opened.

86. Consequently, the Commission has also demonstrated that the Austrian Government has infringed Article 3(5) of the Directive.

— The justification advanced by the Austrian Government

87. As we have seen, the Austrian Government advances three arguments to justify the fact that, by retaining the system of anonymous savings accounts and anonymous transactions relating to them, it failed to comply with Article 3(1) and (5) of the Directive. It maintains, first of all, that the savings accounts cannot be used for money laundering; secondly, that those accounts respond to a need for security and discretion of a large section of the resident population; and, thirdly, that to apply to savings accounts the provisions on compulsory identification would not be proportionate in the light of the aim of the Directive.

88. None of the arguments in defence advanced by the Austrian Government are based on the possible restrictions on the right of establishment permitted under the first paragraph of Article 55 of the EC Treaty (now the first paragraph of Article 45 EC) on the exercise of official authority and Article 56(1) of the EC Treaty (now, after amendment, Article 46(1) EC) on grounds of public policy, public security or public health. Furthermore, since this is a harmonising directive, also based on the abovementioned Article 100a of the EEC Treaty, recourse to

possible grounds for justification based on Article 36 of the EC Treaty (now, after amendment, Article 30 EC) — which do not, in any event, have anything to do with the grounds for justification advanced by the Austrian Government in this case — would be incompatible with case-law which recognises neither the relevance nor the validity of such grounds. [99]

89. But there is another reason why the arguments of the Austrian Government are unconvincing. It cites the alleged unsuitability of anonymous savings accounts for use as a means of laundering dirty money and the fact that the Austrian people are accustomed and profoundly attached to anonymous accounts, [100] to justify keeping in place an *ad hoc* legal system that fails to comply with the programme of abolishing anonymity promoted by the Community legislature. That being so, the effect of the line of defence adopted by Austria is to deprive the money laundering directive of any effectiveness, since it opens up a chink that organised crime could use to its advantage and, in the final analysis, substitutes its own assessment of the risks of anonymous savings accounts for the view clearly expressed by the Council in the Directive. That is tantamount to calling into question the legality of the relevant provisions of the Directive itself, and — as I pointed out above — the defendant Government is not permitted to do that, in the current circumstances. I cannot overemphasise that, according to case-law, a Member State cannot raise the objection that failure to comply with a directive 'has had no adverse consequences for the functioning of the internal market or of that directive'. [101]

90. Finally, as regards the allegation that application of the Directive to savings accounts infringes the principle of proportionality, I would point out that, while it is clear that a Member State may cite justification for failing to fulfil an obligation under Community law only in so far as that justification is necessary and proportionate in relation to the objective pursued, that does not apply where the Commission accuses a Member State of failing to comply with an obligation of that nature. In that situation, the Commission has only to demonstrate that the infringement exists but does not have to prove that the obligation is proportionate in relation to the EC Treaty. Were that not the case, a Member State would basically be able to use the principle of proportionality to call into question the legal basis of a Community act at will in the context of infringement proceedings, and that cannot be allowed for the reasons set out above.

99 — That applies particularly to grounds for justification concerning the protection of health. See, in particular, Case 5/77 *Tedeschi* [1977] ECR 1555, paragraph 35; Case 247/84 *Motte* [1985] ECR 3887, paragraph 16 and, most recently, Case C-112/97 *Commission* v *Italy* [1999] ECR I-1821, paragraph 54.

100 — In that connection, I would point out that, on the basis of settled case-law, a Member State may not, in any event, rely on domestic problems to justify failing to fulfil obligations arising out of a directive. See, among many, Case 225/86 *Commission* v *Italy* [1988] ECR 2271, paragraph 10.

101 — Case C-263/96 *Commission* v *Belgium* [1997] ECR I-7453, paragraph 30.

The alleged infringement of the customer identification requirement in relation to the Austrian legislation on securities accounts

The Commission's complaints

91. The Commission then accuses Austria of failing properly to implement Article 3(1), (5) and (6) of the Directive in relation to the arrangements applicable to securities, because the Austrian Government required customer identification when a securities account was opened only as of 1 August 1996, and not as of 1 January 1994; and required customer identification for transactions from or to existing securities accounts only in respect of the acceptance and acquisition of securities destined for such accounts, according to the provisions of Paragraph 40(5) of the BWG.

92. The Commission sets out those complaints in its application, which reproduces the content of its reasoned opinion of 21 February 1997 word for word. However, the letter of formal notice of 14 February 1996 contained a general reference to the requirement that, on the one hand, 'anonymous accounts opened after 1 January 1994 should be subject to *automatic* and *retroactive* identification,[102] and, on the other, the identification requirement should cover every transaction relating to an anonymous account'.[103] It must be pointed out that, as of 1 August 1996 — that is to say after the Commission dispatched the letter of formal notice and before the reasoned opinion was issued — Austrian legislation on securities accounts was amended, with effect from that date, to require customer identification whenever securities accounts are opened and whenever transactions involving the acceptance and acquisition of securities are carried out.

93. In the application, the Commission explains that, in its view, the measures adopted by the Austrian Government during 1996 are not sufficient to guarantee compliance with the provisions of Article 3(1), (5) and (6) of the Directive in relation to securities accounts. Those provisions were transposed belatedly, and the abolition of anonymous securities accounts and the transactions relating to them was not given retroactive effect. Furthermore, restricting the customer identification requirement to just some of the transactions able to be carried out in relation to securities accounts in existence as at 1 August 1996 meant that those accounts could be used for money laundering, and that is clearly incompatible with the aim of the Directive.

102 — Commission letter of 14 February 1996, attached at annex 1 to the application, conclusions ('Schlussfolgerungen'), p. 5 (my emphasis).

103 — *Ibidem*.

The Austrian Government's arguments in defence

94. The Austrian Government acknowledges that it required customer identification where securities accounts are opened only with effect from 1 August 1996. It basically gives two reasons to justify this: the need to protect the legitimate expectations of economic operators who had opened securities accounts before that date and the need to prevent substantial capital flows deposited in such accounts being transferred to third countries.

95. In setting out the first reason, the Austrian Government emphasised that it would not be appropriate to extend the new system of customer identification retroactively to securities accounts opened before 1 August 1996 because that would have damaged the relationship of trust established between customers and the credit or financial institutions with which they had deposited their securities. That relationship of trust merits protection because it affects individuals' assets, their existing contractual relationship with the bank and, in the final analysis, the system of ownership of securities. [104] Against that backdrop, the solution of gradually abolishing anonymity had the advantage of avoiding over-abrupt changes to the system of securities accounts and allowing customers to take their time in selecting different forms of investment.

96. In setting out the second reason, the Austrian Government highlights the serious risks that would result for the Austrian and, more generally, the European Union's economy if there were an 'uncontrolled withdrawal' ('ungeordneter Aussteigen') [105] from Austria's credit and financial markets of a substantial volume of capital, which could be diverted to other tax havens if anonymity were suddenly abolished. It is, in particular, possible that an exodus of that nature might trigger an excessive rise in interest rates, with serious repercussions for Austria's budgetary stability and — in the longer term — the whole of the European financial system.

97. The Austrian Government also makes the point that, of the transactions able to be carried out in relation to anonymous securities accounts in existence at 1 August 1996, only the acceptance and acquisition of securities were subject to the identification requirement because these were the only transactions that might be of interest to money launderers. In other respects, anonymous securities accounts do not lend themselves to criminal activity, because, after the abovementioned date, no new

104 — Defence, at paragraph III.B.5.

105 — *Ibidem*, p. 27.

security could be deposited in them anonymously, [106] and the administration of the existing funds was limited to the life of the stocks or shares purchased on the capital market, which is not usually extended by the issuing bodies. [107]

Opinion of the Advocate General

98. The method of analysis employed in relation to the earlier complaints can also be applied to this new series of complaints. It is necessary, in this context, to ascertain the scope of the complaints the Commission addresses to Austria, whether they are well founded and whether, and to what extent, the justification put forward by the defendant government can be upheld.

— Scope of the complaints relating to securities accounts

99. For the reasons set out above, I consider that the criticisms the Commission directs at Austria apply only as of 1 January 1995, and cannot relate to the failure to comply with Article 3(1) and (5) of the Directive. In terms of the substance, the situation is clear: the Commission is basically criticising Austria for failing to abolish anonymous securities accounts as of 1 January 1995, and not requiring customer identification for transactions relating to existing securities accounts other than the acceptance and acquisition of new securities.

— Admissibility and validity of the complaints concerning securities accounts

100. I consider that both these complaints by the Commission are admissible. It is true that they were explicitly set out for the first time in the reasoned opinion and that, therefore, formally speaking at least, they do not appear to mirror the complaints contained in the letter of formal notice of 14 February 1996, which simply called for the abolition of anonymous securities accounts and the transactions relating to them; but it is also true that, in the letter of formal notice, the Commission made the point that securities accounts should 'be subject to automatic and retroactive identification', thereby clearly implying that the Austrian authorities ought to have transposed that element of the Directive from the date — 1 January 1995 — they were obliged to comply with the requirements of the Directive. However, although the Austrian Government did transpose that element of the Directive, it did so belatedly and, moreover, with effect only from 1 January 1996. In those circumstances, by rewording the complaints in the rea-

106 — Defence, at paragraph III.B.3. Rejoinder, at paragraph 2.4.1.

107 — Rejoinder, at paragraph 2.4.1, p. 15.

soned opinion the Commission did no more than adjust the terminology to reflect the new position. In this case, we can therefore speak in terms of a *lessening* of the complaints, in the sense that the Commission is asking the Court to find that there was a failure to fulfil an obligation for the period between 1 January 1995 and 1 August 1996 and not — as in the case of the obligation to prohibit money laundering — a change in the *actual substance* of the complaint.

101. That being so, I consider to be well founded — with reference to Article 3(1) and (5) of the Directive — the first of the two complaints, concerning the date from which the obligation to identify customers when securities accounts are opened applies. In that connection, it is sufficient to record that, at the date set in the reasoned opinion, Austria had not abolished the system of anonymity for securities accounts with effect from 1 January 1995, but only from a later date, thereby creating, to its own advantage, an exemption not provided for in the Directive for the period between 1 January 1995 and 1 August 1996. The Court, moreover, has long since ruled that: 'Although the provisions of a directive are no less binding on the Member States to which they are addressed than the provisions of any other rule of Community law, such an effect attaches *a fortiori* to the provisions relating to the periods allowed for implementing the measures prescribed, in particular since the existence of differences in the rules applied in the Member States after these periods have expired might result in discrimination.' [108]

108 — Case 52/75 *Commission* v *Italy* [1976] ECR 277, paragraph 10. See also Case 79/72 *Commission* v *Italy* [1973] ECR 667, paragraph 7.

102. For the same reasons that I explained when analysing the earlier complaints, I do not, however, consider the Commission's second complaint concerning transactions relating to securities accounts to be well founded, in the light of Article 3(1) of the Directive.

— The arguments in defence relied on by the Austrian Government

103. The Austrian Government basically advances two arguments to justify its belated introduction of the customer identification requirement in relation to securities accounts: the protection of legitimate expectations and the danger of an exodus of capital to third countries.

104. Neither of those grounds for justification is among the grounds permitted by the EC Treaty as possible restrictions on the right of establishment or — in terms of the internal market — the free movement of goods. In reality, the reasons the Austrian Government cites in defence of its decision not to abolish anonymous securities accounts before 1 August 1996 relate to domestic difficulties — respect for the needs of savers — which would make it difficult to apply the new rules on securities accounts retroactively. But these problems

do not match up with the concept — evolved in the Court's case-law — of it being 'absolutely impossible' [109] to comply with a Community obligation, the only circumstance that could justify a Member State's failure to fulfil an obligation. They cannot therefore be held to constitute justification.

105. In particular, I find the Austrian Government's argument in defence concerning the protection of legitimate expectations to be inconsistent. In the first place, according to case-law, [110] the principle may be relied on by economic operators whose interests are damaged by Community acts, but, as a rule at least, not by Member States criticised for failing to fulfil obligations arising out of such acts, with the sole exception of the quite specific case of the recovery of unduly paid aid, [111] which does not arise in this case. Secondly, the decision in *Tögel*, [112] to which Austria refers in the rejoinder, does not actually run counter to the abovementioned case-law since it emphasises that where a directive has not been transposed by the requisite time-limit, the national court must, as far as possible, ensure that the national law is construed in a manner compatible with the directive, [113] in accordance with settled case-law. [114] I would add that in this case I very much doubt whether the need of savers to maintain anonymous securities accounts can be considered an interest worth protecting, particularly in the light of the possible criminal implications that anonymous bank accounts are *objectively* likely to encourage. Those same savers, moreover, knew that, as of 1 January 1995, Austria was obliged to require customer identification for *all* business relations established from that date.

106. I consider to be particularly unacceptable the position the Austrian Government takes up in relation to the possible exodus of capital to hypothetical tax havens that could be triggered as a result of the retroactive abolition of securities accounts. As the Commission points out, [115] without contradiction, it is hard to understand what economic reasons honest savers could have for channelling their capital out of Austria to other destinations, if the system of

109 — Case 52/84 *Commission* v *Belgium* [1986] ECR 89, paragraph 16. See also Case 213/85 *Commission* v *Netherlands* [1988] ECR 281, paragraph 22.

110 — See, among many, Case 120/86 *Mulder* [1988] ECR 2321, paragraph 27, Joined Cases C-133/93, C-300/93 and C-362/93 *Crispoltini and Others* [1994] ECR I-4863, paragraph 57 and Case C-68/95 *T. Port* [1996] ECR I-6065, paragraph 40.

111 — See, among many, Joined Cases 205/82 to 215/82 *Deutsche Milchkontor and Others* [1983] ECR 2633, paragraph 33 and Case C-24/95 *Alcan Deutschland* [1997] ECR I-1591, paragraph 38.

112 — Case C-76/97 [1998] ECR I-5357. The sector in question concerns appeals procedures for public works and supply contracts.

113 — *Ibidem*, paragraph 28.

114 — See, in particular, Case C-106/89 *Marleasing* [1990] ECR I-4135, paragraph 8.

115 — Reply, at paragraph 42.

anonymous securities accounts itself were abolished, but the rates of return on capital invested in securities remained unchanged. If, however, Austria is alluding to the fact that any dirty money 'parked' in anonymous accounts could rapidly disappear if the system of anonymity were abolished with retroactive effect, that is all the more reason why the difficulties cited by the Austrian Government may not in any event be taken into consideration.

Costs

107. In accordance with the first subparagraph of Article 69(3) of the Rules of Procedure, where each party succeeds on some and fails on other heads, the Court may order that the costs be shared or that the parties bear their own costs. Since I am proposing to uphold the Commission's application in part only, I consider that the parties should bear their own costs.

Conclusion

108. In the light of the foregoing I propose that the Court declare that:

(1) The Court of Justice is not competent to rule on the alleged failures of the Republic of Austria to comply with Community law in relation to the period before its accession to the European Union.

(2) The plea of illegality entered by the Austrian Government is inadmissible.

(3) The Republic of Austria has failed to fulfil its obligations under Article 3(1) and (5) of Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering by:

— failing to provide, with effect from 1 January 1995, for the identification of customers resident in Austria whenever savings accounts are opened in ATS;

— providing for customer identification whenever securities accounts are opened only with effect from 1 August 1996.

(4) For the rest, the application is rejected.

(5) The parties must bear their own costs.