Reports of Cases

OPINION OF ADVOCATE GENERAL
CRUZ VILLALÓN
delivered on 21 December 2011 [1]

Case C-336/09 P

Republic of Poland
v

European Commission

(Appeal — Agriculture — Common organisation of the markets — Transitional measures adopted in view of the accession of new Member States — Regulation (EC) No 60/2004 — Action for annulment — Time-limit — Starting point — Out of time — Right of action of new Member States in respect of acts adopted between the date of signature and date of entry into force of the Accession Treaty — Union based on the rule of law — Values of the Union — Rule of law — Equality of Member States before the treaties)

1. Four years after the judgment delivered on 23 October 2007 in *Poland* v *Council*,[2] regarding an action for annulment brought by the Republic of Poland against a decision of the Council of the European Union which the Court dismissed on the substance without examining the plea of inadmissibility raised by the Council alleging that the action was out of time[3], the Court must rule on an appeal brought against an order by which the General Court of the European Union declared inadmissible for being out of time, and therefore without examining the substance of the case, an action for annulment brought in a very similar context by the Republic of Poland this time against a European Commission Regulation.[4] In so doing, the Republic of Poland invites the Court to examine, in the context of an appeal, the arguments that it put before the General Court for the purpose of establishing that its application could not be declared inadmissible for being out of time, in terms which were thoroughly examined by Advocate General Poiares Maduro in his Opinion in *Poland* v *Council*. His analysis, with which I agree to a large extent, will allow me to concentrate my analysis on other aspects.

I – Background to the dispute, procedure before the General Court and the contested order

2. By its order of 10 June 2009 in Case T-258/04 *Poland* v *Commission* (now the General Court), not published in the ECR,[5] the Court of First Instance of the European Communities dismissed as inadmissible, for being out of time, the Republic of Poland's action for annulment of Articles 5, 6(1) to (3), 7(1) and 8(2)(a) of Commission Regulation (EC) No 60/2004 of 14 January 2004 laying down transitional measures in the sugar sector by reason of the accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia to the European Union.[6]

1 — Original language: French.

2 — Case C-273/04 *Poland* v *Council* [2007] ECR I-8925

3 — Paragraph 33.

4 — At the same time, an appeal was brought before the Court in a similar case (Case C-335/09 P *Poland* v *Commission*), pending before the Court, against a judgment of the General Court which in the same way and on the same grounds dismissed an action by the Republic of Poland against another Commission Regulation as in part inadmissible for being out of time.

5 — 'The contested order'.

6 — OJ 2004 L 9, p. 8.

3. In that case, the General Court found that Regulation No 60/2004 had been published in the *Official Journal of the European Union* on 15 January 2004 and that the time-limit for bringing an action against that regulation consequently expired on 8 April 2004. Since the Republic of Poland's application was lodged at the Registry of the General Court on 28 June 2004, the General Court declared that it was brought out of time. [7]

4. The General Court upheld the plea of inadmissibility raised by the Commission by strictly applying the provisions of the fifth paragraph of Article 230 EC. It found that the action against Regulation No 60/2004 had been brought after the two month time-limit laid down by that provision, which is calculated from its publication, and concluded that the Republic of Poland was out of time. [8] while also going on to reject the various arguments put forward by the Republic of Poland.

5. The arguments alleging that the regulation had not been published in the twenty official languages of the European Union, [9] that its entry into force was conditional upon that of the Accession Treaty [10] and that it was addressed to all Member States, including future Member States [11] were thus rejected as incapable of calling into question that conclusion.

6. The General Court then sought to show that the strict application of procedural time-limits from the date of publication of Regulation No 60/2004 did not infringe the Republic of Poland's right to effective judicial protection. [12]

7. In the course of examining the admissibility of the action, the General Court made a point of recalling that the strict application of Community rules on procedural time-limits may not be derogated from save where the circumstances are quite exceptional, in the sense of being unforeseeable or amounting to force majeure. [13] However, it held on that point that the Republic of Poland had not explained how the circumstances in question were quite exceptional in regard to it, so as to justify derogation from the principle of strict application of procedural time-limits, thereby prejudicing the principle of legal certainty.

8. By its appeal, the Republic of Poland asks the Court to set aside the contested order, to give final judgment on the application and, accordingly, to declare its action against Regulation (EC) No 60/2004 admissible and to uphold its arguments on the substance put forward at first instance.

II – Procedure before the Court and forms of order sought

9. The Republic of Poland lodged the present appeal at the Registry of the Court on 24 August 2009. In its written pleadings, it asked that its appeal be examined by the Grand Chamber.

10. Since no request to that effect was made by the parties, the Court decided not to hold a hearing.

11. The Republic of Poland contends that the Court should:

— set aside the contested order;

— annul Articles 5, 6(1) to (3), 7(1) and 8(2)(a) of Commission Regulation (EC) No 60/2004; and

— order the Commission to pay the costs.

7 — Paragraphs 42 to 46 of the contested order.
8 — Paragraphs 46, 70 and 71 of the contested order.
9 — Paragraphs 48 to 50 of the contested order.
10 — Paragraphs 51 and 52 of the contested order.
11 — Paragraphs 53 to 56 of the contested order.
12 — Paragraphs 57 to 70 of the contested order.
13 — Paragraph 55 of the contested order.

12. The Commission claims that the Court should:

— dismiss the appeal as unfounded; and

— order the Republic of Poland to pay the costs.

III – The appeal

A – *Arguments of the Republic of Poland*

13. In support of its appeal, the Republic of Poland raises five grounds of appeal criticising the General Court's examination of the admissibility of its action against Regulation No 60/2004. [14]

14. First, the Republic of Poland criticises the General Court for holding, contrary to Council Regulation No 1 of 15 April 1958 determining the languages to be used by the European Economic Community, [15] that the time-limit for bringing an action against Regulation No 60/2004 had begun to run on the day of its publication in the official languages of the European Community of fifteen, and therefore before its publication in all the official languages of the enlarged Community.

15. Secondly, the Republic of Poland claims that the General Court was wrong to hold that it could, in advance of its accession to the European Union, effectively bring an action against Regulation No 60/2004 not on the basis of the second paragraph of Article 230 EC laying down the unconditional right of the Member States, inter alia, to bring proceedings, but on that of the fourth paragraph of Article 230 EC, that is to say on the same basis and under the same conditions as those laid down for natural and legal persons. It submits, first and in particular, that Regulation No 60/2004, on the date of its publication on 15 January 2004, only imposed obligations on Member States, which the Republic of Poland was not yet as a matter of principle, obligations which were moreover future obligations and only applicable from the date of entry into force of the Accession Treaty. Secondly, and in the alternative, the Republic of Poland considers that it did not fulfil, at the time of publication, the specific conditions governing the admissibility of actions laid down by the fourth paragraph Article 230 EC.

16. Thirdly, the Republic of Poland submits that, by depriving it of the right to have Regulation No 60/2004 judicially reviewed when that regulation was addressed to it as a Member State, the General Court infringed the principle of a Community based on the rule of law and its right to effective judicial protection. It adds that the strict application of rules governing time-limits for bringing proceedings cannot lead to inequality between the different Member States and in particular so far as concerns the judicial protection of the old and new Member States.

17. Fourthly, the Republic of Poland considers that, by depriving it of the right to bring proceedings against Regulation No 60/2004, which unlawfully altered the conditions of its accession to the European Union and failed to observe the balance between the rights and obligations resulting from its membership of the Union, the General Court infringed the principles of solidarity and of good faith.

18. Fifthly and finally, the Republic of Poland claims that the General Court committed a procedural error in failing to examine the arguments concerning the infringement of the principles of solidarity and of good faith and in failing to give an adequate statement of reasons in the contested decision.

B – *Analysis*

19. Almost all of the five grounds of appeal raised by the Republic of Poland raise questions of undeniable importance, in the specific and always sensitive context of the progressive enlargement of the Union to other States forming part of Europe. The Republic of Poland put forward its grounds of appeal in the order followed above and it is in principle in that order the Court must usually deal with them.

14 — Paragraphs 40 to 71 of the contested order.

15 — English Special Edition 1952-1958 (I), p. 59.

20. There is however a clear hierarchy between those different grounds of appeal. The third ground, in particular, must in my view be given priority, since it raises questions touching on the foundations of the European Union, on the values, in particular that of the rule of law on which it is inter alia founded [16], on the principle of a Union based on the rule of law [17] in which the acts of the institutions are subject to the 'law', [18] and the structural principle of the European Union that is the equality of Member States before the Treaties, [19] now enshrined in Article 4(2) TEU. [20] It should be pointed out however that, inevitably, the arguments put forward by the Republic of Poland in its second ground of appeal, which raises the question of whether the specific provisions of the fourth paragraph of Article 230 EC are applicable in the present case to an 'impending' Member State, will be indirectly dealt with in the course of that examination.

21. It is important however, before carrying out that two-fold examination, to recall, as the General Court did in the contested order, the case-law of the Court of Justice according to which, first, the strict application of Community rules on procedural time-limits meets the requirement of legal certainty and the need to avoid any discrimination or any arbitrary treatment in the administration of justice [21] and, secondly, they may not be derogated from save where the circumstances are quite exceptional, in the sense of being unforeseeable or amounting to force majeure, in accordance with the second paragraph of Article 45 of the Statute of the Court of Justice of the European Union, or also of an excusable error. [22] Were this case to be resolved by strictly applying the provisions of the fifth paragraph of Article 230 EC, it is clear, without going into detail, that the action would be declared inadmissible. However, the third ground of appeal raised by the Republic of Poland presents us with the issue whether, in the very specific circumstances of the present case, the Court should give a *secundum legem* interpretation, or even a *praeter legem* interpretation, to European Union law, which may lead to a different solution.

22. By its third ground of appeal the Republic of Poland claims more specifically that the strict application of European Union rules governing time-limits for bringing proceedings cannot lead to inequality being accepted in the judicial protection of 'old' and 'new' Member States. The Member States cannot be deprived of their right to bring proceedings under the second paragraph of Article 230 EC, which defines the Member States' *locus standi* and is the expression of their natural right to have their economic and social interests protected by the European Union courts, against a legal act which is addressed to them. Consequently the European Union institutions cannot, by choosing the date of publication of an act addressed to all the Member States, deprive new Member States of their right to judicial protection. Referring in that connection to point 50 of the Opinion of Advocate General Poiares Maduro in *Poland* v *Council*, it submits that, by dismissing its application as

16 — To use the formulation employed in Article 2 TEU.

17 — In accordance with the terminology now adopted by the Court; See Case C-550/09 *E and F* [2010] ECR I-6213, paragraph 44.

18 — To the basic constitutional charter, the Treaties, to use the expression from Case 294/83 *Les Verts* v *Parliament* [1986] ECR 1339, paragraph 23.

19 — Although the Treaties did not expressly refer to the principle of the equality of Member States until the supervening Lisbon Treaty, the Court nevertheless recognised that it was in some way inherent in the Treaties; See to that effect, Zemanek J., 'The Principle of Equality', in Kaddous C. et Auer A., *Les principes fondamentaux de la Constitution européenne*, Helbing & Lichtenhahn, LGDJ, 2006, p. 237; Lenaerts K and Van Nuffel P., 'Advanced Integration and the Principle of Equality of Member States within the European Union', in Kaddous C. et Auer A., op. cit., p. 245, especially p. 249. See Case C-39/72 *Commission* v *Italy* [1973] ECR 101, paragraph 24, and Case C-128/78 *Commission* v *United Kingdom* [1979] ECR 419, paragraph 12. Also see, from an entirely different angle, Case C-231/78 *Commission* v *United Kingdom* [1979] ECR 1447, paragraph 9.

20 — That provision reproduces, in that connection, Article I-5 of the draft Treaty establishing a Constitution for Europe, which had adopted the expression from the case-law of the principle referred to above; See, in that regard, Piris J.-C., *The Lisbon Treaty — A Legal and Political Analysis*, Cambridge University Press, 2010, p. 83 and 84; Blanquet M., Article I-5, in Burgorgue-Larsen L, Levade A. et Picod F. (Eds.), *Traité établissant une Constitution pour l'Europe*, Tome 1, Bruylant, 2007, p. 96.

21 — See, inter alia, Case 209/83 *Ferriera Valsabbia* v *Commission* [1984] ECR 3089, paragraph 14; order in Case C-59/91 *France* v *Commission* [1992] ECR I-525, paragraph 8; order in Case C-239/97 *Ireland* v *Commission* [1998] ECR I-2655, paragraphs 7 to 9; order in Case C-406/01 *Germany* v *Parliament and Council* [2002] ECR I-4561, paragraph 20; and order in Case C-242/07 P *Belgium* v *Commission* [2007] ECR I-9757, paragraph 16.

22 — See, inter alia, Case 117/78 *Orlandi* v *Commission* [1979] ECR 1613, paragraphs 10 and 11; Case C-195/91 *Bayer* v *Commission* [1994] ECR I-5619, paragraph 26; order in Case C-163/07 P *Diy-Mar Insaat Sanayi ve Ticaret and Akar* v *Commission* [2007] ECR I-10125, paragraph 36; order in Case C-112/09 P *SGAE* v *Commission* [2010] ECR I-351, paragraph 20; and order in Case C-73/10 P *Internationale Fruchtimport Gesellschaft Weichert* v *Commission* [2010] ECR I-11535, paragraph 42.

inadmissible, the General Court clearly infringed the principle of the rule of law and the principle of the right to effective judicial protection. The Republic of Poland adds that, contrary to the General Court's ruling at paragraph 55 of the contested order, the situation at issue in the present case is a clear example of exceptional circumstances.

23. This case therefore involves secondary legislation produced by the European Union between the date of signature and the date of entry into force of an Accession Treaty, adopted to meet the requirements of the accession and therefore applicable to the new Member State or the new Member States who have signed the treaty.

24. To respond to the arguments of principle raised by the Republic of Poland we must step back a little, which the following very general remarks endeavour to do.

25. It must be emphasised, first, that the European Union is — which is one of its particular features in comparison with other subjects of international law — a Union of States — and of peoples — which is continually legislating, an activity which scarcely ever stops and which has reached an intensity hitherto unexperienced in an international organisation in the most generic sense of the term. It is no coincidence that the legal order that is the European Union quickly gained the characteristics of autonomy, primacy and effectiveness that it is known to have. [23]

26. It must be emphasised, secondly, that the progressive enlargement of the Union, initially formed by six Member States, is not unexpected but on the contrary is inherent in its aim. The incorporation of a new European State in the European Union is, from that point of view, an increasingly complex process, directly related to the intensity of integration and the increasing volume of its acquis. [24]

27. It follows that the European Union legal order scarcely ever stops functioning and it in particular does not stop legislating during the enlargement process. [25] It is that particular feature that gives rise to the problem posed by acts adopted by the European Union between the date of signature of the Treaties and Acts of Accession and their date of entry into force, whose adoption may be conditional upon the enlargement and which are, therefore, published before the accession has taken place, without however necessarily being in force before that date. Even though the Treaties and Acts of Accession may themselves prescribe, [26] ex ante, the content and effects of such legislation, it is however relatively clear that the possibility to do so is, clearly, quite limited.

23 — See Barents R, *The Autonomy of Community Law*, Kluwer, 2004; Simon D., 'Les fondements de l'autonomie du droit communautaire', in *Droit international et droit communautaire, Perspective actuelles*, 33rd Colloquiam of the Société française pour le droit international, Pedone, 2000, p. 207.

24 — There is no definition of the acquis, despite the fact that the concept is used in the Treaties themselves. In the Joint Declaration on Common Foreign and Security Policy, adopted by the plenipotentiaries and annexed to the Final Act 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 (OJ 1994 C 241, p. 21 and OJ 1995 L 1, p. 1), the Community acquis is, however, defined as 'the rights and obligations attaching to the Union and its institutional framework'.

25 — It is a rather specific problem under the law of the Treaties, which is clearly distinguished in particular from the wider issue of the provisional application of the Treaties; See, in that regard, Article 218(5) TFEU (former Article 300(2) EC) which provides the possibility for the Council, on a proposal by the negotiator, to adopt a decision on the provisional application of a treaty before its entry into force. On that subject, see for example Geslin A., *La mise en application provisoire des traités*, Pedone, 2005; Verwey D., *The European Community, the European Union and the International Law of Treaties*, T.M.C. Aser Press, 2004, p. 124 et seq.; Mathy D., 'Commentaires de l'article 24 des conventions de Vienne de 1969 et 1986', in Corten O. and Klein P., *La Convention de Vienne sur le droit des traités*, Bruylant, 2006, Vol. 1, p. 1045; Lefeber R., 'The provisional Application of Treaties', in Klabbers J. and Lefeber R., *Essays on the Law of Treaties - A Collection of Essays in Honour of Bert Vierdag*, Nijhoff, 1998, p. 81; Vignes D., *Une notion ambiguë: la mise en application provisoire des traités AFDI*, 1972, p. 181.

26 — That eventuality is not rare in European Union law. It could already be found in provisions equivalent to those of Article 2(3) of the 2004 Accession Treaty, on which Regulation No 60/2004 is in particular based, in the 1994 Accession Treaties (Republic of Austria, Republic of Finland, Kingdom of Sweden; Article 2(3)) and the 1985 Accession Treaty (Kingdom of Spain and Portuguese Republic; Article 2(3)). The 2005 Accession Treaty (Republic of Bulgaria and Romania; Article 4(3)), contained the same type of provision. Also see the Decision of the Council of the European Communities of 11 June 1985 on the accession of the Kingdom of Spain and the Portuguese Republic to the European Coal and Steel Community (OJ 1985 L 302, p. 5) However, the 1972 Accession Treaties (United Kingdom of Great Britain and Northern Ireland) and 1979 Accession Treaty (Republic of Greece) did not contain equivalent provisions. Without going into detail here, it is important to point out that the Court has also had to deal with mechanisms which, although different, still meet the same concerns; see, inter alia, Case C-259/95 *Parliament* v *Council* [1997] ECR I-5303. Provisions of that nature are therefore the result of the rich practice of elaborating and implementing accession agreements built up by the European Union institutions, whatever the reasons for inserting them in Accession Treaties. Their principal objective is to allow the European Union institutions to take measures, exhaustively listed, necessary for the accession but which were not able to be adopted before the signature of the Treaty and the Acts of Accession and thereby incorporate the Community acquis.

28. That phenomenon means that we are therefore faced with secondary legislation adopted by the European Union which applies as much to the old as the new Member States, without the new Member States having 'participated' in its elaboration. [27]

29. The powers granted to the European Union institutions by provisions such as Article 2(3) of the Accession Treaty to adopt acts of secondary legislation between the date of signature of the treaty and that of its entry into force gives rise to unequal treatment between two groups of Member States, the first made up of States who are already members on the date on which those acts were adopted and who have therefore participated in their elaboration, and the second made up of States who are not yet members and who were therefore unable to participate in their elaboration. [28]

30. It is important, in that regard, to stress that the idea of a Union based on the rule of law, hereinafter the value of the rule of law, requires not only respect for fundamental rights and that the institutions be subject to judicial review of the compatibility of their acts with the constitutional charter, the Treaties, [29] and general principles of law, [30] but also that secondary legislation adopted by the European Union be created democratically, which implies equal participation of all the Member States, [31] be it directly, through Members of the European Parliament or through the representatives of the Member States at the European Council or Council, [32] or indirectly in the context of a delegation of Council powers [33] or, now, of Parliament and Council powers. [34]

27 — The first characteristic of secondary legislation thereby created is that the new Member States cannot 'participate' in its elaboration, even though they are the principal addressees. Admittedly, Acts of Accession have always taken great care to establish special procedures for the adoption of certain decisions and other measures to be taken during the period preceding the accession. The existence of those procedures, which in substance merely confer upon States that are candidates for accession the right to be consulted, does not mean that they 'participate' in the adoption of measures which moreover do not formally form part of the Community acquis. See for the present case the 'Information and consultation procedure for the adoption of certain decisions and other measures to be taken during the period preceding accession', annexed to the 2003 Acts of Accession (OJ 2003 L 236, p. 987).

28 — It may be observed, in that regard, that in T-257/04 *Poland* v *Commission* [2009] ECR II-1545 paragraph 235, the General Court found that the Republic of Poland had only participated as an observer in the adoption of Commission Regulation (EC) No 1972/2003 of 10 November 2003 on transitional measures to be adopted in respect of trade in agricultural products on account of the accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia (OJ 2003 L 293, p. 3).

29 — To recall one of the criteria of a Community then Union based on the rule of law repeatedly reiterated by the Court since its judgment in *Les Verts* v *Parliament*, paragraph 23. Also see Case C-15/00 *Commission* v *EIB* [2003] ECR I-7281, paragraph 75; Case C-229/05 P *PKK and KNK* v *Council* [2007] ECR I-439, paragraph 109; Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation* v *Council and Commission* [2008] ECR I-6531, paragraph 281; and *E and F*, paragraph 24.

30 — See, inter alia, Case C-50/00 P *Unión de Pequeños Agricultores* v *Council* [2002] I-6677, paragraph 38 and Case C-232/05 *Commission* v *France* [2006] ECR I-10071, paragraph 57.

31 — Article 4(2) TFEU.

32 — Also see, in that regard, point 6 and the note at the bottom of page 5 of the Opinion of Advocate General Poiares Maduro in Case C-411/06 *Commission* v *Parliament and Council* [2009] ECR I-7585.

33 — Under Article 202 EC. It is sufficient, in that connection, to refer to the texts which governed comitology; Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (OJ 1999 L 184, p. 23); See also the Agreement between the European Parliament and the Commission on procedures for implementing Council Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission, as amended by Decision 2006/512/EC (OJ 2008 C 143 p. 1 and corrigendum OJ 2008 C 154, p. 24). See, in particular, Piris, J.-C., 'La comitologie: vers l'épilogue d'une longue saga', in *Chemins d'Europe, Mélanges en l'honneur de Jean-Paul Jacqué*, Dalloz, 2010, p. 547; Jacqué J.-P., 'L'éternel retour — Réflexions sur la comitologie', in, *Mélanges en hommage à Jean-Victor Louis*, ULB, 2003, p. 211; Lenaerts K. et Verhoeven A., *Towards a Legal Framework for Executive Rule-Making in the EU? The Contribution of the New Comitology Decision*, CML Rev., 2000, p. 645.

34 — It should be noted that Article 291 TFEU completely transformed the Commission's exercise of its implementing powers; See, in that regard, Regulation (EU) No 182/2011 of the European Parliament and the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers (OJ 2011 L 55, p. 13), which repeals Decision 1999/468. See Craig P., *Delegated Acts, Implementing acts and the new Comitology Regulation*, European Law Review, 2011, No 5, p. 671; Edenharter A., *Die Komitologie nach dem Vertrag von Lissabon: Verschiebung der Einflussmöglichkeiten zugunsten der EU-Kommission*? Die öffentliche Verwaltung, 2011, p. 645.

31. It is however important to note that the non-participation of future Member States in the elaboration of acts adopted under those specific conditions may indeed, as is the case here, be justified by primary law, in the present case the Treaty and/or Acts of Accession. [35] Treaties and Acts of Accession may, certainly, legitimately provide for the creation of a right that applies to all the Member States, the new and the old, even if the new Member States were not able to 'participate' in its creation, since they consent to it by signing and ratifying those treaties and acts.

32. That can easily be accepted as following from 'the nature of things'. [36] However, the task of explaining the absence of a legal remedy allowing new Member States to have acts adopted in such conditions judicially reviewed is clearly more difficult.

33. It is clear that 'impending' Member States may not contribute, in any way, to the creation of European Union law, in particular through their representatives being present at the Council, until they are actually members of the European Union.

34. The inequality before the Treaties at issue in the present case is not however that lack of contribution but is the inequality that results from the fact that new Member States cannot initiate, under the same conditions as the old Member States, legal proceedings against acts thereby adopted whenever the time-limits for bringing proceedings against those acts have expired by the time they actually become Member States, merely because of their date of publication. [37]

35. In that regard, the starting point, now set out in Article 4(2) TEU, is that 'the Union shall respect the equality of the Member States before the Treaties' which precludes any unjustified inequality between the Member States. [38] It is not easy to justify the inequality resulting from the fact that a State, bound by an act like any other Member State, must simply accept that act, excluding any other course of action.

36. In a situation such as that in question in the present case, the old Member States have 'participated' in the elaboration of acts adopted in such conditions, in one way or another, and they can, as such, bring a direct action against those acts under the second paragraph of Article 230 EC, within the time-limit laid down in the fifth paragraph of Article 230 EC, as privileged applicants. The new Member States, on the other hand, which have necessarily been deprived of any 'participation' in the elaboration of those acts, are equally deprived of any opportunity to bring proceedings, as such, against those acts. In the past, the term 'ukase' was used to describe acts adopted and applied in such conditions. An act which must thus simply be obeyed must be considered structurally alien to the idea of a Union based on the rule of law. Although, broadly speaking, it is not possible to guarantee participation in the elaboration of an act to all the Member States to whom it is addressed, the fundamental idea of a Union based on the rule of law precludes all legal remedies against that act being excluded.

37. There is, admittedly, in principle no great difficulty in accepting that Treaties and Acts of Accession may expressly lay down specific provisions on legal remedies, even, within reasonable limits, restrictions on those legal remedies.

35 — It will simply be recalled that the Court has ruled that the protocols and annexes to an Act of Accession are provisions of primary law which, unless that act provides otherwise, may not be suspended, amended or repealed otherwise than in accordance with the procedures established for review of the original Treaties; See Case C-445/00 *Austria* v *Council* [2003] ECR I-8549, paragraph 62. For its part, the General Court has ruled that a provision of an Act of Accession may serve as the legal basis on which to adopt legislative measures; see Case T-70/99 *Alpharma* v *Council* [2002] ECR II-3495, paragraphs 106 and 107.

36 — As the Baron of Brède liked to say (Montesquieu, *De l'esprit des lois*, 1748).

37 — The right to bring proceedings, which is therefore dependent on a contingency (the date of publication of the act), is left to chance.

38 — It will be recalled here that the Court has already had the opportunity to reject the interpretation of the provisions of an Act of Accession proposed by a new Member State as leading 'to unacceptable consequences as regards the equality of the Member States in relation to certain rules essential for the proper functioning of the common market'; see *Commission* v *United Kingdom*, paragraph 9.

38. The idea of a Union based on the rule of law implies, however, that it is, at least in the absence of an express provision of primary law, not possible to deprive the new Member States to whom acts adopted between the date of signature and the date of entry into force of the Treaties and Acts establishing their accession are deprived of all legal remedies. It implies that those Member States have, in that capacity and once they have acquired that status, the possibility to contest, within reasonable time-limits, secondary legislation applying to the enlarged Union which they were not able to contribute to creating.

39. They must, furthermore, have that possibility as Member States, and not as mere legal persons [39] or as a third country.

40. First, it is in their capacity as 'impending' Member States that they are affected by those acts, and not as legal persons or third countries, and it is in their capacity as Member States and on condition that they actually became Member States that those acts apply to them. [40] The provisions of those acts concern them in their capacity as Member States and it is in that capacity that they must be able to initiate legal proceedings.

41. Secondly and moreover, new Member States must be able to have the right to bring proceedings as provided for in Article 230 EC under the same conditions as the other Member States, conditions which those other States benefit from while having 'participated' in the creation of that right, on an equal footing with the old Member States. In that regard, account must be taken of the fact that it is not by chance that the Member States, [41] like the Parliament, [42] the Council and the Commission [43] have, to adopt the expression used in academic commentary, the status of 'privileged' applicants.

42. Consequently, an interpretation of Article 230 EC which results in an action introduced by the Republic of Poland against Regulation No 60/2004 being declared inadmissible, merely because it was introduced after a period of two months following the date of its publication, must be considered contrary to the rule of law and to the principle of the equality of Member States before the Treaties. [44]

43. The Republic of Poland's arguments must therefore be accepted under its second and third grounds of appeal and, without it being necessary to examine the other pleas, the contested order be annulled.

44. It remains to examine the — not insignificant — question of which solutions are therefore open to the Court to rectify the impact on the rule of law, on the principle of the equality of Member States before the Treaties, and on the privileged right of appeal of a Member State in a situation such as that at issue in the present case, which is likely to result from an interpretation of the Treaties that precludes a new Member State from having a right of action against acts adopted and published between the dates of signature and of entry into force of the Treaty and the Act establishing its accession.

39 — As the Court held in relation to the *locus standi* of the European Parliament, the 'scheme' of the fourth paragraph of Article 230 EC would be 'inappropriate' to an action for annulment brought by a Member States; see Case C-70/88 *Parliament* v *Council* [1990] ECR I-2041, paragraph 14.

40 — On that point, by analogy, See Case C-477/98 *Eurostock* [2000] ECR I-10695, paragraph 58, and Case C-346/09 *Denkavit Nederland and Others* [2011] ECR I-5517, paragraphs 65 and 66.

41 — See, inter alia, Case 166/78 *Italy* v *Council* [1979] ECR 2575, paragraphs 5 and 6, and Case 131/86 *United Kingdom* v *Council* [1988] ECR 905, paragraph 6.

42 — Since the coming into force of the Treaty of Nice.

43 — See, inter alia, Case 45/86 *Commission* v *Council* [1987] ECR 1493, paragraph 3, and Case C-378/00 *Commission* v *Parliament and Council* [2003] I-937, paragraph 28).

44 — I add, in that regard, that the right of appeal that should be accorded to a new Member State in the situation of the Republic of Poland with regard to Regulation No 60/2004 is not qualified by Case C-299/05 *Commission* v *Parliament and Council* [2007] ECR I-8695, paragraphs 29 and 30, which the General Court applied in *Poland* v *Commission*, paragraphs 69 to 73, subject of the appeal in Case C-335/09 P *Poland* v *Commission*. Such a right of appeal cannot depend upon the necessarily contingent nature of any modifications that the institutions make to their acts.

45. According to Advocate General Poiares Maduro's Opinion in *Poland* v *Council*,[45] two possible approaches may be adopted, the first *praeter legem* and the other *secundum legem*.

46. While recognising that the Court may explore the first approach, in line with Advocate General Poiares Maduro's Opinion in *Poland* v *Council*,[46] I am however in favour of the second approach of an interpretation based on the spirit and system of the Treaties, in line with the judgments by which the Court established the Parliament's capacity to have proceedings brought against it[47] and to bring proceedings.[48]

47. It will be recalled that in *Les Verts* v *Parliament*, the Court was faced with the question whether an action for annulment under Article 173 of the EEC Treaty could be brought against acts adopted by the Parliament,[49] notwithstanding the fact that that provision referred to, at that time, only acts of the Council and of the Commission.

48. Invoking the idea of a Community based on the rule of law and regarding the Treaties as a 'constitutional charter', the Court held that an interpretation of Article 173 of the Treaty which excluded measures adopted by the Parliament in the context of the Treaty from those which could be contested would lead to a result contrary both to the spirit of the Treaty, as expressed in Article 164 of the EEC Treaty, and to its system,[50] since, in particular, such acts could encroach on the powers of the Member States or of the other institutions, or exceed the limits which had been set to the Parliament's powers, without it being possible to refer them for review by the Court. It concluded, following the Opinion of Advocate General Mancini on that point,[51] that actions for annulment brought against acts of the Parliament were admissible, in so far as the acts were intended to have legal effects vis-à-vis third parties.

49. Similarly, as Advocate General Poiares Maduro recalled in point 27 of his Opinion in *Poland* v *Council*,[52] notwithstanding the fact that the Parliament did not have the right to bring an action for annulment under Article 173 of the EEC Treaty or Article 146 of the EAEC Treaty, the Court, considering that the task conferred upon it by Article 164 of the EEC Treaty required it to maintain the institutional balance created by the Treaty and, consequently, to review the observance of the European Parliament's prerogatives, held, subject to conditions,[53] that actions for annulment brought by that institution against an act of the Council or Commission are admissible, thereby expanding its earlier case-law.[54] The Court accordingly held that the 'procedural gap' consisting of the lack of any provision giving the Parliament the right to bring proceedings could not 'prevail over the fundamental interest in the maintenance and observance of the institutional balance'.[55]

50. In those two cases, the Court therefore favoured a *praeter legem* interpretation of the Treaties, since there was no other way to guarantee effective judicial protection, a key element of a Union based on the rule of law, judicial protection of any person in respect of acts of the Parliament intended to have legal effects vis-à-vis that person in the first case, and the right of the Parliament to bring proceedings in respect of the acts of other institutions infringing its prerogatives and therefore the institutional balance in the second case.

45 — Points 54 to 60.

46 — See point 59. Since the new Member State is only affected by the Community act subject to and from the entry into force of the Treaty and Act of Accession, the time-limit for bringing proceedings, laid down by the fifth paragraph of Article 230 EC, cannot begin before the Treaty and Act enter into force.

47 — *Les Verts* v *Parliament*, paragraphs 23 to 26.

48 — Case C-70/88 *Parliament* v *Council* [1990] ECR I-2041, paragraphs 11 to 27.

49 — Former Article 230 EC, now Article 263 TFEU.

50 — Former Article 220 EC, provision now reproduced in Article 19 TEU.

51 — See points 6 and 7 of the Opinion in *Les Verts* v *Parliament*.

52 — Point 55.

53 — The action was only inadmissible insofar as it sought only to safeguard the European Parliament's prerogatives and it was founded only on submissions alleging their infringement; See paragraph 27.

54 — The Court had found in Case 302/87 *Parliament* v *Council* [1988] ECR 5615, paragraphs 26 to 28, that the applicable provisions, as they stood at the time, did not make it possible to recognise the capacity of the European Parliament to bring an action, contrary to what Advocate General Darmon concluded.

55 — Paragraph 26.

51. It could even be added that a *praeter legem* interpretation should be applied whenever it is the only valid response to a problem, not foreseen by the Treaties, which seriously calls into question one of the values of the Union such as those listed in Article 2 TEU. [56]

52. The principle of the equality of Member States before the Treaties, together with the rule of law, requires that new Member States are accorded a right to bring proceedings against acts adopted by the institutions of the European Union in circumstances such as those at issue in the present case. Having regard to the requirement for certainty in legal situations, that right to bring proceedings must, in the absence of any other specific provision and by analogy with the provisions of the fifth paragraph of Article 230 EC, be subject to the time-limit laid down in that provision from the date of entry into force of the relevant Accession Treaty.

IV – The action brought against Regulation No 60/2004

53. Under the first paragraph of Article 61 of the Statute of the Court, if the appeal is well founded, the Court may itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the General Court for judgment.

54. While the Court possesses all the information necessary to give final judgment on the plea of inadmissibility raised by the Commission during proceedings before the General Court, [57] that is however not the case so far as concerns the substance of the Republic of Poland's action.

55. It follows from the foregoing considerations that the Republic of Poland's application, lodged at the Registry of the General Court on 28 June 2004, was not late, that, consequently, the Commission's plea of inadmissibility, under which it alleged only that the application was time-barred, must be rejected, and that the Republic of Poland's application must therefore be declared admissible.

56. The Republic of Poland also asks the Court to give final judgment on the substance of the action against Regulation No 60/2004, under Article 61 of the Statute of the Court, and to annul Articles 5, 6(1) to (3), 7(1) and 8(2)(a) of the regulation. It considers that final judgment may be given, relying, in that regard, on the fact that the same claims were raised in the present case and in *Poland* v *Commission*. It also states it that it maintains in full all the pleas put forward in that connection, in both its application and its reply, at first instance.

57. Since the General Court dismissed the action against Regulation No 60/2004 as inadmissible in its entirety, without examining the pleas raised by the Republic of Poland, [58] this case must, therefore, be referred back to the General Court for it to rule on the Republic of Poland's claim for annulment of Regulation No 60/2004. [59]

56 — Constantinesco V., 'The ECJ as a Law-Maker: praeter aut contra legem', in D. O'Keefe (ed.), *Judicial Review in European Union Law, Liber Amicorum in Honour of Lord Slynn of Hadley*, Kluwer Law International, 2000, p. 73.

57 — See, inter alia, Case C-193/01 P *Pitsiorlas* v *Council and ECB* [2003] ECR I-4837, paragraph 32; Case C-521/06 P *Athinaïki Techniki* v *Commission* [2008] ECR I-5829, paragraph 66; Case C-319/07 P *3F* v *Commission* [2009] ECR I-5963, paragraph 99; and Case C-322/09 P *NDSHT* v *Commission* [2010] ECR I-11911, paragraphs 65 and 66.

58 — To that effect see, inter alia, Case C-362/09 P *Athinaïki Techniki* v *Commission* [2010] ECR I-13275, paragraph 79; Case C-506/08 P Sweden v *My Travel and Commission* [2011] ECR I-6237, paragraph 126; and Joined Cases C-463/10 P and C-475/10 P *Deutsche Post and Germany* v *Commission* [2011] ECR I-9639, paragraphs 81 and 82.

59 — The fact that the General Court has already had the opportunity to rule on the validity of Regulation No 60/2004//EC in the context of a plea of inadmissibility in another case (Joined Cases T-300/05 and T-316/05 *Cyprus* v *Commission* [2009] ECR II-192, paragraphs 43 to 115) does not alter that conclusion, notwithstanding the similarity of some of the pleas and arguments raised.

V – Conclusions

58. I therefore propose that the Court should:

(1) set aside the order of the General Court of the European Union of 10 June 2009 in Case T-258/04 *Poland* v *Commission*;

(2) reject the plea of inadmissibility raised by the European Commission before the General Court of the European Union;

(3) refer the case back to the General Court of the European Union for it to rule on the Republic of Poland's claim for annulment of Articles 5, 6(1) to (3), 7(1) and 8(2)(a) of Commission Regulation No 60/2004 of 14 January 2004 laying down transitional measures in the sugar sector by reason of the accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia to the European Union;

(4) order that costs are reserved.