OPINION OF ADVOCATE GENERAL SHARPSTON
delivered on 6 April 2006 [1]

1. This appeal raises, in somewhat novel terms, the question of what constitutes an act reviewable under Article 230 EC.

2. It concerns decisions taken by the Commission to bring actions for damages, in the United States, against certain tobacco companies.

3. The Court of First Instance dismissed a challenge to those decisions as inadmissible, essentially on the ground that they lacked binding legal effects for the companies. The appellants now allege error in the assessment of such effects, violation of their right to effective judicial protection, misapplication of the case-law on manifestly unlawful acts and disregard of Article 292 EC.

4. A further dimension is highlighted by the Council, which submits in intervention that although a decision of the kind in issue could never be challenged by the individuals concerned, it could be challenged by privileged applicants under Article 230 EC in so far as it could produce binding legal effects for them.

Article 230 EC

5. The first four paragraphs of Article 230 EC provide:

'The Court of Justice shall review the legality of acts adopted jointly by the European Parliament and the Council, of acts of the Council, of the Commission and of the ECB, other than recommendations and opinions, and of acts of the European Parliament intended to produce legal effects vis-à-vis third parties.

1 — Original language: English.

It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers.

The Court of Justice shall have jurisdiction under the same conditions in actions brought by the Court of Auditors and by the ECB for the purpose of protecting their prerogatives.

Any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.'

Facts

6. On 19 July 2000, in an effort to combat cigarette-smuggling into the Community, the Commission approved the principle of bringing a civil action in the United States against certain American tobacco companies. It decided to inform the Member States and empowered its President and one of its members to instruct the Legal Service to take the necessary steps.

7. On 3 November 2000, the Commission, on behalf of the European Community and the Member States it was empowered to represent, duly brought proceedings in the United States District Court, Eastern District of New York ('the District Court'), against companies belonging to the Reynolds Tobacco group and against Japan Tobacco Inc. (hereinafter collectively 'the tobacco companies'). [2] It alleged that the tobacco companies were involved in smuggling cigarettes into the Community and distributing them there, and sought compensation for lost customs duties and VAT. The District Court dismissed the action.

8. On 25 July 2001, the Commission approved the principle of a new civil action in the United States, to be brought by the Community and at least one Member State against the same cigarette manufacturers, and again empowered its President and one of its members to instruct the Legal Service to take the necessary steps. Accordingly, two

2 — Another company, Philip Morris International Inc., was also a defendant in those proceedings, an applicant before the Court of First Instance and initially an appellant in the present proceedings. It has, however, withdrawn its appeal.

further actions were brought before the District Court, one in August 2001 and one in January 2002, by the Commission acting on behalf of the Community and the Member States it was empowered to represent, and by 10 Member States. Again, those actions were dismissed. [3]

The judgment under appeal

9. In late 2000 and in 2001, the tobacco companies brought actions before the Court of First Instance, [4] seeking annulment of the Commission's decisions approving the bringing of proceedings against them in the United States ('the contested decisions'). [5]

10. The Commission, supported by the Parliament and nine Member States, submitted that a decision to initiate court proceedings was not reviewable under the fourth paragraph of Article 230 EC.

11. The Court of First Instance agreed. It dismissed the action as inadmissible by judgment of 15 January 2003. [6]

12. The Court of First Instance noted that only measures whose legal effects are binding on the applicant and capable of affecting his interests by bringing about a distinct change in his legal position may be the subject of an action for annulment. [7] It proceeded to examine whether the contested decisions met that definition.

13. The Court of First Instance considered that, in general, [8] the commencement of proceedings has legal effects. However, those effects concern principally the procedure before the court seised. Commencement of proceedings is indispensable for obtaining a binding judgment but does not determine the parties' obligations: that can result only from the judgment itself. Some consequences — such as interruption of a limitation period or obligation to pay interest on an amount claimed — may flow in law from the commencement of proceedings, but these are not legal effects for the purposes of Article 230 EC. Once proceedings are

3 — In addition, a fourth action was brought by the Commission and 10 Member States on 30 October 2002, after the hearing before the Court of First Instance in the present case.

4 — The five actions were subsequently joined by order of the President of the Second Chamber (Extended Composition) of the Court of First Instance of 31 January 2002.

5 — Reynolds brought a further action againstXXXthe Commission decision 'resulting in the filing of the third complaint on 30 October 2002, as publicly announced by the Commission in its Press Release IP/02/1592 of 31 October 2002', on 9 January 2003 (Case T-6/03), which is still pending before the Court of First Instance and which is not the subject of the present appeal.

6 — Joined Cases T-377/00, T-379/00, T-380/00, T-260/01 and T-272/01 *Philip Morris International and Others* v *Commission* [2003] ECR II-1.

7 — See paragraph 77 of the judgment under appeal, citing inter alia Case 60/81 *IBM* v *Commission* [1981] ECR 2639, paragraph 9, and Case C-117/91 *Bosman* v *Commission* [1991] ECR I-4837, paragraph 13.

8 — See paragraphs 79 to 82 of the judgment under appeal.

commenced the court seised may take decisions affecting a defendant's legal position, but that effect cannot be attributed to the party bringing the proceedings. Finally, a decision to commence proceedings is not in principle intended to produce other effects — put another way, it is not intended to produce by itself the effects of the judgment.

14. However, [9] since the contested decisions concerned proceedings before a foreign jurisdiction (namely, a United States court) rather than within the Community, it was also necessary to consider whether they might have given rise to other definitive legal effects bringing about a distinct change in the tobacco companies' legal position, either in the Community legal order or under United States law.

15. First, [10] the tobacco companies argued that the contested decisions undermined the institutional balance, producing legal effects as regards the division of powers under the Treaty.

16. The Court of First Instance accepted that by taking the decisions the Commission adopted a position as to its competence. However, that had no significance independent of the decisions taken and thus no binding legal effect. Unlike an act conferring competence, it did not, therefore, affect the division of powers. Recommendations and opinions also imply adoption of a position as to competence, but they likewise produce no legal effects of themselves and so are not open to challenge.

17. Nor could the contested acts acquire binding legal effect if the Commission simply lacked competence. The seriousness of an alleged infringement or of its alleged impact on fundamental rights cannot justify an exception to the rules on admissibility in the Treaty. [11] The same is true of an alleged infringement of the institutional balance.

18. Exceptionally, where even the appearance of legality is lacking, judicial review of a preparatory act may be envisaged. However, the authority for that proposition [12] predated the Court's clear ruling in *FNAB*, and there

9 — See paragraph 83 of the judgment.

10 — See paragraphs 85 to 91 of the judgment.

11 — Order in Case C-345/00 P *FNAB* v *Council* [2001] ECR I-3811, paragraphs 39 to 42.

12 — *IBM* v *Commission*, cited in footnote 7, paragraph 23; Joined Cases T-10/92, T-11/92, T-12/92 and T-15/92 *Cimenteries CBR and Others* v *Commission* [1992] ECR II-2667, paragraph 49.

was no authority [13] for review of any acts which lack legal effects. A decision empowering the Vice-President of the Commission to sign an international agreement had been considered reviewable, [14] but the agreement there at issue was intended to produce legal effects by establishing reciprocal obligations, whereas here the power conferred related only to bringing the cases before the District Court.

19. Second, [15] the tobacco companies argued that the contested decisions produced binding legal effects by ignoring Community and Member States' procedures governing recovery of tax and customs duties and anti-fraud measures, depriving them of safeguards under those procedures and subjecting them to the rules of another legal order.

20. The Court of First Instance noted that all courts must apply their own procedural law and the substantive law determined by their rules of conflict, but considered that the resulting legal effects cannot be attributed to the party who brought the proceedings. The commencement of proceedings before a court which applies different rules does not of itself bring about a distinct change in the parties' legal position.

21. Some procedural decisions may alter substantive rights and obligations. Community examples include decisions lifting immunity from fines in the competition field and decisions initiating examination of State aid, which may require Member States to modify their conduct. However, the absence of a Community procedure for recovery of taxes and customs duties is not comparable to an expressly conferred immunity; and whilst the contested decisions might imply provisional assessment of the tobacco companies' conduct by the Commission, that did not change their obligations or require them to modify their conduct.

22. Other procedural decisions are actionable because they affect parties' procedural rights — for example a decision to suspend an administrative procedure under Regulation No 17 and to institute infringement proceedings. Here, however, the tobacco companies would have had no procedural rights in any infringement proceedings brought. Therefore, they could not be

13 — The tobacco companies had cited Case C-170/96 *Commission* v *Council* [1998] ECR I-2763, and Case C-303/90 *France* v *Commission* [1991] ECR I-5315.

14 — In Case C-327/91 *France* v *Commission* [1994] ECR I-3641.

15 — See paragraphs 92 to 106 of the judgment.

deprived of any such rights. Furthermore, in the absence of Community competence to recover the duties and taxes in question, there were no Community safeguards which they could have been denied.

23. Whilst Member States' procedures for recovery of taxes and customs duties or anti-fraud procedures may limit liability or confer procedural guarantees, the tobacco companies had not submitted that any specific procedures were disregarded or circumvented by the proceedings before the District Court, or that any such procedures had even been initiated against them.

24. Admittedly, the District Court could not seek a preliminary ruling pursuant to Article 234 EC. However, that was a consequence of its own procedural rules and not a legal effect for the purpose of Article 230 EC. In any event, Article 234 EC concerns the right or duty of Member States' courts to seek a preliminary ruling. It does not confer any right of referral on litigants.

25. Therefore the contested acts did not produce binding legal effects in the Community legal order by subjecting the tobacco companies to another legal order or by bringing about a change in their legal position at the substantive or procedural level.

26. The Court of First Instance then considered the effects of the commencement of the proceedings in the United States legal order. [16]

27. It agreed that commencement of the actions before the District Court had consequences, as alleged by the tobacco companies, in terms of both procedural and substantive law. It dealt with those consequences as follows.

28. The Court of First Instance considered that the procedural effects were either no different from those which necessarily arise when any court is seised, or were purely factual: thus, for example, the tobacco companies had to incur costs in order to defend themselves.

16 — At paragraphs 109 to 118 of the judgment.

29. An order requiring disclosure of facts or documents would have binding legal effects, but those effects would result from the independent exercise of the District Court's own powers and not from the contested decisions as such. The Community was not legally bound by the terms of the actions simply because the District Court could impose penalties if they were abusive, frivolous or vexatious — conduct penalised by a court is not comparable to the adoption of an act having binding effects.

30. The tobacco companies would be affected by a judgment against them, but the decisions to commence proceedings did not of themselves determine the existence of liability. Whilst the decisions informed the tobacco companies that a judgment against them was possible, that was not a legal effect but a factual matter, as were the accusation of criminal conduct and any consequences which might ensue for share prices.

31. Immunity from defamation claims for statements made in proceedings was an effect of United States law and could not be attributed to the Commission. The publication of the Commission's complaints on the internet, by the District Court acting in the exercise of its own powers, could likewise not be compared to a decision by the Commission lifting a prohibition on using a document in national legal proceedings.

32. Finally,[17] the Court of First Instance examined the tobacco companies' arguments concerning the need for effective judicial protection.

33. The companies argued that if their actions were inadmissible they would have no legal means of challenging the contested decisions. Since the court seised was in a non-Member State and there would be no subsequent act of a Community institution, neither the Community courts nor those of the Member States could rule on the lawfulness of the Commission's conduct.

34. The Court of First Instance noted that access to justice is a constitutive element of a Community based on the rule of law, guaranteed by a complete system of remedies and procedures for review of the legality of Community measures[18] and derived from constitutional traditions common to the

17 — At paragraphs 120 to 124 of the judgment.

18 — Case 294/83 *Les Verts* v *Parliament* [1986] ECR 1339, paragraph 23.

Member States and from the European Convention on Human Rights, [19] and that the right to an effective remedy is reaffirmed in the Charter of fundamental rights. [20]

35. However, individuals are not denied access to justice because conduct lacking the features of a decision cannot be challenged in an action for annulment, since an action for damages [21] remains available.

36. Although a remedy against actions of the institutions which prejudice individuals' interests but do not amount to decisions might be desirable, it is not provided for by the Treaty. It is not for the Court to usurp the function of the founders of the Community by changing the established system of legal remedies and procedures. [22]

Assessment of the appeal

37. The tobacco companies put forward five grounds of appeal: misinterpretation of Article 230 EC as meaning that (i) the contested decisions and (ii) the filing of civil actions in the United States did not have legal effects; (iii) infringement of the fundamental right to effective judicial protection; (iv) misapplication and misinterpretation of the case-law on whether manifestly illegal measures may be challenged; and (v) infringement of Article 292 EC.

38. The Commission, supported by eight Member States, [23] the Parliament and the Council, contends that the grounds of appeal are inadmissible and/or unfounded.

Admissibility of the appeal

39. Objections to the admissibility of the first, second and fourth grounds of appeal are raised by the Commission and Finland, and I shall examine them in due course.

19 — Case 222/84 *Johnston* [1986] ECR 1651, paragraph 18; Articles 6 and 13 of the Convention.

20 — OJ 2000 C 364, p. 1; Article 47.

21 — Under Article 235 EC and the second paragraph of Article 288 EC.

22 — Joined Cases T-172/98 and T-175/98 to T-177/98 *Salamander v Parliament and Council* [2000] ECR II-2487, paragraph 75.

23 — Finland, France, Germany, Greece, Italy, the Netherlands, Portugal and Spain.

40. However, a potentially more fundamental issue arose at the hearing when, in response to a question from the Court as to the current status of the proceedings in the United States, the agent for the Commission stated: 'It's over. They won.'

41. It appears that the proceedings brought pursuant to the contested decisions have now run their full course. [24] The Commission's actions have been dismissed and no further avenues of appeal remain open following a decision of the United States Supreme Court on 9 January 2006.

42. What, then, could be achieved by the present appeal? If the tobacco companies were successful, the case would have to be referred back to the Court of First Instance. But the applications at first instance seek no more than annulment of decisions to bring proceedings. Those decisions have now exhausted all their effects, be those effects legally binding for the purposes of Article 230 EC or not. Even if the settlement in the United States did not give the tobacco companies full satisfaction on costs, the actions at first instance seek no compensation for any loss, and annulment of the contested decisions would not be an essential precondition in order to obtain such redress. [25]

43. The Court may of its own motion decide that a party has no interest in bringing or maintaining an appeal unless the appeal is likely, if successful, to procure an advantage for the appellant. [26] Here, at first sight, the advantage seems nonexistent.

44. However, the Court has also held that an interest in contesting a decision cannot be denied on the ground that the decision had already been implemented when the action was brought; annulment may be of itself capable of having legal consequences, in particular by preventing a repetition of the practice complained of. [27]

45. Consequently, even if the contested decisions as such have now exhausted all possible effects for the tobacco companies, I do not propose that the appeal should be dismissed as inadmissible on that ground. There may still be an interest in avoiding future proceedings, and another action by

24 — It appears from what was said at the hearing that the proceedings brought on 30 October 2002 are still pending, although it is not clear whether they were based on either of the contested decisions (see footnotes 3 and 5 above).

25 — See further point 73 et seq. below.

26 — See for example Case C-19/93 P *Rendo* v *Commission* [1995] ECR I-3319, paragraph 13; Case C-174/99 P *Parliament* v *Richard* [2000] ECR I-6189, paragraph 33; order of 19 January 2006 in Case C-82/04 P *Audi* v *OHIM*, not published in the paragraph 19 et seq.

27 — See Case 53/85 *AKZO* v *Commission* [1986] ECR 1965, paragraph 21.

Reynolds challenging a decision to bring proceedings in the United States courts is still pending before the Court of First Instance. [28]

46. I shall therefore address the grounds of appeal in turn. As a general point, it should be made clear that the tobacco companies do not dispute the well-established principle that an action for annulment may be brought only against measures whose legal effects are binding on the applicant and capable of affecting his interests by bringing about a distinct change in his legal position. They seek rather to establish that such effects were present and/or that the novel circumstances of the case required their action to be held admissible on other, exceptional grounds.

First ground of appeal: Misinterpretation of Article 230 EC as meaning that the contested decisions did not have legal effects

47. This ground is presented under five subheadings, which in the view of the Commission and (on four counts) of Finland are inadmissible as mere repetition of arguments raised at first instance.

28 — See footnote 5 above.

48. While the tobacco companies' submissions may coincide to an appreciable extent with their submissions at first instance, that cannot in itself render them inadmissible on appeal. What matters is whether they allege specific errors in law in clearly identified parts of the judgment under appeal. [29] In the present case it seems clear to me that the arguments meet that criterion and I propose to examine their substance.

Review of decisions to commence proceedings

49. The tobacco companies submit that the Court of First Instance erred in considering at paragraph 79 of its judgment that, as a matter of principle, a decision to commence proceedings cannot be open to challenge. That is so, they say, only where the measures concerned form part of a procedure leading to a later decision itself open to judicial review within the Community framework, when issues of prior illegality or competence can be considered. [30]

29 — See for example Case C-352/98 P *Bergaderm and Goupil* v *Commission* [2000] ECR I-5291, paragraphs 34 and 35; Case C-76/01 P *Eurocoton* v *Council* [2003] ECR I-10091, paragraphs 46 and 47.

30 — See *IBM* v *Commission* cited in footnote 7, paragraph 20; Case C-191/95 *Commission* v *Germany* [1998] ECR I-5449, paragraph 44.

50. In my view however that is not how the Court of First Instance reasoned its conclusion in the passage cited. It reached that conclusion on the basis that such a decision 'does not ... in itself alter the legal position in question'. I agree here with Spain and Germany when they say that it is for that reason that preparatory acts are not open to challenge, rather than because they form part of a continuing procedure — the principle being the same as for confirmatory acts, communications, opinions, reports and acts of internal organisation.

51. It is further clear that the Court of First Instance did go on to consider in detail whether the contested decisions produced relevant legal effects.

52. The argument is therefore unfounded.

Incorrect application of the case-law to a unique situation

53. The tobacco companies argue that the Court of First Instance failed to adapt its application of the case-law to the unprecedented circumstances of the case, in which no act or consequence subsequent to the contested decisions could be reviewed by the Community courts, with the danger that the Community institutions may be able to initiate litigation outside the Community legal order on any matter, in any circumstances.

54. However, the argument appears merely as a preface to the remaining three subheadings under this ground of appeal, and does not call for independent analysis.

Absence of a preliminary reference mechanism

55. In the tobacco companies' view the Court of First Instance misinterpreted the case-law in considering, in paragraph 105 of its judgment, that no legal effects ensued from the absence of a possibility of obtaining a preliminary ruling as to the Commission's competence to take the contested decisions, in contrast to the position if the Commission were to bring proceedings in the courts of a Member State.

56. I agree with the Court of First Instance that the fact that the District Court must work within its own procedures and competences cannot be considered to be a legal effect of the decision to bring proceedings

before it. It seems to me that the complaint underlying this argument may be more relevant to the third ground of appeal, concerning the right to effective judicial protection.

Choice of procedure

57. The tobacco companies consider that the Court of First Instance misapplied the case-law — in particular *Spain* v *Commission* [31] — to the effect that, where a definitive choice has been made for one procedure (here, proceedings in the United States) over another (proceedings in the Community), the decision embodying that choice has legal effects.

58. I agree with the Spanish Government that in *Spain* v *Commission* what mattered was not the choice of a particular procedure, but the fact that the initiation of that procedure entailed an assessment by the Commission that produced legal effects for the applicant. [32] The same is true of the *Cimenteries* case, [33] also cited in the appeal.

59. This argument is thus based on a false premiss.

Definitive establishment of competence

60. The tobacco companies claim that the Court of First Instance failed to recognise that the Commission's adoption of a position as to its competence had legal effects. The Commission could act only if secondary legislation empowered it to commence the legal proceedings in issue. The contested decisions thus had the same legal effects as an act of secondary legislation. They also authorised expenditure for the purposes of the legal proceedings. [34] By effectively taking the place of primary or secondary legislation amending the division of powers under the Treaty, those decisions intended to alter that division of powers, a situation comparable to that in *France* v *Commission*. [35]

61. I find some ingenuity in an argument that a decision to do anything has legal effects because it implicitly confers on its author the legal authority to take it. However, the ingenuity is of a circular nature, since the Commission needs no legal

31 — Case C-312/90 [1992] ECR I-4117.

32 — See in particular paragraphs 12 to 17 of that judgment.

33 — Joined Cases 8/66 to 11/66 *Cimenteries* v *Commission* [1967] ECR 75.

34 — Compare Joined Cases C-239/96 R and C-240/96 R *United Kingdom* v *Commission* [1996] ECR I-4475.

35 — Case C-366/88 [1990] ECR I-3571.

authority to take a decision lacking legal effects. Or, put more precisely with reference to the present case, if an institution assumes legal authority to take a decision which has no legal effect vis-à-vis a particular party, that assumption of authority likewise cannot have any legal effect vis-à-vis that party. The starting point (and in this case stumbling block) is the decision itself, not the decision to take it.

64. I consequently find that none of the tobacco companies' arguments in their first ground of appeal identifies any error of law in the judgment under appeal.

Second ground: Misinterpretation of Article 230 EC as meaning that the filing of the civil actions in the United States did not produce binding legal effects

62. In so far as concerns the use of budgetary resources, I agree with Germany that the financial aspect is purely incidental to the contested decisions. I agree with the Parliament that the Commission has a sufficient mandate under Article 211 EC to incur such expenditure in order to ensure that Community law is applied, and under Article 274 EC to implement the budget on its own responsibility.

65. The tobacco companies contend that the Court of First Instance incorrectly assumed in paragraph 105 of its judgment that the District Court could remedy the lack of a preliminary reference mechanism by applying Community law itself; in fact, the Act of State doctrine — under which United States courts will not review official acts of a foreign sovereign power — meant that that court was unlikely to rule on the Commission's competence to bring proceedings in the United States.

63. And in *France* v *Commission* the question of the alleged lack of powers was decided in the part of the judgment dealing with the substance, not in the preliminary examination of admissibility. [36]

66. The Commission and the Finnish Government submit that this argument is entirely new and thus inadmissible. The tobacco companies however claim to have relied upon the Act of State doctrine, at least in substance, before the Court of First

36 — See in particular paragraphs 7 to 13 of the judgment in *France* v *Commission*. For consideration of another issue related to the allegation of lack of competence, see point 94 et seq. below.

Instance. That claim is in my view borne out by paragraph 72 of the judgment under appeal, [37] even if the doctrine is not named as such.

67. That said, the tobacco companies' own use of the words 'likely' and 'unlikely' in their development of this argument on appeal deprives the argument of its basis. The existence of an intervening degree of probability means that, however binding the effects may be if they are realised, they cannot be the effects of the original decision but only of the intervening event. The ground of appeal nevertheless specifically alleges binding legal effects flowing from the filing of the civil actions.

Third ground: Violation of the fundamental right to effective judicial protection

68. This ground refers to the statement in paragraph 123 of the judgment under appeal that 'individuals are not denied access to justice because conduct lacking the features of a decision cannot be challenged by way of an action for annulment, since an action for non-contractual liability ... is available if the conduct is of such a nature as to entail liability for the Community'.

69. The tobacco companies claim that the Court of First Instance erred in law in taking access to justice and not the existence of an effective remedy as the relevant criterion. [38] Moreover, the Court of Justice does not refer to an action for damages under Article 288 EC in its account of a complete system of legal remedies. [39] Nor can the existence of an action for damages always provide effective judicial protection. The tobacco companies seek protection from the bringing of proceedings against them, on the ground that the Commission lacks competence to bring them. However, that lack of competence would not itself give rise to liability in damages. Normally, the non-availability of a direct action implies the possibility of a preliminary ruling procedure. That is not so in the present case. Even if the District Court were to rule on the Commission's competence, it could not provide effective judicial protection, because it lacks the expertise and experience to decide fundamental issues of Community constitutional law.

37 — 'According to the applicants, the American court lacks jurisdiction to rule on the question as to the Commission's competence raised in the present proceedings.'

38 — Case C-50/00 P *Unión de Pequeños Agricultores* v *Council* [2002] ECR I-6677, paragraph 39.

39 — Case C-321/95 P *Greenpeace* v *Commission* [1998] ECR I-1651; *Unión de Pequeños Agricultores*, cited above, paragraph 40.

70. The Commission contends that the principle of effective judicial protection does not extend to acts, such as the contested decisions, which are incapable of violating rights or freedoms guaranteed by Community law and thus having legal effects for those concerned. As regards their rights and freedoms under United States law, the tobacco companies enjoy all the guarantees available in the District Court. The Court held in *Unión de Pequeños Agricultores* [40] that interpretation of the requirement of individual concern in the light of the principle of effective judicial protection cannot have the effect of setting aside that requirement. As regards Article 288 EC, the Commission submits that the tobacco companies could certainly bring an action for damages. Their difficulty there would lie not in establishing admissibility, but in demonstrating that the Commission had acted unlawfully in bringing the civil actions and that they had suffered harm as a direct consequence.

71. Spain adds that the right to effective legal protection is not so absolute that any act must be open to challenge or that anyone may bring an action. It recalls that the preliminary reference mechanism is one of collaboration between the Court of Justice and the courts of the Member States, to ensure uniform interpretation and application of Community law. Its use is unrelated to the availability of an action for annulment.

72. This third ground is, in my view, the most important of the issues raised in the appeal. Access to justice and the availability of an effective remedy are, together with respect for fundamental rights, the cornerstones of a Community governed by the rule of law. An essential element of the Court's duty under Article 220 EC in ensuring that 'in the application of the Treaty ... the law is observed' is indeed to ensure that those principles are respected. [41] That said, in the present case I concur in the arguments of both the Commission and Spain.

73. In relation to the tobacco companies' argument that the Court does not mention Article 288 EC in its case-law stressing the existence of a complete system of remedies, it seems to me important to note that in those judgments the Court has been referring overwhelmingly if not exclusively to a complete system for review of validity of

40 — Cited above, paragraph 44.

41 — See, for example, order in Case C-2/88 Imm *Zwartveld* [1990] ECR I-3365 for a very broad use of this power. In the context of the scope and nature of the Court's powers of review, see for example Case C-376/98 *Germany* v *Parliament and Council ('Tobacco Advertising')* [2000] ECR I-8419, paragraph 84. See also Opinion C-1/92 [1992] ECR I-2821, on the draft EEA Agreement.

Community acts which have binding legal effects. That is clear from *Les Verts*[42] to, most recently, *Gaston Schul.*[43]

74. A remedy for damages does not fall within that system of judicial review. Rather, it is 'an autonomous form of action, with a particular purpose to fulfil within the system of legal remedies and subject to conditions of use dictated by its specific purpose. Although actions for annulment ... seek a declaration that a legally binding measure is unlawful ..., an action to establish liability seeks compensation for damage resulting from a measure or from unlawful conduct, attributable to a Community institution or body.'[44]

75. Thus, there is a complete system of legal remedies, or judicial protection, where a party's legal position is affected by a measure having binding legal effects. There is another, complementary remedy where a party has suffered damage as a result of unlawful conduct. Both may be available in a particular set of circumstances, but will not necessarily be so in every case.

76. In the contested passage of its judgment, the Court of First Instance was clearly referring to the broader 'complete system', encompassing both review of validity and establishment of liability in damages. It had already found that there was no scope for review of validity because there were no binding legal effects. However, it pointed out that the tobacco companies would not be denied a remedy under Community law if they could establish that they had incurred loss as a result of unlawful action by the Commission. Such reasoning cannot in my view be criticised unless the premiss — lack of binding legal effect — is disproved. I do not consider that the tobacco companies have disproved it in their first two grounds of appeal.

77. The actual outcome of an action for damages is of course uncertain. There is at present no such action before the Court and no view can be expressed as to whether, if brought, it would be admissible or well founded. Clearly, if the tobacco companies were unable to establish the existence of unlawful conduct on the part of the Community institutions,[45] of the damage alleged

42 — Cited in footnote 18, paragraph 23.

43 — Case C-461/03 *Gaston Schul Douane-expediteur* [2005] ECR I-10513, paragraph 22.

44 — See, most recently, Case C-234/02 P *European Ombudsman* v *Lamberts* [2004] ECR I-2803, paragraph 59, and the case-law cited there. That and the following paragraphs also confirm the consistent case-law to the effect that the admissibility of an action for damages is unrelated to the admissibility of an action for annulment of the same allegedly unlawful act. An action for damages depends on a measure or on unlawful conduct having adverse material consequences for the applicant, whereas an action for annulment depends on its having legal consequences.

45 — Or, in the *Schoppenstedt* formulation, 'a sufficiently flagrant violation of a superior rule of law for the protection of the individual' (Case 5/71 [1971] ECR 975, paragraph 11).

and of a causal link between that conduct and the loss claimed, they would be unsuccessful. The fact that in those circumstances they would not qualify for compensation does not mean that they would be denied access to effective legal protection.

78. One can certainly imagine not wholly dissimilar circumstances in which an action for damages might be likely to succeed. Suppose that, for example, the Commission decided with no shadow of justification to bring aggressive legal proceedings against one or more small agricultural producers in an ACP State, exposing them to the threat of economic extinction before the litigation could be settled. Not only would the case for damages seem reasonably clear to establish, but the conditions for obtaining interim relief [46] might well be present — perhaps even taking the form of suspension of the operation of the decision to bring proceedings. [47]

79. Finally, I do not accept the tobacco companies' submission at the hearing to the effect that the five-year time-limit for bringing a claim for damages [48] might be too short. That time-limit applies in all cases, and it does not start to run until the three conditions for bringing an action are satisfied. [49]

80. I am therefore of the view that the tobacco companies have not established any violation of their right to effective judicial protection.

Fourth ground: Misapplication and misinterpretation of the case-law on whether manifestly unlawful measures may be challenged

81. This ground of appeal refers essentially to paragraphs 87 and 88 of the judgment under appeal, summarised in points 17 and 18 above. The tobacco companies contend that nothing in Community law entitles the Commission to commence legal proceedings outside the Community legal order or to take executive action for collection of customs duties and VAT. The contested decisions are therefore manifestly unlawful and the actions

46 — Pursuant to Article 243 EC and the second subparagraph of Article 104(1) of the Rules of Procedure of the Court of First Instance.

47 — The possibility of ordering suspension in connection with an action for damages has never been explicitly confirmed, but remains open; see the orders in Cases C-51/90 R and C-59/90 R *Comos-Tank and Others* v *Commission* [1990] ECR I-2167, paragraph 33, and in Case T-203/95 R *Connolly* v *Commission* [1995] ECR II-2919, paragraph 23.

48 — Article 46 of the Statute of the Court of Justice.

49 — See, for example, Joined Cases 256/80, 257/80, 265/80 and 267/80 and 5/81 *Birra Wührer* v *Council and Commission* [1982] ECR 85, paragraphs 9 and 10.

should have been found admissible, following the dictum in *IBM* v *Commission*[50] concerning judicial review in exceptional circumstances of preparatory measures which 'lack even the appearance of legality'. When in *FNAB*[51] the Court of Justice spoke of the 'rules for admissibility expressly laid down by the Treaty', it was referring to the criteria of direct and individual concern, not to the exceptional circumstances referred to in *IBM*.

82. The Commission and Finland consider the ground of appeal inadmissible as a mere repetition of the arguments raised at first instance. Again, however, I consider that it clearly meets the criteria in *Bergaderm* and *Eurocoton*,[52] and is therefore admissible.

83. The Commission points out that the privileged applicants whose prerogatives might be affected by any assumption of power on its part have supported its right to adopt the contested decisions. As a matter of principle (expressed in Article 282 EC) it enjoys a monopoly to represent the Community before the courts. Since it thus has at least prima facie competence, it follows as a matter of logic that the contested decisions cannot lack 'even the appearance of legality'. Spain moreover submits that *IBM* v *Commission* does not have the import ascribed to it by the tobacco companies. Rather, the question whether such measures might exceptionally be reviewed was left open in that case.

84. First of all, I agree with Spain as to the interpretation of the *IBM* judgment. Paragraph 23 states: 'It is not necessary for the purposes of this case to decide whether, in exceptional circumstances, where the measures concerned lack even the appearance of legality, a judicial review at an early stage such as that envisaged by IBM may be considered compatible with the system of remedies provided for in the Treaty, because the circumstances referred to by the applicant in this case are in any event not such as would make it possible to regard the action as admissible.' The *Cimenteries CBR* judgment, the only other case cited by the tobacco companies in support of their proposition, similarly finds simply that 'in any event, ... in this case there are no exceptional circumstances'. In both decisions, therefore, the point was expressly left open.[53] The Court of First Instance cannot have erred in law by failing to follow non-existent authority.

50 — Cited in footnote 7, paragraph 23; see also *Cimenteries CBR*, cited in footnote 12.

51 — Cited in footnote 11, paragraph 40.

52 — See point 48 and footnote 29 above.

53 — Although the tobacco companies also referred to *Commission* v *Council* and *France* v *Commission* (see footnote 13), those cases concerned measures which clearly did have legal effects.

85. In any event, the test of whether a measure 'lacks even the appearance of legality' sets a very high standard. It cannot be said to be satisfied in circumstances in which the alleged illegality resides in the assertion that the Commission lacked competence to adopt the measure in question, and in which other institutions and/or Member States alleged to possess that competence in the Commission's stead not only do not dispute the Commission's competence but positively support it.

86. The tobacco companies' alternative arguments on this ground are also unfounded. First, they say, to the extent that the ground of appeal may concern the substance of the application, the Court of First Instance should have joined the question of admissibility to the substance. However, the case-law which they cite [54] does not concern situations in which there was any issue of competence or manifest unlawfulness. Second, they claim that, since it did not join admissibility and substance, the Court of First Instance should have considered admissibility — namely, whether the contested decisions had legal effects — on the basis of the facts as asserted [55] — namely, on the assumption that the Commission lacked competence. However, the Court of First Instance did just that in paragraph 87 of its judgment. It concluded that mere lack of competence could not give rise to legal effects.

87. I am therefore of the view that this ground of appeal must fail also.

Fifth ground: Infringement of Article 292 EC

88. The tobacco companies claim that the Court of First Instance's conclusion that any disputes as to the Commission's competence could be determined by the District Court was contrary to Article 292 EC and the system of the Treaties. The autonomy of the Community legal order is jeopardised by any extra-Community system which binds the Community and its institutions to a particular interpretation of the rules of Community law in the exercise of their internal powers. [56] Such would be the case if the District Court were to determine the Commission's competence to commence proceedings in the United States for recovery of customs duties and VAT.

54 — Joined Cases 358/85 and 51/86 *France* v *Parliament* [1988] ECR 4821; Case C-366/88 *France* v *Commission*, cited in footnote 35; Case C-303/90 *France* v *Commission*, cited in footnote 13; and Case C-325/91 *France* v *Commission* [1993] ECR I-3283.

55 — Case 169/84 *Cofaz* [1986] ECR 391, paragraph 20.

56 — Opinion 1/91 [1991] ECR I-6079, paragraphs 41 to 46; Opinion 1/00 [2002] ECR I-3493, paragraph 45.

89. First, I agree here with the Commission that the wording of Article 292 EC — 'Member States undertake not to submit a dispute concerning the interpretation or application of this Treaty to any method of settlement other than those provided for therein' — clearly indicates that that provision is a commitment by the Member States, not a constraint on the scope of action of the institutions.

90. Second, a decision on competence by a court before which a Community institution brings an action [57] is not comparable to the signing by the Community of an international agreement binding the institutions in the exercise of their internal powers or introducing a large body of rules into the Community legal order, such as those with which the two Opinions cited are concerned. A decision on competence by the District Court would be binding only in relation to the specific proceedings. It could be called in question even in the same court in other proceedings brought on the basis of a different decision by the Commission, and *a fortiori* in other courts and other jurisdictions.

91. I agree further with the Commission that the District Court, being the forum of the jurisdiction where most of the tobacco companies were established and where the activities complained of took place, was best placed to secure effective enforcement of the judgment sought; and with Germany that the tobacco companies' approach to Article 292 EC entails the danger that proceedings legitimately brought in a non-Community forum could be thwarted by any defendant by merely raising the same objection.

92. Moreover, like Germany, I fail to see how infringement of Article 292 EC if established could in itself create binding legal effects rendering the contested decisions challengeable.

Conclusion on the grounds of appeal

93. Having examined the tobacco companies' five grounds of appeal, I am of the opinion that they have not established any error of law in the judgment of the Court of First Instance, and that the appeal should consequently be dismissed.

57 — As Germany points out, this assumes that the Act of State doctrine will *not* apply whereas the second ground of appeal assumes that it *will* apply.

The Council's intervention

The issue

94. Another issue is raised by the Council. It concerns the status of privileged and non-privileged applicants in relation to the criterion of binding legal effect in the scheme of Article 230 EC. Essentially, the Council submits that the Court of First Instance was right to find the application inadmissible because the contested decisions did not produce binding legal effects for the tobacco companies. However, it contends that the situation of privileged applicants named in the second paragraph of Article 230 EC should be distinguished from that of non-privileged applicants such as the tobacco companies. The Council considers that privileged applicants should not be prevented on grounds of admissibility from challenging a decision of the same kind (although the Council adds that it had no reason for making such a challenge in this case).

95. The Commission and the Parliament express agreement with the Council's position. The tobacco companies also agree in part. However, they derive from the Council's submission the further argument that, if the contested decisions could be challenged by privileged applicants, they must therefore produce binding legal effects for the purposes of Article 230 EC. Since moreover there can be no doubt that those decisions are of direct and individual concern to the tobacco companies, the actions should have been declared admissible.

Assessment

96. This submission by the Council is made ostensibly in support of the form of order sought by the Commission, that the appeal should be dismissed as partly inadmissible and partly unfounded. It does not however rebut any of the arguments put forward in the appeal. It thus appears irrelevant to the proceedings as brought.

97. To the extent that the submission takes issue with the Court of First Instance's reasoning on the existence of binding legal effects for the purposes of Article 230 EC, it would have been more appropriate as a separate appeal under the third paragraph of Article 56 of the Statute of the Court of Justice. However, I am not convinced that the reasoning in question is at odds with the Council's position.

98. It is true that paragraphs 85 to 91 of the judgment under appeal refer only to binding effects in general. From that it might be thought that the Court of First Instance was

applying a general criterion, failure to meet which would preclude any challenge by any party. None the less, it seems clear that the examination was undertaken in the light of the criterion of legal effects binding on the specific applicant, stated as a general principle in paragraph 77, and that the Court of First Instance's conclusion was that there were no such effects binding on the tobacco companies. From that point of view, the Council's contention that assessment of the right of privileged applicants to bring an action should give rise to a different result is not incompatible with the Court of First Instance's approach.

99. Consequently, the submission appears to fall outside the scope of the appeal, so that it would be unnecessary for the Court to examine it. I shall however devote some attention to the issue, since it may help to clarify other aspects of the appeal.

100. The predecessor of the first three paragraphs of Article 230 EC [58] was the first paragraph of Article 173 of the EEC Treaty which read, until amended to the present wording by the Maastricht Treaty in 1992:

'The Court of Justice shall review the legality of acts of the Council and the Commission other than recommendations or opinions. It shall for that purpose have jurisdiction in actions brought by a Member State, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers.'

The wording of the following paragraph, concerning the right of action of natural or legal persons directly and individually concerned, has remained unchanged.

101. It was in that context that the Court developed its case-law on the criterion of binding legal effect (and indeed on direct and individual concern).

102. In the first cases in which the issue arose, the Court referred in general to measures having binding force or intended to have or produce legal effect. [59] Then in

58 — See point 5 above.

59 — Case 48/65 *Lütticke* v *Commission* [1966] ECR 19, at 27; Case 22/70 *Commission* v *Council* [1971] ECR 263, paragraph 42; Case 133/79 *Sucrimex* v *Commission* [1980] ECR 1299, paragraph 17.

IBM [60] it made the statement (narrower but in no way incompatible with its previous formulations) that: 'According to the consistent case-law of the Court any measure the legal effects of which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position is an act or decision which may be the subject of an action' for annulment. That criterion of legal effect for the applicant has been consistently followed, most recently in *Commission* v *Greencore*, [61] where it appears in tandem with the more general formulation. It has also been consistently followed by the Court of First Instance, from *Marcopoulos* v *Court of Justice* [62] to *Infront* v *Commission*. [63]

103. It thus seems that the first test for admissibility under Article 230 EC is the existence of binding legal effect *both* in general *and* for the applicant(s) in question. The absence of any such effect whatever renders it unnecessary to go on to examine whether individual effect is present.

104. That test appears moreover to be applicable regardless of whether an applicant is 'privileged' or not for the purpose of Article 230 EC, as may be seen from the example of two recent cases in which a Member State, the Netherlands, had sought annulment of a Commission measure, only to have the application dismissed as inadmissible on the ground that there were no binding legal effects *on the applicant*. [64]

105. In that light, the criterion of direct and individual concern in the fourth paragraph of Article 230 EC forms a separate and logically subsequent test for non-privileged applicants alone. Thus, a regulation having general effect may produce binding legal effects on such applicants, but will not usually be of individual concern to them according to the case-law. That situation may be compared to the — again separate — test of 'protecting their prerogatives' which applies to 'semi-privileged' applicants under the third paragraph of Article 230 EC. Neither of these separate and subsequent tests applies to the 'fully-privileged' applicants identified in the second paragraph.

60 — Cited in footnote 7, paragraph 9.

61 — Case C-123/03 P [2004] ECR I-11647, paragraph 44.

62 — Joined Cases T-32/89 and T-39/89 [1990] ECR II-281, paragraph 21.

63 — Case T-33/01 [2005] ECR II-5892, paragraph 89.

64 — Case C-308/95 *Netherlands* v *Commission* [1999] ECR I-6513, especially at paragraphs 26 and 29; Case C-164/02 *Netherlands* v *Commission* [2004] ECR I-1177, especially at paragraphs 18 and 22.

106. Consequently, if the Council, or any other of the applicants listed in the last-mentioned paragraph, wished to challenge a decision by the Commission of the nature of those contested in the present proceedings, it would have to establish the existence of legal effects binding on it and capable of affecting its interests by bringing about a distinct change in its legal position.

107. On the other hand, Advocate General Jacobs recently queried whether the Court's approach in the two *Netherlands* cases was correct, expressing the view that the requirement of legal effects binding on the applicant seemed to make sense only in the case of individual, non-privileged applicants. [65] He considered that a Member State did not have to show any specific legal interest in the outcome of an action under Article 230 EC.

108. Since however the point was not essential to that case (and the Court in its judgment referred merely to legal effects without specifying whether the effects had to be for the Member State), and since it is irrelevant to the outcome of the present appeal, it may be preferable to leave a decision to a later case in which it may be fully relevant.

65 — Opinion in Case C-301/03 *Italy* v *Commission* [2005] ECR I-10217, points 52 and 53, and footnote 15.

Costs

109. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Under Article 69(4), Member States and institutions which intervene in the proceedings are to bear their own costs.

110. In the present case, I consider that the appeal should be dismissed. The Commission has asked for costs in its pleadings. The Parliament, the Council and eight Member States have intervened.

111. Consequently, the tobacco companies should bear their own costs and those of the Commission. The interveners should bear their own costs.

Conclusion

112. I am therefore of the opinion that the Court should

— dismiss the appeal;

— order the appellants to bear their own costs and those of the Commission;

— order the interveners to bear their own costs.